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# TABLE OF ABBREVIATIONS.

## A

Abb. Adm.....Abbott's Admiralty (U. S.)  
 Abb. Dec.....Abbott's Decisions (N. Y.)  
 Abb. Law Dict.....Abbott's Law Dictionary.  
 Abb. N. C.....Abbott's New Cases (N. Y.)  
 Abb. Prac.....Abbott's Practice (N. Y.)  
 Abb. Prac. (N. S.)...Abbott's Practice, New Series (N. Y.)  
 Abb. Shipp.....Abbott on Shipping.  
 Abb. (U. S.).....Abbott's United States.  
 Abr. ....Abridgment.  
 Adams .....Adams (N. H.)  
 Adams, Eq.....Adams' Equity.  
 Add. ....Addams' Ecclesiastical Reports.  
 Add. ....Addison (Pa.)  
 Add. Cont. ....Addison on Contracts.  
 Add. Ecc.....Addams' Ecclesiastical Reports.  
 Add. Torts .....Addison on Torts.  
 Adj. Sess.....Adjourned Session.  
 Adol. & El.....Adolphus and Ellis' English King's Bench Reports.  
 Adol. & El. (N. S.)..Adolphus and Ellis' English Queen's Bench Reports, New Series.  
 Aik. Dig.....Aikin's Digest of Laws (Ala.)  
 Aikens .....Aikens (Vt.)  
 A. K. Marsh.....A. K. Marshall (Ky.)  
 Ala. ....Alabama.  
 Alb. Law J.....Albany Law Journal.  
 Alger's Law Promotors & Prom. ....Alger's Law in Relation to Promoters and Promotion of Corporations.  
 Allen .....Allen (Mass.)  
 Allison's Am. Dict...Allison's American Dictionary.  
 Amb. ....Ambler's English Chancery Reports.  
 Am. Bankr. Reg....National Bankruptcy Register (U. S.)  
 Am. Bankr. Rep....American Bankruptcy Reports.  
 Am. Dec.....American Decisions.  
 Am. Ed.....American Edition.  
 Am. Enc. Dict.....American Encyclopedic Dictionary.  
 Amend. ....Amendment.  
 Am. Eng. Enc. Law..American and English Encyclopedia of Law.  
 Am. Ins.....Arnold on Marine Insurance.  
 Am. Law J.....American Law Journal.  
 Am. Law Rec.....American Law Record (Cin.)  
 Am. Law Reg. (N. S.) .....American Law Register, New Series.  
 Am. Law Reg. (O. S.) .....American Law Register, Old Series.  
 Am. Law Rev.....American Law Review.  
 Am. Law T. Rep...American Law Times Reports.  
 Am. Lead. Cas.....American Leading Cases (Hare & Wallace's).  
 Amos & F. Fixt...Amos and Ferard on Fixtures.  
 Am. Reg.....American Law Register.  
 Am. Rep.....American Reports.

7 Wds. & P.

Am. St. Rep.....American State Reports.  
 Am. & Eng. Dec. Eq..American and English Decisions in Equity.  
 Am. & Eng. Enc. Law .....American and English Encyclopedia of Law.  
 Am. & Eng. Ry. Cas..American and English Railway Cases.  
 Anc. Charters.....Ancient Charters (1692).  
 And. Law Dict.....Anderson's Law Dictionary.  
 Ang. Car.....Angell on Carriers.  
 Ang. Highw.....Angell & Durfee on Highways.  
 Ang. Ins.....Angell on Insurance.  
 Ang. Lim.....Angell on Limitation of Actions.  
 Ang. Tide Waters...Angell on Tide Waters.  
 Ang. Water Courses..Angell on Water Courses.  
 Ang. Waters.....Angell on Tide Waters.  
 Ang. & A. Corp....Angell and Ames on Corporations.  
 Ann. ....Queen Anne (as 8 Ann. c. 19).  
 Ann. Code.....Annotated Code.  
 Ann. Codes & St...Bellinger and Cotton's Annotated Codes and Statutes (Or.)  
 Ann. St.....Annotated Statutes.  
 Ann. St. Ind. T....Annotated Statutes of Indian Territory.  
 Anstr. ....Anstruther's English Exchequer Reports.  
 Anth. N. P.....Anthon's Nisi Prius Reports (N. Y.)  
 App. ....Appleton (Me.)  
 App. Cas.....Appeal Cases, English Law Reports.  
 App. D. C.....Appeal Cases (D. C.)  
 App. Div.....Appellate Division (N. Y.)  
 Archb. Cr. Law....Archbold's Pleading and Evidence in Criminal Cases.  
 Archb. Cr. Prac. & Pl. ....Archbold's Pleading and Evidence in Criminal Cases.  
 Arch. Cr. Pl.....Archbold's Criminal Pleading.  
 Arch. N. P.....Archbold's Law of Nisi Prius.  
 Ariz. ....Arizona.  
 Ark. ....Arkansas.  
 Arn. Ins.....Arnold's Marine Insurance.  
 Ashm. ....Ashmead (Pa.)  
 Assem. ....Assembly (State Legislature).  
 Assiz. ....Assizes.  
 Atk. ....Atkyns' English Chancery Reports.  
 Atl. ....Atlantic Reporter.  
 Aust. Jur.....Austin's Jurisprudence.

## B

Bac. Abr. ....Bacon's Abridgment.  
 Bac. Ins.....Bacon on Benefit Societies and Life Insurance.  
 Bac. Max.....Bacon's Maxims of the Law.  
 Bac. Ben. Soc.....Bacon on Benefit Societies and Life Insurance.  
 Bail. ....Bailey (S. C.)  
 Bailey .....Bailey (S. C.)

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Bailey, Dict.....	Nathan Bailey's English Dictionary.	Bid. Ins.....	Biddle on Insurance.
Bailey, Eq.....	Bailey's Equity (S. C.)	Bid. War. Sale Chat.....	Biddle on Warranties in Sale of Chattels.
Bailey, Mast. Liab..	Bailey's Law of Master's Liability for Injuries to Servant.	Big.....	Bignell's Reports (India).
Bainb. Mines.....	Bainbridge on Mines and Minerals.	Bigelow, Estop.....	Bigelow on Estoppel.
Baldw. ....	Baldwin (U. S.)	Bigelow, Lead. Cas.....	Bigelow's Leading Cases on Bills and Notes, Torts, or Wills.
Ballinger's Ann.		Big. Torts.....	Bigelow on Torts.
Codes & St.....	Ballinger's Annotated Codes and Statutes (Wash.)	Bin.....	Binney (Pa.)
Bankr. Act.....	Bankruptcy Act.	Bing.....	Bingham's English Common Pleas Reports.
Bankr. Form.....	Bankruptcy Forms.	Bing. N. C.....	Bingham's New Cases, English Common Pleas.
Ban. & A.....	Banning & Arden's Patent Cases (U. S.)	Bish. Cont.....	Bishop on Contracts.
Barb. ....	Barbour (N. Y.)	Bish. Cr. Law.....	Bishop on Criminal Law.
Barb. (Ark.).....	Barber (Ark.)	Bish. Cr. Proc.....	Bishop on Criminal Procedure.
Barb. Ch. ....	Barbour's Chancery (N. Y.)	Bish. Eq.....	Bispham's Principles of Equity.
Barb. Ch. Fr.....	Barbour's Chancery Practice.	Bish. Mar., Div. & Sep. ....	Bishop on Marriage, Divorce, and Separation.
Barb. Cr. Law.....	Barbour's Criminal Law.	Bish. Mar. & Div....	Bishop on Marriage and Divorce.
Barn. & Adol.....	Barnewall and Adolphus' English King's Bench Reports.	Bish. New Cr. Law..	Bishop's New Criminal Law.
Barn. & Ald.....	Barnewall and Alderson's English King's Bench Reports.	Bish. New Cr. Proc..	Bishop's New Criminal Procedure.
Barn. & C.....	Barnewall and Cresswell's English King's Bench Reports.	Bish. Non-Cont. Law .....	Bishop's on Non-Contract Law, Rights and Torts.
Barb. & C. Ky. St.	Barbour and Carroll's Kentucky Statutes.	Bish. St. Crimes....	Bishop on Statutory Crimes.
Barn. & S.....	Best and Smith's English Queen's Bench Reports.	Bisp. Eq.....	Bispham's Principles of Equity.
Barr .....	Barr (Pa.)	Biss.....	Bissell (U. S.)
Bates' Ann. St....	Bates' Annotated Revised Statutes (Ohio).	Bissett, Est.....	Bisset on Estates for Life.
Bates, Part.....	Bates' Law of Partnership.	Bl. ....	Henry Blackstone's English Common Pleas Reports.
Bat. Rev. St.....	Battle's Revisal of the Public Statutes of North Carolina.	Black .....	Black (U. S.)
Battle's Revisal....	Battle's Revisal of the Public Statutes of North Carolina.	Blackb. Sales.....	Blackburn on Sales.
Batts' Ann. Civ. St. }	Batts' Annotated Revised Civil Statutes (Tex.)	Black. Com.....	Blackstone's Commentaries on the Laws of England.
Batts' Rev. St. }		Black, Const. Law..	Black on Constitutional Law.
Baxt. ....	Baxter (Tenn.)	Black. Dict.....	Black's Law Dictionary.
Bay .....	Bay (S. C.)	Blackf. ....	Blackford (Ind.)
Bayley, Bills.....	Bayley on Bills.	Black, Interp. Laws..	Black on the Construction and Interpretation of Laws.
Baylies, Sur.....	Baylies on Sureties and Guarantors.	Black, Intox. Lq....	Black on the Laws Regulating the Manufacture and Sale of Intoxicating Liquors.
Beach, Contrib. Neg..	Beach on Contributory Negligence.	Black, Judg.....	Black on Judgments.
Beach, Inj.....	Beach on Injunctions.	Black, Law Dict....	Black's Law Dictionary.
Beach, Mod. Eq. Jur..	Beach's Commentaries on Modern Equity Jurisprudence.	Bland .....	Bland (Md.)
Beach, Priv. Corp...	Beach on Private Corporations.	Blatchf. ....	Blatchford (U. S.)
Beach, Pub. Corp...	Beach on Public Corporations.	Blatchf. Prize Cas..	Blatchford's Prize Cases (U. S.)
Beasl. ....	Beasley (N. J.)	Blatchf. & H.....	Blatchford & Howland (U. S.)
Beav. ....	Beavan's English Rolls Court Reports.	Bl. Comm.....	Blackstone's Commentaries on the Laws of England.
Beavan, Ch.....	Beavan's English Rolls Court Reports.	Bliss, Code Pl....	Bliss on Code Pleading.
Beawes' Lex Merc..	Beawes' Lex Mercatoria.	Bliss, Ins.....	Bliss on Life Insurance.
Beck, Med. Jur.....	Beck's Medical Jurisprudence.	B. Mon.....	B. Monroe (Ky.)
Bee .....	Bee (U. S.)	Bond .....	Bond (U. S.)
Bell, Comm.....	Bell's Commentaries on the Law of Scotland.	Bosw. ....	Bosworth (N. Y.)
Ben. ....	Benedict (U. S.)	Bos. & P.....	Bosanquet and Puller's English Common Pleas Reports.
Ben. Adm. ....	Benedict's American Admiralty Practice.	Bos. & P. (N. R.)..	Bosanquet and Puller's New Reports, English Common Pleas.
Benj. Sales.....	Benjamin on Sales.	Bouv. Inst.....	Bouvier's Institutes of American Law.
Benn. ....	Bennett (Cal.)	Bouv. Law Dict....	Bouvier's Law Dictionary.
Benth. Jud. Ev....	Bentham's Judicial Evidence.	Bradf. Sur. ....	Bradford's Surrogate (N. Y.)
Best, Ev.....	Best on Evidence.	Bradw. ....	Bradwell (Ill.)
Best, Presumptions..	Best on Presumptions of Law and Fact.	Branch .....	Branch (Fla.)
Best & S.....	Best and Smith's English Queen's Bench Reports.	Brandt, Sur.....	Brandt on Suretyship and Guaranty.
Bibb .....	Bibb (Ky.)	Brayt. ....	Brayton (Vt.)

# TABLE OF ABBREVIATIONS.

v

Breese ..... Breese (Ill.)  
 Brev. .... Brevard (S. C.)  
 Brev. Dig..... Brevard's Digest of the  
 Public Statute Law (S.  
 C.)  
 Brewst. .... Brewster (Pa.)  
 Brick. Dig..... Brickell's Digest (Ala.)  
 Brightly, Dig..... Brightly's Analytical Dig-  
 est of the Laws of the  
 United States.  
 Brightly, Elect. Cas.. Brightly's Leading Elec-  
 tion Cases (Pa.)  
 Brightly, N. P..... Brightly's Nisi Prius Re-  
 ports (Pa.)  
 Bro. C. C..... Brown's English Chancery  
 Cases or Reports.  
 Bro. Civ. Law..... Browne's Civil and Ad-  
 miralty Law.  
 Brock. .... Brockenbrough (U. S.)  
 Brock. & H..... Brockenbrough & Holmes  
 (Va.)  
 Brod. & B..... Broderip & Bingham's  
 English Common Pleas  
 Reports.  
 Brooke, Abr..... Brooke's Abridgment.  
 Broom, Leg. Max... Broom's Legal Maxims.  
 Broom's Com. Law.. Broom's Commentaries on  
 the Common Law.  
 Broom & H. Comm.. Broom and Hadley's Com-  
 mentaries on the Laws of  
 England.  
 Brown, Adm..... Brown's Admiralty (U. S.)  
 Brown, C. C..... Brown's English Chancery  
 Cases or Reports.  
 Brown, Ch..... Brown's English Chancery  
 Reports.  
 Brown, Civ. Law... Browne's Civil and Admi-  
 ralty Law.  
 Browne ..... Browne (Pa.)  
 Browne, Jud. Interp.. Browne's Judicial Inter-  
 pretation of Common  
 Words and Phrases.  
 Browne's Roman  
 Law ..... Brown's Epitome and  
 Analysis of Saligny's  
 Treatise on Obligations  
 in Roman Law.  
 Browne, St. Frauds.. Browne on Statute of  
 Frauds.  
 Brownl. & G..... Brownlow and Goldsbor-  
 ough, English Common  
 Pleas Reports.  
 Brunner, Col. Cas... Brunner's Collected Cases  
 (U. S.)  
 Buff. Super. Ct.... Sheldon's Buffalo Superior  
 Court Reports (N. Y.)  
 Bull. N. P..... Bull's Law of Nisi Prius.  
 Bulst. .... Bulstrode's English King's  
 Bench Reports.  
 Bump. Fraud. Conv.. Bump on Fraudulent Con-  
 veyances.  
 Bump's Int. Rev.  
 Law ..... Bump's Internal Revenue  
 Laws.  
 Burge, Sur..... Burge on Suretyship.  
 Burl. Natural & Pol.  
 Law ..... Burlamaqui's Natural and  
 Politic Law.  
 Burn. .... Burnett (Wis.)  
 Burn, J. P..... Burn's Justice of the Peace.  
 Burns' Ann. St.... Burns' Annotated Stat-  
 utes (Ind.)  
 Burns' Ecc. Law... Burns' Ecclesiastical Law.  
 Burns' Rev. St.... Burns' Annotated Statutes  
 (Ind.)  
 Burr. .... Burrows' English King's  
 Bench Reports.  
 Burrill, Assignm.... Burrill on Assignments.  
 Burrill, Circ. Ev... Burrill on Circumstantial  
 Evidence.  
 Burr, Law Dict.... Burrill's Law Dictionary.  
 Burr, Pr..... Burrill's New York Prac-  
 tice.  
 Burt. Real Prop.... Burton on Real Property.  
 Busb. .... Busbee (N. C.)  
 Busb. Eq..... Busbee's Equity (N. C.)  
 Bush ..... Bush (Ky.)

B. & Ald..... Barnewall and Alderson's  
 English King's Bench  
 Reports.  
 B. & C..... Barnewall and Cresswell's  
 English King's Bench  
 Reports.  
 B. & C. Comp.... Bellinger and Cotton's An-  
 notated Codes and Stat-  
 utes (Or.)  
 B. & P..... Bosanquet & Puller's Eng-  
 lish Common Pleas Re-  
 ports.

## C

Cab. & El..... Cababé and Ellis' Queen's  
 Bench Reports.  
 Caines ..... Caines (N. Y.)  
 Caines, Cas..... Caines' Cases (N. Y.)  
 Cal. .... California.  
 Call ..... Call (Va.)  
 Callis, Sew..... Callis on Sewers.  
 Calvin, Lex..... Calvin's Lexicon Juridi-  
 cum.  
 Calv. Parties..... Calvert's Parties to Suits  
 in Equity.  
 Camp. .... Campbell's English Nisi  
 Prius Reports.  
 Cam. & N..... Cameron & Norwood's  
 Conference (N. C.)  
 Can. Leg. N..... Canada Legal News.  
 Car. .... Carolus (as 22 & 23 Car.  
 II.)  
 Car. Law Repoa... Carolina Law Repository  
 (N. C.)  
 Carr. & M..... Carrington and Marsh-  
 man's English Nisi Prius  
 Reports.  
 Cart. .... Carter (Ind.)  
 Carth. .... Carthew's English King's  
 Bench Reports.  
 Carv. Carr..... Carver's Treatise on the  
 Law Relating to the Car-  
 riage of Goods by Sea.  
 Car. & K..... Carrington & Kirwan's  
 English Nisi Prius Re-  
 ports.  
 Car. & P..... Carrington & Payne's  
 English Nisi Prius Re-  
 ports.  
 Casey ..... Casey (Pa.)  
 Ca. temp. Hard.... Cases temp. Hardwicke by  
 Lee and Hardwicke.  
 C. B. .... English Common Bench  
 Reports (Manning, Gran-  
 ger & Scott).  
 C. B. (N. S.)..... English Common Bench  
 Reports, New Series, by  
 John Scott.  
 C. C. A..... Circuit Court of Appeals  
 (U. S.)  
 C. E. Green..... C. E. Green (N. J.)  
 Cent. Dict..... Century Dictionary.  
 Cent. Dict. & Ency.. Century Dictionary and  
 Encyclopedia.  
 Cent. Law J..... Central Law Journal, St.  
 Louis, Mo.  
 Chambers' Cyclopæ-  
 dia ..... Ephraim Chambers' Eng-  
 lish Cyclopædia.  
 Chand. .... Chandler (Wis.)  
 Chan. Sentinel .... Chancery Sentinel (N. Y.)  
 Ch. App..... Chancery Appeal Cases,  
 English Law Reports.  
 Charlt., R. M..... R. M. Charlton (Ga.)  
 Charlt., T. U. P.... T. U. P. Charlton (Ga.)  
 Chase ..... Chase (U. S.)  
 Chase's St..... Chase's Statutes at Large  
 (Ohio)  
 Chase, Steph. Dig.  
 Ev. .... Chase on Stephens' Digest  
 of Evidence.  
 Ch. Cas..... English Cases in Chancery.  
 Ch. Div..... Chancery Division, English  
 Law Reports.

Chest. Co. Rep.....	Chester County Reports (Pa.)	Co. Inst.....	Coke's Institutes.
Cheves .....	Cheves (S. C.)	Coke .....	Coke's English King's Bench Reports.
Cheves, Eq.....	Cheves' Equity (S. C.)	Cold .....	Coldwell (Tenn.)
Chi. Leg. N.....	Chicago Legal News (Ill.)	Colem. Cas.....	Coleman's Cases (N. Y.)
Chip., D.....	D. Chipman (Vt.)	Colem. & C. Cas....	Coleman & Caines' Cases (N. Y.)
Chip., N.....	N. Chipman (Vt.)	Co. Litt.....	Coke on Littleton.
Chit. Bills .....	Chitty on Bills.	Colly. ....	Collyer's English Chancery Cases.
Chit. Bl. Comm....	Chitty's Edition of Blackstone's Commentaries.	Colly. Partn.....	Collyer on Partnership.
Chit. Cont.....	Chitty on Contracts.	Colo. ....	Colorado.
Chit. Cr. Law .....	Chitty's Criminal Law.	Colo. App.....	Colorado Appeals Reports.
Chit. Gen. Pr.....	Chitty's General Practice.	Colo. Law Rep....	Colorado Law Reporter.
Chit. Pl.....	Chitty on Pleading.	Colq. Rom. Civ. Law .....	Colquhoun's Roman Civil Law.
Chit. Pr.....	Chitty's General Practice.	Com. Dig.....	Comyn's Digest of the Laws of England.
Chitty .....	Chitty on Bills.	Comm. ....	Commentaries.
Chitty, Bl. Comm....	Chitty's Edition of Blackstone's Commentaries.	Com. on Con.....	Comyn's Law of Contracts.
Ch. Pl. ....	Chitty on Pleading.	Comp. Laws.....	Compiled Laws.
Cin. R.....	Cincinnati Superior Court Reports (Ohio)	Comp. St.....	Compiled Statutes.
Cin. Super. Ct. Rep'r .....	Cincinnati Superior Court Reporter (Ohio)	Comst. ....	Comstock (N. Y.)
Cir. Ct. Dec.....	Circuit Decisions (Ohio)	Comyn .....	Comyns' English King's Bench Reports.
Cir. Ct. R.....	Circuit Court Reports (Ohio)	Comyn, Usury.....	Comyn on Usury.
Cir. Ct. Rule.....	Circuit Court Rule.	Conf. R.....	Conference Reports (N. C.)
City Ct. R.....	City Court Reports (N. Y.)	Cong. ....	Congress.
City Ct. R. Supp...	City Court Reports, Supplement (N. Y.)	Conn. ....	Connecticut.
City H. Rec.....	City Hall Recorder (N. Y.)	Con. St.....	Consolidated Statutes.
Civ. Code.....	Civil Code.	Const. ....	Constitution.
Civ. Code Practice..	Civil Code of Practice.	Const. Amend.....	Amendment to Constitution.
Civ. Prac. Act.....	Civil Practice Act.	Const. U. S. Amend..	Amendment to the Constitution of the United States.
Civ. Proc. R.....	Civil Procedure Reports (N. Y.)	Con. Sur.....	Connolly's Surrogate (N. Y.)
C. L.....	English Common Law Reports (American Reprint).	Cooke .....	Cooke (Tenn.)
Clancy, Husb. & W. }	Clancy's Treatise of the Rights, Duties, and Liabilities of Husband and Wife.	Cooke, Ins. ....	Cooke on Life Insurance.
Clancy, Rights. }		Cook's Pen. Code ..	Cook's Penal Code (N. Y.)
Clark .....	Clark (Pa.)	Cook, Stock, Stockh. & Corp. Law.....	Cook on Stock, Stockholders, and General Corporation Law.
Clarke .....	Clarke (Iowa)	Cooley, Bl. Comm....	Cooley's Edition of Blackstone's Commentaries.
Clarke, Ch.....	Clarke's Chancery (N. Y.)	Cooley, Const. Law..	Cooley's Constitutional Law.
Clark's Code.....	Clark's Annotated Code of Civil Procedure (N. C.)	Cooley, Const. Lim..	Cooley's Constitutional Limitations.
Clark & F.....	Clark and Finnelly's House of Lords Reports.	Cooley, Tax'n ....	Cooley on Taxation.
Clay's Dig.....	Clay's Digest of Laws of Alabama.	Cooley, Torts.....	Cooley on Torts.
Cleve. Law Rec.....	Cleveland Law Recorder (Ohio)	Coop. Eq. Pl.....	Cooper's Equity Pleading.
Cleve. Law Rep....	Cleveland Law Reporter (Ohio)	Copp, Pub. Land Laws .....	Copp's United States Public Land Laws.
Clev. Insan.....	Clevenger's Medical Jurisprudence of Insanity.	Co. Rep.....	Coke's English King's Bench Reports.
Cliff. ....	Clifford (U. S.)	Corn. Deeds .....	Cornish on Purchase Deeds.
C. M. & R.....	Compton, Meeson, and Roscoe's English Exchange Reports.	Cornish, Purch. Deeds .....	Cornish on Purchase Deeds.
Co. ....	Coke's English King's Bench Reports.	Cow. ....	Cowen (N. Y.)
Cobb, Dig.....	Cobb's Digest of Statute Laws (Ga.)	Cow. Cr. Rep.....	Cowen's Criminal Reports (N. Y.)
Cobbey, Repl.....	Cobbey's Practical Treatise on the Law of Replevin.	Cowell .....	Cowell's Law Dictionary.
Cobbey's Ann. St..	Cobbey's Annotated Statutes (Neb.)	Cowp. ....	Cowper's English King's Bench Reports.
Code Civ. Proc.....	Code of Civil Procedure.	Cox .....	Cox (Ark.)
Code Cr. Proc.....	Code of Criminal Procedure.	Cox .....	Cox's English Chancery Cases.
Code Gen. Laws....	Code of General Laws.	Cox, C. C.....	Cox's English Criminal Cases.
Code Prac.....	Code of Practice.	Cox, Cr. Cas.....	Cox's English Criminal Cases.
Code Proc. ....	Code of Procedure.	Coxe .....	Coxe (N. J.)
Code Pub. Gen. Laws .....	Code of Public General Laws.	C. P. Div.....	Common Pleas Division, English Law Reports.
Code Pub. Loc. Laws .....	Code of Public Local Laws.	C. P. Rep.....	Common Pleas Reporter (Pa.)
Code R. (N. S.)....	Code Reports, New Series (N. Y.)	Crabbe .....	Crabbe (U. S.)
Code Rep.....	Code Reporter (N. Y.)	Crabb, Eng. Synonyms .....	Crabb's English Synonyms.
Code Supp.....	Supplement to the Code.	Crabb, Real Prop...	Crabb on Real Property.
Cod. St. ....	Codified Statutes.		

Cr. Act.....	Criminal Act.	Daniel, Neg. Inst....	Daniel's Negotiable Instruments.
Craig, Dict.....	Craig's Etymological, Technical, and Pronouncing Dictionary.	Davis, Cr. Law....	Davis' Criminal Law.
Craig & P.....	Craig and Phillips' English Chancery Reports.	Dawson's Code....	Dawson's Code of Civil Procedure (Colo.)
Cranch .....	Cranch (U. S.)	Day .....	Day (Conn.)
Cranch, C. C.....	Cranch's Circuit Court (U. S.)	D. C.....	District of Columbia.
Cranch, Pat. Dec...	Cranch's Patent Decisions (U. S.)	D. Chip.....	D. Chipman (Vt.)
Cr. Cir. Comp.....	Crown Circuit Companion (Irish)	Deac. Cr. Law.....	Deacon on Criminal Law of England.
Cr. Code.....	Criminal Code.	Deady .....	Deady (U. S.)
Cr. Law Mag.....	Criminal Law Magazine (N. J.)	Dears. & B. Crown	
C. Rob. Adm.....	Charles Robinson's English Admiralty Reports.	Cas. ....	Dearsly and Bell's English Crown Cases.
Cro. Car.....	Croke's English King's Bench Reports temp. Charles I (3 Cro.)	De Gex, F. & J....	De Gex, Fisher & Jones' English Chancery Reports.
Cro. Cas.....	Croke's English King's Bench Reports temp. Charles I (3 Cro.)	De Gex, J. & S....	De Gex, Jones, and Smith's English Chancery Reports.
Cro. Eliz.....	Croke's English King's Bench Reports, temp. Elizabeth (1 Cro.)	De Gex, M. & G....	De Gex, Macnaghten, and Gordon's English Chancery Reports.
Cro. Jac.....	Croke's English King's Bench Reports temp. James (Jacobus) I (2 Cro.)	De Jure Mar.....	Hale's De Jure Maris (Appendix to Hall on the Sea Shore).
Crompt. Just.....	Crompton's Office of Justice of the Peace.	Del. ....	Delaware.
Crompt., M. & R....	Crompton, Meeson, and Roscoe's English Exchequer Reports.	Del. Ch.....	Delaware Chancery.
Crompt. ....	Star Chamber Cases by Crompton.	Del. Co. R.....	Delaware County Reports (Pa.)
Crompt. & J.....	Crompton & Jervis' English Exchequer Reports.	Del. Term R.....	Delaware Term Reports.
Cr. Prac. Act .....	Criminal Practice Act.	Dem. Sur.....	Demarest's Surrogate (N. Y.)
Cr. Proc. Act .....	Criminal Procedure Act.	Denio .....	Denio (N. Y.)
Cr. St.....	Criminal Statutes.	Denison, Cr. Cas....	Denison's English Crown Cases.
Cruise's Dig.....	Cruise's Digest of the Law of Real Property.	Desaus. ....	Desaussure's Equity (S. C.)
Ct. Cl.....	Court of Claims (U. S.)	Desty, Tax'n.....	Desty on Taxation.
Curt. ....	Curtis (U. S.)	Dev. ....	Devereux (N. C.)
Curt. Ecc.....	Curtis English Ecclesiastical Reports.	Dev. Ct. Cl.....	Devereux's Court of Claims (U. S.)
Curt. Pat.....	Curtis on Patents.	Dev. Eq.....	Devereux's Equity (N. C.)
Cush. ....	Cushing (Mass.)	Devl. Deeds.....	Devlin on Deeds.
Cush. Law & Prac.		Dev. & B.....	Devereux & Battle (N. C.)
Leg. Assem.....	Cushing's Law and Practice of Legislative Assemblies.	Dev. & B. Eq.....	Devereux & Battle's Equity (N. C.)
Cushm. ....	Cushman (Miss.)	Dacey, Confl. Laws..	Dacey on Conflict of Laws.
Cyc. ....	Cyclopedia of Law and Procedure.	Dacey, Dom.....	Dacey's Law of Domicil.
Cyc. Law & Proc...	Cyclopedia of Law and Procedure.	Dick. ....	Dickinson (N. J.)
Cyclop. Dict.....	Shumaker & Longsdorf's Cyclopedic Dictionary.	Dickens .....	Dickens' English Chancery Reports.
C. & K.....	Carrington and Kirwan's English Nisi Prius Reports.	Dict. ....	Dictionary.
C. & P.....	Carrington and Payne's English Nisi Prius Reports.	Dict. Droit Civil...	Dictionnaire Droit Civil.
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<b>Edw. Bills &amp; N.</b> ....	<b>Edwards on Bills and Notes.</b>	<b>Falc. Marine Dict.</b> ..	<b>Falconer's Marine Dictionary.</b>
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**Freem.**.....Freeman (Ill.)  
**Freem. Ch.**.....Freeman's Chancery (Miss.)  
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**Gav. & H. St.**.....Gavin and Hord's Revised Statutes (Ind.)  
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**Gen. Dig. U. S.**.....General Digest of the United States.  
**Gen. Laws.**.....General Laws.  
**Gen. R. R. Act.**.....General Railroad Act.  
**Gen. St.**.....General Statutes.  
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**George**.....George (Miss.)  
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		Mass. ....	Massachusetts.
		Math. Pres. Ev. ....	Mathews on Presumptive Evidence.
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		Md. ....	Maryland.
		Md. Ch. ....	Maryland Chancery.
		Me. ....	Maine.
		Mechem, Ag. ....	Mechem on Agency.
		Mechem, Pub. Off. ....	Mechem on Public Offices and Officers.
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		Miles .....	Miles (Pa.)
		Mill, Const. ....	Mill's Constitutional Reports (S. C.)
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Pa. ....	Pennsylvania State.	Pike ....	Pike (Ark.)
Pac. ....	Pacific Reporter.	Pin. ....	Pinney (Wis.)
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U. S. App. ....	United States Appeals.	Watts .....	Watts (Pa.)
U. S. Comp. St. 1901..	United States Compiled Statutes 1901.	Watts & S.....	Watts & Sergeant (Pa.)
U. S. Comp. St.		W. Bl. ....	Sir William Blackstone's English King's Bench Reports.
Supp. 1903.....	Supplement 1903 to the United States Compiled Statutes of 1901.	Webst. Dict.....	Webster's Dictionary.
U. S. Law Mag....	United States Law Maga- zine (N. Y.)	Webst. Dict. Unabh..	Webster's Unabridged Dic- tionary.
U. S. Month. Law		Webster in Sen.	
Mag. ....	United States Monthly Law Magazine.	Doc. ....	Webster in Senate Docu- ments.
Utah .....	Utah.	Webst. Int. Dict....	Webster's International Dictionary.
<b>V</b>		Wedgw. Dict. Eng.	
		Etymology .....	Wedgwood's Dictionary of English Etymology.
Va. ....	Virginia.	Welsb., Hurl. & G..	Welsby, Hurlstone, and Gordon's Reports (1-9 English Exchequer Re- ports).
Va. Cas. ....	Virginia Cases.	Wend. ....	Wendell (N. Y.)
Va. Law J.....	Virginia Law Journal, Richmond.	West Coast Rep....	West Coast Reporter.
Van Fleet, Coll. At- tack .....	Van Fleet on Collateral Attack.	West. Law J.....	Western Law Journal, Cincinnati (Ohio)
Van Ness, Prize Cas..	Van Ness' Prize Cases (U. S.)	West. Law Month..	Western Law Monthly (Ohio)
Vattel, Law Nat...	Vattel's Law of Nations.	West. L. M.....	Western Law Monthly (Ohio)
Vent. ....	Ventris' English Common Pleas Reports.	Whart. ....	Wharton (Pa.)
Vern. ....	Vernon's English Chancery Reports.	Whart. Ag.....	Wharton on Agency.
Ves. ....	Vesey, Junior, English Chancery Reports.	Whart. Am. Cr. Law..	Wharton's American Crim- inal Law.
Ves. Jr.....	Vesey, Junior, English Chancery Reports.	Whart. Confl. Laws..	Wharton's Conflict of Laws.
Ves. Sr.....	Vesey, Senior, English Chancery Reports.	Whart. Cr. Ev....	Wharton on Criminal Evi- dence.
Ves. & B.....	Vesey and Beames' Eng- lish Chancery Reports.	Whart. Cr. Law....	Wharton's American Crim- inal Law.
Vict. ....	Queen Victoria (as 5 & 6 Vict.)	Whart. Cr. Pl. & Prac. ....	Wharton's Criminal Plead- ing & Practice.
Vin. Abr.....	Viner's Abridgment.	Whart. Ev.....	Wharton on Evidence in Civil Issues.
Vroom .....	Vroom (N. J.)	Whart. Law Dict..	Wharton's Law Diction- ary (or Law Lexicon).
V. S. ....	Vermont Statutes.	Whart. Law Lexi- con .....	Wharton's Law Diction- ary (or Law Lexicon).
Vt. ....	Vermont.	Whart. Neg.....	Wharton on Negligence.
<b>W</b>		Whart. St. Tr....	Wharton's State Trials (U. S.)
		Whart. & S. Med. Jur. ....	Wharton and Stille's Med- ical Jurisprudence.
W. ....	William (as Wm. IV).	Wheat. ....	Wheaton (U. S.)
Wade, Am. Mining Law .....	Wade on American Mining Law.	Wheat. El. Int. Law .....	Wheaton's Elements of In- ternational Law.
Wade, Attachm.....	Wade on Attachment and Garnishment.	Wheeler, Am. Cr. Law .....	Wheeler's Abridgment of American Common Law Cases.
Wag. St. ....	Wagner's Statutes (Mo.)	Wheeler, Cr. Cas...	Wheeler's Criminal Cases (N. Y.)
Wait, Act. & Def...	Wait's Actions and De- fenses.	White's Recop....	White's Recopilacion (Land Laws of Spain and Mex- ico).
Wait's Prac.....	Wait's New York Practice.		
Walk. ....	Walker (Miss.)		
Walk. Am. Law....	Walker's American Law.		
Walk. Ch.....	Walker's Chancery (Mich.)		
Walk. (Pa.) ....	Walker (Pa.)		
Walk. Pat.....	Walker on Patents.		
Wall. ....	Wallace (U. S.)		

White & T. Lead. Cas. Eq.....	White and Tudor's Leading Cases in Equity.	Wm. & Mary.....	William and Mary (as 2 Wm. & Mary, c. 1).
White & W. Civ. Cas. Ct. App.....	White & Willson's Civil Cases Court of Appeals (Tex.)	Woerner, Adm'n....	Woerner's Treatise on the American Law of Administration.
Wig. Wills.....	Wigram on Wills.	Woodb. & M.....	Woodbury & Minot (U. S.)
Wilcox .....	Wilcox (Pa.)	Wood, Ins. ....	Wood on Fire Insurance.
Will .....	William (as 1 Will. IV).	Wood, Inst.....	Wood's Institutes of the (Common) Laws of England.
Will. Eq. Jur.....	Willard's Equity Jurisprudence.	Wood, Landl. & Ten..	Wood on Landlord and Tenant.
Willes .....	Willes' English Common Pleas Reports.	Wood, Lect.....	Woodeson's Lectures on Laws of England.
Williams (Vt.) .....	Williams (Vt.)	Wood, Lim.....	Wood on Limitation of Actions.
Williams, Ex'rs ...	Williams on Executors.	Wood, Mast. & Serv. ....	Wood on Master and Servant.
Williams, Real Prop..	Williams on Real Property.	Wood, Nuls.....	Wood on Nuisances.
Wills, Cir. Ev.....	Wills on Circumstantial Evidence.	Wood, Ry. Law....	Wood's Law of Railroads.
Willson, Civ. Cas. Ct. App. ....	Willson's Civil Cases Court of Appeals (Tex.)	Woods .....	Woods (U. S.)
Willson, Tex. Cr. Law .....	Willson's Revised Penal Code, Code of Criminal Procedure, and Penal Laws of Texas.	Wood's Civ. Law...	Wood's Institutes of the Civil Law of England.
Wila. ....	Wilson (Ind.)	Woodw. Dec.....	Woodward's Decisions (Pa.)
Wila. ....	Wilson's English Common Pleas Reports.	Woolr. Waters....	Woolrych's Law of Waters.
Winch .....	Winch's English Common Pleas Reports.	Woolw. ....	Woolworth (U. S.)
Winch .....	Winch's Entries.	Worcest. Dict.....	Worcester's Dictionary.
Winfield, Words & Phrases .....	Winfield's Adjudged Words and Phrases, with Notes.	Wor. Dict. ....	Worcester's Dictionary.
Winst. ....	Winston (N. C.)	Works, Courts ....	Works on Courts and Their Jurisdiction.
Winst. Eq. ....	Winston's Equity (N. C.)	Works, Pr.....	Works' Practice, Pleading, and Forms.
Wis. ....	Wisconsin.	Wright .....	Wright (Ohio)
Witthaus & Becker's Med. Jur.....	Witthaus and Becker's Medical Jurisprudence.	Wright (Pa.) .....	Wright (Pa.)
Wkly. Dig.....	Weekly Digest (N. Y.)	W. Rob. Adm.....	W. Robinson's English Admiralty Reports.
Wkly. Law Bul....	Weekly Law Bulletin (Ohio)	W. S. ....	Wagner's Statutes (Mo.)
Wkly. Law Gaz....	Weekly Law Gazette (Ohio)	W. Va. ....	West Virginia.
Wkly. Notes Cas....	Weekly Notes Cases (Pa.)	Wyatt, Prac. Reg..	Wyatt's Practical Register in Chancery.
Wkly. Rep.....	Weekly Reporter, London (English).	Wyo. ....	Wyoming.
Wm. ....	William (as 9 Wm. III).	Wythe .....	Wythe's Chancery (Va.)
Wm. Bl.....	Sir William Blackstone's English King's Bench Reports.		
Wm. Rob. Adm.....	William Robinson's English Admiralty Reports.		
Wma. Ex'rs.....	Williams on Executors.		

Y

Yeates .....	Yeates (Pa.)
Yerg. ....	Yerger (Tenn.)
York Leg. Rec.....	York Legal Record (Pa.)
Younge & C. Ch....	Younge & Collyer's English Chancery Reports.

Z

Zab. ....	Zabriskie (N. J.)
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# JUDICIAL AND STATUTORY DEFINITIONS

## OF

# WORDS AND PHRASES.

### VOLUME 7.

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#### PUBLISH.

See "Publication."

"Publish" is defined as to issue; to make known what before was private; to put into circulation; the idea of publicity, of circulation, of intended distribution. *United States v. Williams* (U. S.) 3 Fed. 484, 486.

"Publish" primarily means to make known, so that, where a notice is required to be published in a newspaper, printed in German, the notice must also be in German. When printed in English, it would be merely printed, not published. *State v. City of Orange*, 22 Atl. 1004, 1005, 54 N. J. Law (25 Vroom) 111, 14 L. R. A. 62.

The guaranty in Const. art. 1, § 8, providing that every citizen may speak, write, and publish his sentiments upon all subjects, does not give to the citizen the right to murder; nor does it give him the right to advise the commission of that crime by others. What it does permit is liberty of action only to the extent that such liberty does not interfere with or deprive others of the equal right. In the eye of the law, each citizen has an equal right to live and to act, and to enjoy the benefits of the laws of the state under which he lives; but no one has the right to use the privileges thus conferred in such a way as to murder his fellow citizens, and one who imagines he has labors under a serious misconception, not only of the true meaning of the constitutional provision referred to, but of his duties and obligations to his fellow citizens and to the state itself. Thus the publication of an article in an anarchistic paper inciting a murder is not within the protection conferred by such provision. *People v. Most*, 75 N. Y. Supp. 591, 592, 71 App Div. 160.

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#### PUBLISHER.

"Publisher" is defined in *Bouvier's Law Dictionary* "as one who, by himself or his agent, makes a thing publicly known; one engaged in the circulation of books, pamphlets, or other papers." *Le Roy v. Jamison* (U. S.) 15 Fed. Cas. 373, 376.

A publisher is one who makes anything publicly known, as such is its meaning in reference to publication of a libel. *Sproul v. Pillsbury*, 72 Me. 20, 21.

#### Manager synonymous.

See "Manager."

#### As manufacturer.

See "Manufacturer."

#### As printer.

The publisher of a paper is ordinarily a printer, in the sense of being the person for whom, as principal, and by whose servants, the paper is printed, and is thus held synonymous with "printer," so that an affidavit of the publication of a summons made by a publisher is a sufficient compliance with Civ. Code Proc. § 415, requiring the affidavit to be made by the printer, or the foreman or the principal clerk. *People v. Thomas*, 36 Pac. 9, 10, 101 Cal. 571 (citing *Sharp v. Daugney*, 33 Cal. 505, 513; *Bunce v. Reed* [N. Y.] 16 Barb. 347; *Menard v. Crowe*, 20 Minn. 448, 452 [Gil. 402]; *Kipp v. Cook*, 46 Minn. 535, 537, 49 N. W. 257).

#### As proprietor.

The word "proprietor," used in connection with a country weekly newspaper, has been held synonymous with "publisher" within the meaning of a statute (Code Iowa, § 2620) requiring the affidavit of the publi-

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cation of a legal notice to be made by the publisher of the paper. *Palmer v. McCormick* (U. S.) 28 Fed. 541, 544.

#### **Publisher of libel.**

He is the publisher of a libel who, either of his own will, or by the persuasion or dictation of another, executes the same in any of the modes pointed out as constituting a libel; but, if any one by force or threats is compelled to execute such libel, he is guilty of no offense. Pen. Code Tex. 1895, art. 725.

### **PUEBLO.**

See "Mexican Pueblo."

The term "pueblo," in its ordinary signification, means people or population, but is used in the sense of the English word "town." It has the indefiniteness of that term, and, like it, is sometimes applied to a mere collection of individuals residing at a particular place—a settlement or village as well as to a regularly organized municipality. *Trenouth v. City and County of San Francisco*, 100 U. S. 251, 25 L. Ed. 626 (citing *Grisar v. McDowell*, 73 U. S. [6 Wall.] 363, 18 L. Ed. 863).

A grant to a pueblo in Mexican law did not constitute a private land grant in the sense which took title out of the state. It was the mere vesting in the pueblo—a political subdivision of the state—of the use of the land in trust for the benefit of the inhabitants thereof, and with power, as the representatives of the state, to make grants which should vest the title in private ownership of solares or house lots. These grants did not deprive the state from thereafter making technical private land grants vesting the title in natural persons. *United Land Ass'n v. Knight*, 24 Pac. 818, 827, 828, 85 Cal. 448.

Pueblos, under the Mexican law, were simply part of the political government of the country, and, as political agencies, the state succeeded to control over them upon the change of government. Whatever property they had, incidental to their existence as pueblos, was held as a municipal trust for the public use of the pueblo. As such agencies, the state was under no obligation to continue their existence. In the exercise of her sovereign power, she could have abolished them altogether, or have incorporated them into her own scheme of government, as municipalities, with such powers and restrictions as she might see fit to impose upon them. *City of Monterey v. Jacks*, 73 Pac. 436, 441, 139 Cal. 542.

#### **PUEBLO INDIANS.**

The Pueblo Indians are not included within the meaning of Act June 30, 1834, de-

claring that every person who makes a settlement on any lands belonging, secured, or granted by treaty to any Indian tribe is liable to a penalty, etc., as they are Indians only in feature, complexion, and a few of their habits. *United States v. Joseph*, 94 U. S. 614, 617, 24 L. Ed. 295.

### **PUFFER.**

A "puffer," in the strict meaning of the word, is a person who, without having any intention to purchase, is employed by the vendor at an auction to raise the price by fictitious bids, thereby increasing the competition among the bidders, while he himself is secured from risk by a secret understanding by the vendor that he shall not be bound by his bids. The employment of a puffer is a fraud on the real bidders which will relieve the highest bidder from any obligation to complete his contract. *Peck v. List*, 23 W. Va. 338, 375, 48 Am. Rep. 398.

A puffer is a person who attends an auction and bids for the purpose of inflating the value of the property, in behalf of those interested in the sale, with no desire to purchase the property. Such person is sometimes referred to as a "by-bidder," "capper," "decoy duck," "white bonnet," "sham bidder." *McMillan v. Harris*, 35 S. E. 334, 335, 110 Ga. 72, 48 L. R. A. 845, 78 Am. St. Rep. 93.

### **PUIS DARREIN CONTINUANCE.**

A plea *puis darrein continuance*, in the common-law system, was a pleading which set up some matter of defense that had arisen after plea, and before replication, or after issue joined. *City of Chattanooga v. Neely*, 37 S. W. 280, 281, 97 Tenn. 514.

A plea *puis darrein continuance* is a pleading of facts occurring since the last stage of the suit, whatever that stage may be, provided it precedes the trial. This plea, if sustained, may abate the particular suit without affecting the right, or it may go to the merits and defeat the right of action. A plea of this kind is always pleaded by way of substitution for the former plea, on which no proceeding is afterward had. *Waterbury v. McMillan*, 46 Miss. 635, 640.

A plea of *puis darrein* is in substitution of all previous pleas, and is always pleaded by way of substitution. It may be either in bar or abatement. *Woods v. White*, 97 Pa. 222, 227.

### **PULL**

In a statement that persons who were around the criminal section of the district court witnessed a striking illustration of

what it is to be "possessed of a pull," and that the same persons were also given an illustration of how easy it is for a man to keep out of the penitentiary if the pull is worked for all it is worth, the phrase "possessed of a pull" is, to speak strictly, without an intelligible meaning, and is, in any event, so doubtful and uncertain that it cannot be applied as imputing that the court was corrupt, with any greater certainty than it may be said to refer to some other person or persons, or to actions or motives erroneous and improper, but not corrupt. *Percival v. State*, 64 N. W. 221, 223, 45 Neb. 741, 50 Am. St. Rep. 568 (approved in *Rosewater v. State*, 66 N. W. 640, 641, 47 Neb. 630).

## PULLICAN.

A pullican is an instrument formerly used for extracting teeth by main force. It frequently brought with them a part of the jawbone. In *re Hunter*, 60 N. C. 372, 373.

## PULSATORY CURRENT.

A pulsatory current is one caused by sudden or instantaneous changes of electrical intensity. *Dolbear v. American Bell Telephone Co.*, 8 Sup. Ct. 778, 781, 126 U. S. 1, 31 L. Ed. 863.

## PUNCTUATION.

See "Mark of Punctuation."

## PUNISH.

"To punish" means to impose a penalty upon; to afflict with pain or loss or suffering for a crime or fault; to inflict a penalty for an offense upon the offender; to impose a penalty for the commission of crime. *Bradley v. State*, 36 S. E. 630, 631, 111 Ga. 168, 50 L. R. A. 691, 78 Am. St. Rep. 157.

## PUNISHABLE.

The word "punishable," as used in statutes which declare that certain offenses are punishable in a certain way, means liable to be punished in the way designated. It does not mean "must be punished." *State v. Neuner*, 49 Conn. 232, 233; *People v. Keating*, 16 N. Y. Supp. 748, 750, 61 Hun. 260; *Smith v. Commonwealth*, 37 S. W. 586, 587, 100 Ky. 133; *State v. Mayberry*, 48 Me. 218, 235, 236; *United States v. Watkins* (U. S.) 6 Fed. 152, 160; *Miller v. State*, 58 Ga. 200, 203; *People v. Murphy*, 57 N. E. 820, 821, 185 Ill. 623. The fact that a recommendation to mercy may reduce the punishment otherwise prescribed does not take the offense out of the operation of a general provision as to of-

fenses punishable by imprisonment exceeding certain limits. *Miller v. State*, 58 Ga. 200, 203.

Within the Code, providing that such offenses as are punishable with death or confinement in the penitentiary are felonies, the word "punishable" refers to offenses which may be punished by confinement in the penitentiary, and not to those only which must be so punished. *Benton v. Commonwealth*, 16 S. E. 725, 89 Va. 570; *People v. Hughes*, 32 N. E. 1105, 1106, 137 N. Y. 29.

The word "punishable," in Laws 1897, p. 69—the indeterminate sentence law—relating to criminal cases where defendant is on trial for a felony punishable by confinement in the State Prison, applies only to those crimes which actually are, and not which may be, punished by confinement in the State Prison. *Hicks v. State*, 50 N. E. 27, 28, 150 Ind. 293.

The word "punishable," in Rev. St. § 6830, making it criminal for any person to verbally accuse any other person of a crime punishable by law, with intent to extort, etc., is not descriptive of a crime, but only operates to limit the subject-matter of the accusation to those acts which come within the penalties of the criminal laws of the state. *Mann v. State*, 26 N. E. 226, 227, 47 Ohio St. 556, 11 L. R. A. 656.

## PUNISHABLE WITH IMPRISONMENT.

The provision of a charter, and an ordinance passed thereunder, providing that the town council might provide for the punishment of offenders against ordinances, and that it should be competent for the magistrate before whom any offender had been tried to direct that he be committed to the county jail until he pay the fines, forfeitures, and costs which were recovered or adjudged against him, is not in violation of a provision of the Constitution prohibiting a justice of the peace from trying any person, except as a court of inquiry, for an offense punishable with imprisonment or death. In such case it could not properly be said the offense was punishable with imprisonment, but rather that the imprisonment was a mere means of collecting the fine, and incident thereto. *Ex parte Bollig*, 31 Ill. 88, 96.

"Punishable" means liable to punishment, and the expression "punishable with imprisonment for life," in Gen. St. c. 160, § 1, providing that murder committed in the commission of, or attempt to commit, any crime punishable with death or imprisonment for life, is murder in the first degree, is broad enough to include every crime for which, on conviction, the guilty party is liable to such imprisonment. *Commonwealth v. Pemberton*, 118 Mass. 36, 42.

**PUNISHMENT.**

See "Corporal Punishment"; "Cruel and Unusual Punishment"; "Cumulative Punishment"; "Infamous Punishment"; "Same Punishment"; "Unusual Punishment."

Commutation of, see "Commute—Commutation."

Punishment is the penalty for the transgression of the law. *People v. Court of Sessions*, 19 N. Y. Supp. 508, 510 (citing *Whart. Law Lex.*); *State v. Smith*, 7 Conn. 428, 431.

"Punishment" is synonymous with "penalty." And "liability" and "forfeiture" are synonymous with "punishment," in connection with crimes of the highest grade. The punishment or penalty is fixed by the law defining and inhibiting the criminal act. *Featherstone v. People*, 62 N. E. 684, 687, 194 Ill. 325 (citing *Beggs v. State*, 122 Ind. 54, 23 N. E. 693; *United States v. Reisinger*, 128 U. S. 398, 5 Sup. Ct. 99, 32 L. Ed. 480).

The terms "penalty" and "punishment" are frequently used as synonyms of each other. Thus, Webster defines "punishment" as pain, suffering, or loss inflicted on a person because of a crime or offense. *State ex rel. Reid v. Walbridge*, 24 S. W. 457, 458, 119 Mo. 383, 41 Am. St. Rep. 663.

Rev. St. § 1290 [U. S. Comp. St. 1901, p. 916], allowing a soldier discharged from service, except by way of "punishment for an offense," transportation and subsistence from the place of his discharge to that of his enlistment, means a discharge as a punishment inflicted by the judgment of a court-martial or other military authority for a specific offense, and not a discharge for unfitness for service and general bad character, and hence a soldier discharged for the latter cause is entitled to transportation and subsistence, etc. *United States v. Kingsley*, 11 Sup. Ct. 286, 287, 138 U. S. 87, 34 L. Ed. 896.

The terms "conviction" and "punishment" each have a well-settled legal meaning, and are used in the law to designate certain stages and incidents of a criminal prosecution; and when the Legislature declared, in *Laws 1893*, p. 60, that for a violation of his official duty a county treasurer should, on conviction thereof, be punished, it manifestly intended that the proceedings against him should be on the criminal, and not the civil, side of the court. *Ex parte Howe*, 37 Pac. 536, 537, 26 Or. 181.

Under Revenue Act, §§ 287, 288, providing that, for the offenses therein described, a person found guilty may be removed from office, the penalties which might be imposed under such section constituted "punishment," in the sense in which that word is used in Cr. Code, § 208, providing that every person holding any public office who shall be guilty of

any palpable omission of duty, malfeasance, etc., where no special provision shall have been made for the punishment thereof, shall be fined, etc., and may be removed from his office. *Gunning v. People*, 86 Ill. App. 174, 178, 180 (quoting Cent. Dict.).

The punishment or penalty is fixed by the law defining and inhibiting the criminal act. The sentence is the final determination of the criminal court—the pronouncement by the judge of the penalty or punishment as the consequence to the defendant of the fact of his guilt. *Featherstone v. People*, 62 N. E. 684, 687, 194 Ill. 325.

**Civil relief.**

The word "punishment," as used in act for the prohibition and punishment of transactions which are calculated to lessen competition in trade, or to influence the price of either imported or domestic articles, would include civil relief to the injured person against the wrongdoer. *State v. Schlitz Brewing Co.*, 59 S. W. 1033, 1039, 104 Tenn. 715, 78 Am. St. Rep. 941.

**Deprivation of civil or political right.**

The deprivation of any civil right for past conduct is punishment for such conduct. *State ex rel. Reid v. Walbridge*, 24 S. W. 457, 458, 119 Mo. 383, 41 Am. St. Rep. 645.

In holding that a law requiring a test oath that a person taking the oath had not engaged in rebellion against the United States, assisted or aided its enemies, etc., as a condition of his right to exercise the privileges of a minister of the gospel, was the infliction of a "punishment," as the term is understood in the law relative to *ex post facto* laws, the court say: "The deprivation of any rights, civil or political, previously enjoyed, may be punishment; the circumstances attending and the causes of the deprivation determining this fact. Disqualification from the pursuit of a lawful avocation, or from positions of trust, or from the privilege of appearing in the courts, or acting as an executor, administrator, or guardian, may also, and often has been, imposed as punishment. We do not agree with the counsel of Missouri that to punish one is to deprive him of life, liberty, or property, and that to take from him anything less than these is no punishment at all. The theory upon which our political institutions rest is that all men have certain inalienable rights; that among these are life, liberty, and the pursuit of happiness, and that, in the pursuit of happiness, all avocations, all honors, all positions, are alike open to every one; and that, in the protection of these rights, all are equal before the law. Any deprivation or suspension of any of these rights for past conduct is punishment, and can be in no otherwise defined. Some punishments, says Blackstone, consist in

exile or banishment, by abjuration of the realm or transportation; others, in loss of liberty by perpetual or temporary imprisonment. Some extend to confiscation by forfeiture of lands or movables, or both, or of the profits of lands for life; others induce a disability of holding offices or employments, being heirs, executors, and the like." *Cummings v. State of Missouri*, 71 U. S. (4 Wall.) 277, 320, 18 L. Ed. 356.

#### Fine.

The word "punishment," as used in a verdict stating that the jury find the defendant guilty of criminal trespass, and assess her punishment at a certain sum, is synonymous with "fine." *Beggs v. State*, 23 N. E. 693, 694, 122 Ind. 54.

#### Forfeiture.

See "Forfeit—Forfeiture."

#### Revocation of license.

The revocation of a liquor license by a municipal court is not a "punishment," within the meaning of that word in the clause of a Constitution defining the limit of the jurisdiction of justices of the peace as to punishment. It is not a punishment in that sense of the word. The license is a mere privilege conferred to pursue a business peculiarly subject to police regulation and control. While the revocation by the court follows the conviction, as a consequence of the violation of an ordinance, it has no more the purpose and effect of punishment than if the license were revoked by the mayor or city council, neither of whom would have the power to impose punishment for the offense. There is a plain distinction between such withdrawal of special privilege, which has been abused, the termination of a mere license, and the penalty which the law imposes as a punishment for the crime. The constitutional provision limiting the jurisdiction of justices of the peace by the measure of punishment which may be imposed has no reference to any such incidental consequences. *State v. Harris*, 52 N. W. 387, 388, 50 Minn. 128.

#### PUNISHMENTS NOT CORPOREAL

Punishments not corporeal are fines, forfeitures, suspensions, or deprivations of some political or civil rights: deprivation of office, and being rendered incapable to hold office. *State v. Grant*, 79 Mo. 113, 129, 49 Am. Rep. 218 (quoting 2 Bouv. Law Dict.); *State ex rel. Reid v. Walbridge*, 24 S. W. 457, 458, 119 Mo. 383, 41 Am. St. Rep. 663.

#### PUNITIVE DAMAGES.

"Punitive" damages are the same as "vindictive" and "exemplary" damages.

*Chiles v. Drake*, 59 Ky. (2 Metc.) 146, 147, 74 Am. Dec. 406; *Murphy v. Hobbs*, 5 Pac. 119, 123, 7 Colo. 541, 49 Am. Rep. 366; *Louisville & N. R. Co. v. Kelly's Adm'r*, 38 S. W. 852, 854, 100 Ky. 421; *Roth v. Eppy*, 80 Ill. 283, 287; *Claiborne v. Chesapeake & O. Ry. Co.*, 33 S. E. 262, 263, 46 W. Va. 363. Such damages are sometimes called "smart money." *Springer v. J. H. Somers Fuel Co.*, 46 Atl. 370, 371, 196 Pa. 156; *Lake Shore & M. S. Ry. Co. v. Prentice*, 13 Sup. Ct. 261, 263, 147 U. S. 101, 37 L. Ed. 97.

Punitive damages are damages over and above such sum as will compensate a person for his actual loss. *Miller v. Donovan*, 39 N. Y. Supp. 820, 824, 16 Misc. Rep. 453; *Murphy v. Hobbs*, 5 Pac. 119, 123, 7 Colo. 541, 49 Am. Rep. 366; *Springer v. J. H. Somers Fuel Co.*, 46 Atl. 370, 371, 196 Pa. 156.

Punitive damages are sometimes spoken of as "vindictive damages" and "exemplary damages." They are sometimes referred to as "smart money" and "blood money." They are called "punitive damages" because of the theory that such damages will act as a sort of punishment of the defendant for such wrongdoing; not only as a punishment for past wrongdoing, but to deter the defendant and others in similar business from repeating such wrongdoing in the future. *Oliver v. Columbia, N. & L. R. Co.*, 43 S. E. 307, 320, 65 S. C. 1.

"Punitive," "vindictive," and "exemplary" damages are all synonymous terms. *Louisville & N. R. Co. v. Kelly's Adm'r*, 19 Ky. Law Rep. 69, 78, 38 S. W. 852, 100 Ky. 421.

Punitive damages are awarded to punish a defendant for his evil intent and motive in doing an unlawful act. *Fuller v. Redding*, 16 Misc. Rep. 634, 636, 637, 39 N. Y. Supp. 109.

Punitive damages are those given in addition to compensation for a loss sustained, in order to punish and make an example of the wrongdoer. *Reid v. Terwilliger*, 22 N. E. 1091, 1092, 116 N. Y. 530; *Bank of Palo Alto v. Pacific Postal Tel. Cable Co. (U. S.)* 103 Fed. 841, 847; *Roza v. Smith (U. S.)* 65 Fed. 592, 596; *Times Pub. Co. v. Carlisle (U. S.)* 94 Fed. 762, 767, 36 C. C. A. 475; *Warner v. Southern Pac. Co.*, 45 Pac. 187, 189, 113 Cal. 105, 54 Am. St. Rep. 327; *Nixon v. Rauer (Cal.)* 66 Pac. 221, 222; *Monongahela Nav. Co. v. United States*, 13 Sup. Ct. 622, 626, 148 U. S. 312, 37 L. Ed. 463; *Lake Shore & M. S. Ry. Co. v. Prentice*, 13 Sup. Ct. 261, 263, 147 U. S. 101, 37 L. Ed. 97; *Murphy v. Hobbs*, 5 Pac. 119, 123, 7 Colo. 541, 49 Am. Rep. 366; *Yazoo & M. V. R. Co. v. White*, 33 South. 970, 82 Miss. 120; *McKnight v. Denny*, 47 Atl. 970, 971, 198 Pa. 323; *Limbeck v. Gerry*, 39 N. Y. Supp. 85,

104, 15 Misc. Rep. 663; *Holmes v. Jones*, 41 N. E. 409, 411, 147 N. Y. 59, 49 Am. St. Rep. 646; *Atchison, T. & S. F. R. Co. v. Watson*, 15 Pac. 877, 888, 37 Kan. 773. Such damages rest on the right to punish, and not the right of the injured party to compensation for a wrong done. *French v. Deane*, 36 Pac. 609, 612, 19 Colo. 504, 24 L. R. A. 387; *Costich v. City of Rochester*, 73 N. Y. Supp. 835, 838, 68 App. Div. 623.

In actions of tort, where gross fraud, malice, oppression, or wanton, willful, or reckless conduct, or criminal indifference to civil obligations affecting the rights of others, appear, or where legislative enactment authorizes it, the jury may assess punitive damages. *Clalborne v. Chesapeake & O. Ry. Co.*, 33 S. E. 262, 263, 46 W. Va. 363; *Holmes v. Jones*, 41 N. E. 409, 411, 147 N. Y. 59, 49 Am. St. Rep. 646; *Times Pub. Co. v. Carlisle*, 94 Fed. 762, 767, 36 C. C. A. 475. Punitive damages are damages where a person acts willfully and maliciously to the injury of another. *McKnight v. Denny*, 47 Atl. 970, 971, 198 Pa. 323; *Limbeck v. Gerry*, 39 N. Y. Supp. 95, 104, 15 Misc. Rep. 663. Punitive damages are damages which may be awarded where a man wantonly, maliciously, or with utter disregard commits a trespass. *Benscoter v. Long*, 27 Atl. 674, 677, 157 Pa. 208. Exemplary, punitive, and vindictive damages are allowed in theory when a tort is aggravated by evil motive, actual malice, deliberate violence, or oppression or fraud. *Springer v. J. H. Somers Fuel Co.*, 46 Atl. 370, 371, 196 Pa. 156; *Louisville & N. R. Co. v. Ray*, 46 S. W. 554, 555, 101 Tenn. 1. Exemplary or punitive damages, being awarded not by way of compensation to the sufferer, but by way of punishment to the offender and as a warning to others, can be awarded only against one who has participated in the offense. *Lake Shore & M. S. Ry. Co. v. Prentice*, 13 Sup. Ct. 261, 263, 147 U. S. 101, 37 L. Ed. 97; *Day v. Woodworth*, 54 U. S. (13 How.) 363, 371, 14 L. Ed. 181, 185; *Sheldon v. Baumann*, 19 App. Div. 61, 45 N. Y. Supp. 1016; *Limbeck v. Gerry*, 39 N. Y. Supp. 95, 104, 15 Misc. Rep. 663; *Voltz v. Blackmar*, 64 N. Y. 440, 444; *Costich v. City of Rochester*, 73 N. Y. Supp. 835, 838, 68 App. Div. 623; *Milwaukee & St. P. R. Co. v. Arms*, 91 U. S. 489, 23 L. Ed. 374; *Peoria Bridge Ass'n v. Loomis*, 20 Ill. 235, 71 Am. Dec. 263.

Punitive damages are only permissible when "the illegal act for which redress is sought is not only tortious, but is dictated by malice or evil intent, or is attended with circumstances of intentional oppression, insult, or outrage." *Atchison, T. & S. F. R. Co. v. Watson*, 15 Pac. 877, 880, 37 Kan. 773.

Punitive damages are those damages which may be awarded in actions of tort founded on the malicious or wanton misconduct of the defendant, or upon such neglect

as is equivalent to malicious or wanton misconduct. *Maisenbacker v. Society Concordia*, 42 Atl. 67, 69, 71 Conn. 369, 71 Am. St. Rep. 213 (citing *St. Peter's Church v. Beach*, 26 Conn. 355; *Weich v. Durand*, 36 Conn. 182, 4 Am. Rep. 55; *Burr v. Town of Plymouth*, 48 Conn. 460).

Punitive damages can only be awarded against one who has participated in the offense. *Nixon v. Rauer* (Cal.) 66 Pac. 221, 222; *Warner v. Southern Pac. Co.*, 45 Pac. 187, 189, 113 Cal. 105, 54 Am. St. Rep. 337; *Bank of Palo Alto v. Pacific Postal Tel. Cable Co.* (U. S.) 103 Fed. 841, 847; *Lake Shore & M. S. Ry. Co. v. Prentice*, 13 Sup. Ct. 261, 263, 147 U. S. 101, 37 L. Ed. 97, 101. See, also, *Caldwell v. New Jersey Steamboat Co.*, 47 N. Y. 282; *Fisher v. Metropolitan Elevated Ry. Co.*, 34 Hun. 433, 437; *Muckle v. Rochester Ry. Co.*, 79 Hun. 32, 38, 29 N. Y. Supp. 732, 736; *Costich v. City of Rochester*, 73 N. Y. Supp. 835, 838, 68 App. Div. 623; *Vanderbilt v. Richmond Turnpike Co.*, 2 N. Y. (2 Comst.) 479, 51 Am. Dec. 315; *Cleghorn v. New York Cent. & H. R. R. Co.*, 56 N. Y. 44, 47, 15 Am. Rep. 375, 377.

## PUNITORY DAMAGES.

"Punitory damages," as distinguished from "actual damages," are given by way of punishment or example, when it is found that the acts of the defendant tending to the injury of the plaintiff are willful, wanton, or malicious. *Grace v. McArthur*, 45 N. W. 518, 521, 76 Wis. 641.

The term "punitory damages" is used to designate damages in excess of compensatory damages, which are allowed as a punishment of the wrongdoer. It is synonymous with the terms "exemplary," "vindictive," and "punitive" damages. *Murphy v. Hobbs*, 5 Pac. 119, 123, 7 Colo. 541, 49 Am. Rep. 366.

Punitory damages are such as may be awarded only when the wrong is shown to be malicious, and are to be assessed by the jury in their sound discretion, without bias or feeling, according to the malignity shown, and in such reasonable sum as will tend to prevent future evils of like kind and degree. *Wimer v. Allbaugh*, 42 N. W. 587, 588, 78 Iowa, 79, 16 Am. St. Rep. 422.

## PUPIL

"Pupil" as used in Rev. St. §§ 2762, 2767, providing that the expenses of maintenance of the blind, deaf, and dumb may be recovered from the parents, etc., of the pupils, the word "pupils" should be limited to persons in attendance at such institutions, notwithstanding the act also names the hospital for the insane, since an inmate of an insane

asylum is not a "pupil" within the meaning of the word as used in the statute. *Marshall County Com'rs v. Burkey*, 27 N. E. 1108, 1109, 1 Ind. App. 565.

## PURCHASE.

See "Cash Purchase"; "Certificate of Purchase"; "Compulsory Purchase"; "Conditional Purchase"; "Title by Purchase"; "Words of Purchase."

Purchase is called "the possession of lands and tenements that a man hath by his own deed or agreement, unto which possession he cometh, not by title of descent from any of his ancestors or cousins, but by his own deed." *H. C. Frick Coke Co. v. Laughhead*, 52 Atl. 172, 174, 203 Pa. 168 (quoting Litt. § 12).

"Purchase" means the acquisition of property by a party's own act, as distinguished from acquisition by act of law. *Kinne v. Kinne* (N. Y.) 45 How. Prac. 61, 65 (citing *Burrill*, Law Dict. 842; *Steph. Comm.* 355; 4 Kent, Comm. 373).

In law, the acquisition of land by any lawful act of the party, in contradistinction to acquisition by operation of law, is a purchase, and it includes title by deed, by matter of record, and by devise. *Cobb v. Webb*, 64 S. W. 792, 793, 26 Tex. Civ. App. 467.

"Purchase," in its most enlarged sense, includes "all lawful acquisition to real estate by any means whatever except by descent." *Watson v. Donnelly* (N. Y.) 28 Barb. 653, 658 (quoting 2 Bl. Comm. 241); *Starr v. Hamilton* (U. S.) 22 Fed. Cas. 1107, 1111; *City of Enterprise v. Smith*, 62 Pac. 324, 325, 62 Kan. 815.

"Acquisition by purchase" includes every mode of taking title except descent or inheritance. *Stamm v. Bostwick* (N. Y.) 40 Hun, 35, 38 (citing *Hall v. Hall*, 81 N. Y. 134).

"Purchase," in the enlarged and technical sense, may be defined to be a lawful acquisition of real estate by any means whatever except descent. *Porter v. Greene*, 4 Iowa (4 Clarke) 571, 575. A lessee is a purchaser as truly as he who becomes grantee in fee. Hence it is held that under Act May 8, 1854 (P. L. 1854, p. 621, § 23, subd. 2), requiring the board of school directors to cause suitable lots to be purchased, and buildings to be erected, purchased, or rented for schoolhouses, and section 33, authorizing the levy of a special tax to be applied solely to the purpose of purchasing or paying for the ground and the erection of school buildings thereon, the levying of a special tax for the purpose of paying rent on a building to be used as a schoolhouse is au-

thorized. *Hackett v. Emporium Borough School Dist.*, 150 Pa. 220, 226, 24 Atl. 627.

The term "purchase," when applied to real estate, means the acquisition of lands by other means than descent or inheritance. As applied to personalty, it is the acquisition of anything for a price by the payment of money or its equivalent. "Sale" and "exchange" are used interchangeably in the law, and as a transmutation of property from one party to another in consideration of some price or recompense in value. By the settled rule of interpretation, in the absence of any expression to narrow its significance, the word "purchase" must be given its ordinary, well-understood meaning as accepted in the daily transactions of the business world, and that carries the right to buy for cash, for any equivalent agreed upon, or on the credit of the buyer. *Berger v. United States Steel Corp.*, 53 Atl. 68, 71, 63 N. J. Eq. 809.

Littleton defines "purchase" to be "the possession of lands \* \* \* which a man hath by his own act or agreement," and says: "In this sense he who takes by gift \* \* \* or by alienation is regarded by the law as a purchaser. *Grant v. Bennett*, 96 Ill. 513, 535.

The term "purchase," as used in speaking of an estate acquired by purchase, means an acquisition either from an ancestor or any other person, by deed, will, or gift, and not as heir at law. *Priest v. Cummings* (N. Y.) 20 Wend. 338, 349.

The word "purchase" is a term which includes every mode of acquiring an estate known to the law, except that by which as heir, on the death of his ancestor, becomes substituted in his place as owner by operation of law. *Falley v. Gribbling*, 128 Ind. 116, 115, 116, 26 N. E. 794 (citing *Webst. Dict.*).

The term "purchase," in its general signification, and which is the legal sense of it, includes all modes of acquiring property except by descent, and it embraces a devise. *McCartee v. Orphan Asylum Soc.* (N. Y.) 9 Cow. 437, 491, 18 Am. Dec. 516.

As used in Acts 22d Gen. Assem. c. 85, § 2, relating to "purchase" of lands by aliens, purchase includes every method of acquiring title to real estate, except by descent by operation of law. *Bennett v. Hibbert*, 55 N. W. 93, 96, 88 Iowa, 155; *Burrow v. Burrow*, 67 N. W. 287, 288, 98 Iowa, 400; *Opel v. Shoup*, 69 N. W. 560, 562, 100 Iowa, 407, 37 L. R. A. 583.

The word "purchase," as used in Laws 1875, c. 38, providing that aliens may inherit from a citizen who has purchased and taken a conveyance to real estate, is not used in its popular and commercial meaning as equivalent with to "buy," but in its proper extended legal meaning, as including every

mode of acquiring land except by descent. *Stamm v. Bostwick*, 25 N. E. 233, 122 N. Y. 48, 9 L. R. A. 597. The word "purchase" in such law embraces only lands acquired by purchase, and does not apply to lands descended to deceased, though owned and held at the time of the decease, and the same descends only to such heirs as are citizens. *Callahan v. O'Brien*, 25 N. Y. Supp. 410, 413, 72 Hun, 216.

There is a clear distinction which has always been recognized in the law of real property between titles acquired by real purchase and titles acquired by descent. The latter vest by operation of law. Laws N. Y. 1845, c. 115, as amended by Laws 1874, c. 261, providing that those aliens who, according to the statutes of New York, would answer to the description of "heirs," may take by descent from any alien resident or any naturalized or native citizen of the United States who has purchased and taken, or who shall thereafter purchase and take, a conveyance of real estate, gives the right of transmission by descent only to resident aliens and naturalized and native citizens, and attaches only to land acquired by purchase. *Branagh v. Smith* (U. S.) 46 Fed. 517, 518.

There are two modes only of acquiring a title to land, namely, descent and purchase, purchase including every mode of acquisition known to the law, except that by which an heir, on the death of an ancestor, becomes substituted in his place as owner by the act of law. *Stamm v. Bostwick*, 25 N. E. 233, 122 N. Y. 48, 9 L. R. A. 597. The heir who takes by descent is not a purchaser in the eye of the law, and does not hold the estate by purchase. The word "purchase," as used in 1 Rev. St. p. 738, § 137, declaring that an unacknowledged and unattested deed shall not take effect as against a purchaser, etc., is used in its legal sense. *Strough v. Wilder*, 119 N. Y. 530, 535, 23 N. E. 1057, 7 L. R. A. 555.

The power of purchase given a corporation which is prohibited from taking by devise has been construed in its vulgar, and not in its legal, sense, which signifies an acquisition by any other mode than inheritance. *Chambers v. City of St. Louis*, 29 Mo. 543, 574.

At common law, when a party dies, leaving issue who are aliens, the latter are not deemed heirs at law, but the estate descends to those who have inheritable blood. But an alien may take by purchase. *Orr v. Hodgson*, 17 U. S. (4 Wheat.) 453, 4 L. Ed. 613. The word "purchase," in the above case, is used in its enlarged sense, which includes every other mode of acquiring property as distinguished from descent, and of course includes acquisition by devise. *Jones*

*v. Minoque*, 29 Ark. 637, 645 (citing 4 Kent, Comm. pp. 373, 374).

"Purchase," in its most enlarged and technical sense, signifies the lawful acquisition of real estate by any means whatever except by descent. In its more limited sense, "purchase" is applied only to such acquisitions of land as are obtained by trade, or bargain and sale, for money or some other valuable consideration. In common parlance, "purchase" signifies the buying of real estate and of goods and chattels. *Purcell v. Smidt*, 21 Iowa, 540, 546.

The word "purchased," in a declaration alleging that plaintiff purchased of defendants certain land, held to mean "bought" or "acquired by paying a price." *Curtis v. Burdick*, 48 Vt. 166, 171.

Where a defendant, claiming to be a bona fide purchaser of certain estate, denied notice of an incumbrance at the time of the purchase, it is held that the word "purchase" is to be understood as meaning when the contract for the purchase was made, and not as referring to the actual signing, sealing and delivery of the conveyance. *Dean v. Anderson*, 34 N. J. Eq. (7 Stew.) 496, 504.

#### Acquisition founded on consideration.

The word "purchase," in its popular sense, has the narrower signification of acquisition by voluntary act or agreement for a valuable consideration. *City of Enterprise v. Smith*, 62 Pac. 324, 325, 62 Kan. 815.

"Purchase," in a popular and confined sense, means acquisition by way of bargain and sale or other valuable consideration, or the transmission of property from one person to another by their voluntary act and agreement, founded on a valuable consideration. *Cobb v. Webb*, 64 S. W. 792, 793, 26 Tex. Civ. App. 467.

#### Acquisition for price in money.

The word "purchase," in its common sense, means no more than when a man gives money for anything. *Martin v. Strachan*, 1 Wils. 66, 72.

The definition of the word "purchase," in common usage, as a verb, as appears by Dr. Webster, is to buy; to obtain property by paying an equivalent in money. *Hoyt v. Van Alstyne* (N. Y.) 15 Barb. 568, 572. See, also, *Hamilton v. Gray*, 31 Atl. 315, 316, 67 Vt. 233, 48 Am. St. Rep. 811.

If a person other than the maker or person under obligations to pay a note paid for it in money, it was a purchase and sale. If the consideration for the transfer of such note was other notes, than the transaction was an exchange or barter. *Labaree v.*



Klosterman, 49 N. W. 1102, 1106, 33 Neb. 150.

As the term "purchase" is used in reference to negotiable paper, it means "to pay a certain sum for it, the standard of which is fixed by the agreement of the parties." *Ridgway v. National Bank of New Castle*, 12 Ky. Law Rep. 216, 220.

To "purchase" is to obtain or secure as one's own by paying or promising to pay a price. *Cheatham v. Bobbitt*, 24 S. E. 13, 14, 116 N. C. 343.

The word "purchased," in an allegation that plaintiff purchased certain realty of defendants on reliance on certain false and fraudulent representations, means bought or acquired by paying a price. *Curtis v. Burdick*, 48 Vt. 166, 171.

#### **As bargain.**

Webster defines the verb "to purchase" as to bargain for, and the noun "purchase" as bargain. The word as used in a letter addressed to a party, reciting that a certain party "comes to see you to purchase your cattle in the county adjoining our pasture, or any 'purchase' he may make of you on this trip for joint account for us and himself we have authorized him to do so." etc., means bargain. *Half v. O'Connor*, 37 S. W. 238, 241, 14 Tex. Civ. App. 191.

#### **Barter.**

Purchase differs from barter only in the circumstance that, in purchasing, the price or equivalent given or secured is money. *Hoyt v. Van Alstyne* (N. Y.) 15 Barb. 568, 572; *Labaree v. Klosterman*, 49 N. W. 1102, 33 Neb. 150.

#### **Champerly distinguished.**

It is said that the words "purchase" and "sale" have been used indiscriminately in connection with the term "champerly," and that such use has bred confusion in the books. "Champerly" is defined as an agreement by one to take a suit or claim, and at his own expense gather in the spoils, dividing them with the owner. It does not imply a purchase. The word "purchase" means to buy by paying a price, and implies a payment. A purchase is that which is obtained for a price in money or its equivalent. *Hamilton v. Gray*, 31 Atl. 315, 316, 67 Vt. 233, 48 Am. St. Rep. 811.

#### **Condemnation.**

The word "purchase" was used in the title of Laws 1897, c. 82, reading, "An act authorizing and empowering cities \* \* \* to obtain \* \* \* water \* \* \* by purchasing or constructing, owning and operating water-works \* \* \* by said cities," in its popular but restricted sense of acquisition

of property by voluntary agreement for a valuable consideration, and not in its technical or enlarged sense of acquisition by all means other than by descent or operation of law. Consequently, the title of the act did not express the subject of the acquisition of waterworks property by condemnation proceedings, and, in consequence, section 12 of the act, which purports to authorize such proceedings, was unconstitutional and void. *City of Enterprise v. Smith*, 62 Pac. 324, 325, 62 Kan. 815.

#### **Conveyance of fee.**

The word "purchase," in a contract for the sale of land, which recited the payment of a certain sum in judgment of a right of way for laying a pipe line, and also the purchase of a piece of property, was construed to show a contract for a conveyance of the fee in the property, and not merely for a limited use for the making of a crossing. *Camden & T. Ry. Co. v. Adams*, 51 Atl. 24, 26, 62 N. J. Eq. 656.

The phrase "contract for the purchase," as used in Rev. St. Tex. art. 4691, providing that property held under a contract for the purchase thereof belonging to the state shall be considered for all purposes of taxation as the property of the person so holding the same, means a contract to acquire the fee in the land. A contractor who binds himself in writing, mutually executed and delivered by him and the proper state authorities, to erect a specified building for certain clearly designated parcels of land, is to be held as acquiring or holding such lands, after entry permitted and before patent, under a contract for the purchase of such lands. *Taylor v. Robinson* (U. S.) 34 Fed. 678, 681.

Where there is a covenant in a lease providing that the lessee "shall have liberty to purchase," such phrase is to be construed as meaning that the lessee shall have, if he purchase, a clear title, free from a claim of dower and all other incumbrances. It means the whole title. *In re Hunter* (N. Y.) 1 Edw. Ch. 1, 5.

#### **Conveyance of right to use.**

The word "purchase," when applied to a dramatic production, means that a party has acquired from the author or owner a right to use it on payment of a stipulated royalty. *Sanger v. French*, 51 N. E. 979, 980, 157 N. Y. 213.

#### **Conveyance in trust.**

Every method of coming into an estate except by inheritance is a "purchase," and hence, where property was conveyed in trust for two persons, a contention that they did not become joint tenants because they did not take by purchase was of no merit. *Greer v. Blanchar*, 40 Cal. 194, 197.

**In corporate charter.**

A general power given to a railroad company of purchasing, or otherwise receiving and becoming possessed of, holding, and conveying, real and personal estate, is limited, and can only be exercised to effect the purposes for which the road is chartered. Depots, cars, engine houses, tanks, repair shops, houses for bridge and switch tenders, coal and wood yards, are necessary appendages to the operation of such a company. This power to hold land for such purposes will be implied, but not the power to hold lands for dwellings for employes, for car or locomotive factories, coal mines, etc., as it is not necessary to the operation of such a company that it own such property. *Camden & A. R. & Transp. Co. v. Mansfield Tp.*, 23 N. J. Law (3 Zab.) 510, 513, 57 Am. Dec. 409.

Judge Dillon, in his work on Municipal Corporations (section 444), lays down the law thus: "Whether a municipal corporation with power to 'purchase and hold real estate' for certain purposes has acquired and is holding such property for other purposes, is a question which can only be determined in a proceeding instituted at the instance of the state. If there is capacity to purchase, the deed to the corporation divests the estate of the grantor, and there is a complete sale; and whether the corporation, in purchasing, exceeded its power, is a question between it and the state, and does not concern the vendor." *Hayward v. Davidson*, 41 Ind. 212, 215.

"Where a conveyance is made to a county of land for the special use of educational purposes, the heirs of the grantor cannot raise the objection that the deed conveyed property to the county for other and different purposes than those specified in the statute, in an action by them against the county to quiet title to the land. *Raley v. Umatilla County*, 13 Pac. 890, 891, 15 Or. 172, 3 Am. St. Rep. 142.

**Devise.**

Title is acquired by purchase when the title is vested in him by his own act or agreement. A title by devise is a title by purchase. *Allen v. Bland*, 33 N. E. 774, 134 Ind. 78.

The word "purchase," as used in Act 1851, incorporating the Marshall Infirmary, and declaring the same capable of taking, by direct purchase, or otherwise holding, conveying, or disposing of, any real or personal estate, is used in its popular sense, and does not include acquisition by will. *Downing v. Marshall*, 23 N. Y. 366, 388, 80 Am. Dec. 290.

Municipal corporations empowered to purchase and hold real estate for certain purposes may take title under a will devising land to it for its use forever. *Hayward v.*

*Davidson*, 41 Ind. 212, 215; *Chambers v. City of St. Louis*, 29 Mo. 543, 574.

**Discount.**

The terms "purchase" and "discount," when used in reference to the transfer of a negotiable paper, are generally used as correlative terms. When a piece of business paper, a valid and subsisting obligation (not an accommodation note made and known to be made for the sole purpose of raising money), is discounted by another at any rate, such discount is held to be a purchase of the paper, and is called sometimes a "discount" and sometimes a "purchase." *Niagara County Bank v. Baker*, 15 Ohio St. 68, 74, 75.

**Gift.**

The word "purchase," as used in Rev. St. 1858, c. 18, § 7, providing that the property of all Indians who are not citizens shall be exempt from taxation, except lands held by them by purchase, should be construed in its more limited sense as used in common parlance, meaning the acquisition of lands for a valuable consideration, and not in its technical sense, which is the acquisition of real estate by any means whatever except descent. Lands held by Indians by gift or donation from the original Indian tribe, with the assent of the government of the United States, and by patent from that government, are not held by "purchase" within the meaning of the statute. *Farrington v. Wilson*, 29 Wis. 383, 392.

**Hiring with option to purchase.**

The authority of the master of a vessel to "purchase" necessary supplies for the vessel while in a foreign port implies the power to obtain such supplies by hiring with the option to purchase. *Negus v. Simpson*, 99 Mass. 388, 392.

**Hold distinguished.**

See "Hold."

**Mortgage.**

A mortgage of real estate is a "purchase" within the meaning of the recording laws, and a mortgagee is, to the extent of his claim, a purchaser of the land. But this has no application in a state where a mortgage conveys no title. *Hitchcock v. Nixon*, 47 Pac. 412, 413, 16 Wash. 281.

**Partition.**

A tenant in common whose interest becomes severed by partition is a "purchaser" of the interests of his co-tenants in the lands set apart to him. *Campau v. Barnard*, 25 Mich. 381, 382.

**Sale implied.**

The very idea of purchase imports a sale. Thus, if both the parties to a contract covenant and agree that one of the parties

reserves the right to purchase the property of the other at a certain period, it is a fair implication that the other party will sell at such time. In re Water Com'rs of Village of White Plains, 76 N. Y. Supp. 11, 15, 71 App. Div. 544.

The word "purchase," as used in Laws 1902, p. 415, providing that insurance companies shall not purchase stock of any company which has not paid dividends, is not used in the broad sense of "acquired," but in the more usual popular sense, which makes it the correlative of the word "sell." Subscribing for new stock is a very different thing from buying or purchasing stock which has already been issued and is held against the company which issued it. Subscribing for an original issue of stock at the formation of a corporation, or for a new issue made by an existing corporation, is an act in the nature of a loan, and is not a purchase within the statute. *Robotham v. Prudential Ins. Co.*, 53 Atl. 842, 847, 64 N. J. Eq. 673 (citing *Commercial Fire Ins. Co. v. Board of Revenue of Montgomery County*, 99 Ala. 1, 6, 14 South. 490, 42 Am. St. Rep. 17).

#### **PURCHASE AND HOLD.**

The term "purchase and hold," under Act March 17, 1787, enabling the Bank of North America to have, hold, and purchase lands, rents, etc., and also to sell, grant, or convey the same lands, provided that such lands and tenements which the said corporation were thereby able to "purchase and hold" should only extend to such lots of ground and convenient buildings, etc., which they might find necessary for carrying on the business of the said bank, etc., and all such lands and tenements which might be bona fide mortgaged to them as securities for their debts, cannot be construed as precluding a bank from purchasing absolutely lands in a distant county which it does not occupy. "The restriction is that the bank shall not purchase and hold. 'Purchasing' and 'holding' are very different things, and the consequences of each are very different. If the words had been that the bank should neither purchase nor hold, then it could neither have done one nor the other." *Leazure v. Hillegas* (Pa.) 7 Serg. & R. 313, 319.

#### **PURCHASE MONEY.**

"Purchase money" means money paid for the land, or the debt created by the purchase. *Austin v. Underwood*, 37 Ill. 438, 442, 87 Am. Dec. 254; *Eyster v. Hatheway*, 50 Ill. 521, 525, 99 Am. Dec. 537; *Kneen v. Halin*, 59 Pac. 14, 15, 6 Idaho, 621.

The words "purchase money" should be held to mean the original demand for the property sold, as distinguished from a demand on the security given for the payment

of the purchase price, and hence the property of the surety on a note given for the purchase price of a horse is not exempt from levy on an execution issued on a judgment recovered on the note. *Davis v. Peabody* (N. Y.) 10 Barb. 91, 93.

Code 1873, § 3665, provides that the section of the statute of frauds which declares that parol evidence is incompetent to establish a contract for the creation or transfer of any interest in real estate does not apply where the purchase money or any portion of it has been received by the vendor. Held, that the term "purchase money," as there used, means the consideration received, in whatever form it exists; and therefore, where the vendor has received the consideration for his undertaking, the parties are not precluded by the provision in question from showing by parol what the real nature of the agreement was. *Devin v. Himer*, 29 Iowa, 297, 299 (cited and approved in *Stem v. Nysonger*, 29 N. W. 433, 434, 69 Iowa, 512); *Devin v. Eagleson*, 44 N. W. 545, 546, 79 Iowa, 269.

#### **Debt for lumber for house.**

The term "purchase money," in a homestead law, does not include a debt for lumber bought and used for building a house on such homestead. The thing to which the homestead right attaches under the statute is not the house, considered alone as personal property severed from the freehold, but the real estate interest of the owner in the land, which carries with it the dwelling as an appurtenance and part of the realty. Any debt contracted in the purchase of this real estate represents in whole or in part the purchase money of the property, but not debts incurred in making improvements or erections thereon of any kind. *Smith v. Lackor*, 23 Minn. 454, 458.

#### **Judgment for conversion.**

The "purchase money" means the money agreed to be paid by the purchaser for the property, and does not include a judgment recovered in an action for taking personal property without the consent of the owner, and converting and disposing of the same. *Hoyt v. Van Alstyne* (N. Y.) 15 Barb. 568, 572.

#### **Loans for purchase.**

Money loaned to be used in purchasing property, and to enable borrower to purchase, and actually used in making the purchase, and paid to the seller as part of the consideration of it, is purchase money. *Houlihan v. Rassler*, 41 N. W. 720, 721, 73 Wis. 557.

The term "purchase money" is one used to designate the money stipulated to be paid by the purchaser to the vendor. It does not

relate, as between the borrower and lender, to money borrowed with which to purchase real estate. *Heuisler v. Nickum*, 38 Md. 270, 279; *Eyster v. Hatheway*, 50 Ill. 521, 525, 99 Am. Dec. 537.

### **PURCHASE-MONEY MORTGAGE.**

The effect of a mortgage to secure the purchase money, executed simultaneously with the deed to the vendee, is that the legal title remains with the mortgagee or vendor of the land. *Baker v. Clepper*, 26 Tex. 629, 634, 84 Am. Dec. 591.

### **PURCHASE OF PEACE.**

Compromise as, see "Compromise."

### **PURCHASE SCALE.**

A partner in a sawmill firm purchased logs for the firm. His partners being dissatisfied, he bought the logs from the firm for his own account, the firm agreeing to saw them at so much per thousand, "purchase scale." Held, that the term "purchase scale" meant the scale made at the time of the purchase, and not the scale made at the mill as the lumber was cut. *Hayes v. Cummings*, 58 N. W. 46, 47, 99 Mich. 206.

### **PURCHASER.**

See "Bona Fide Purchaser"; "Complete Purchaser"; "First Purchaser"; "Innocent Purchaser"; "Ordinary Purchaser"; "Subsequent Purchaser."

Purchaser or otherwise, see "Otherwise."

As the term is used in the law of sales "purchaser" means the person buying the goods sold. *Eldridge v. Kuehl*, 27 Iowa, 160, 173.

An allegation that a note was transferred by indorsement before due, and that the indorsee had no knowledge of the usury which existed in the note at the date of its inception, is not an allegation that the indorsee was a bona fide purchaser of the note. It may have been a gift, or it may have been indorsed merely for collection. *Dunn v. Moore*, 26 Ohio St. 641, 642.

The word "purchaser," as used in *Swan & C. St. p. 467, § 8*, providing that, if a conveyance of land be not recorded within six months from the date thereof, the same shall be deemed fraudulent as far as relates to any subsequent bona fide purchaser, is not used "in its broadest sense, including every person who acquires land otherwise than by descent, but in its ordinary and original meaning, that the acquisition is for a valuable consideration." *Morris v. Daniels*, 35 Ohio St. 406, 417.

The word "purchaser," as used in 1 Rev. St. p. 738, § 137, declaring that an unacknowledged and unattested deed "shall not take effect as against a purchaser or incumbrancer until so acknowledged," means one who derives title by purchase from the grantor in the unacknowledged and unattested deed, or from one who himself is mediately or immediately a purchaser from such grantor. One claiming land under a deed from the heirs of a former owner, who had previously conveyed the land by an unacknowledged and unattested deed, is not a purchaser within this definition. *Strough v. Wilder*, 119 N. Y. 530, 535, 23 N. E. 1057, 7 L. R. A. 555.

The term "purchaser," in Enrollment Law 1892, § 11, providing that a lien of judgment, decree, and forfeited forthcoming bond, shall cease and determine as against purchasers or creditors of the debtor, unless the same shall be enforced by execution within five years, etc., means bona fide purchasers. *Fowler v. McCartney*, 27 Miss. (5 Cushm.) 509, 515.

The word "purchasers," as used by the trustees of a corporation, authorizing an officer of the corporation to convey land to purchasers at his discretion, was used in its broadest sense, and includes the power to donate land, to execute a conveyance by gift, and all other modes of personal acquisition of real property, except by descent and distribution. *State v. Glenn*, 1 Pac. 186, 192, 18 Nev. 34, 47.

The term "purchaser," as used in the chapter relating to real property, shall be construed to embrace every person to whom any real estate or interest therein shall be conveyed for a valuable consideration, and also any assignee of a mortgage or lease of other conditional estate. *Cobbe's Ann. St. Neb. 1903, § 10246*; *Comp. Laws Mich. 1897, § 8993*; *Rev. St. Wyo. 1899, § 2729*; *Rev. St. Wis. 1898, § 2242*; *Gen. St. Minn. 1894, § 4184*; *Bank for Savings v. Frank*, 45 N. Y. Super. Ct. (13 Jones & S.) 404, 410, 411.

Under Rev. St. 1878, §§ 2241, 2242, providing that the term "purchaser" shall be construed to embrace every person to whom any estate or interest in real estate shall be conveyed for a valuable consideration, and also every assignee of a mortgage or lease or other conditional estate, a purchaser of a mortgage is included within the term "purchaser." *Butler v. Bank of Mazepa*, 68 N. W. 998, 999, 94 Wis. 351.

#### **Assignee for benefit of creditors.**

The term "purchaser," within the rule that purchasers of property without notice of certain equities will be protected, does not include an assignee for the benefit of creditors. In *re Goodwin Gas Stove & Meter Co.'s Assigned Estate*, 31 Atl. 91, 92, 106 Pa. 296.

The word "purchaser," as used in our statutes, has acquired a well-defined technical signification, and embraces every holder of the legal title to real or personal property where such title has been acquired by deed. There is no exception to this rule. *Snyder v. Hitt*, 32 Ky. (2 Dana) 204 (cited in *Halbert v. McCulloch*, 60 Ky. [2 Metc.] 456, 79 Am. Dec. 556).

#### **Assignee of mortgage.**

An assignee of a mortgage is a purchaser within the recording acts. *Larned v. Donovan*, 32 N. Y. Supp. 731, 733, 84 Hun, 533.

#### **As assign.**

See "Assigna."

#### **As creditor.**

See "Creditor."

#### **Devisee.**

The word "purchaser," as used in Rev. St. 75, § 17, providing that it shall be lawful for any widow entitled to dower in any lands of which her husband died seised, or any heirs or guardian of any minor child entitled to any estate in the lands, or any purchaser thereof, to apply to the orphans' court for the appointment of commissioners to assign dower, does not include a devisee. In *re Hopper*, 6 N. J. Eq. (2 Halst. Ch.) 325.

#### **Judgment creditor.**

A judgment creditor is not a purchaser of an interest in his debtor's land, within the meaning of the recording act of 1775. "No man," it is said in *Brace v. Duchess of Marlborough*, 2 P. Wms. 491, "can call a judgment creditor a purchaser; nor has such a creditor any right to the land. He has neither *jus in re*, nor *ad rem*. And therefore, though he release all his right to the land, he may extend it afterwards. All that he has by the judgment is a lien on the land; nor is he deceived or defrauded, though the cognizor of the judgment had before made 20 mortgages of his real estate." *Cover v. Black*, 1 Pa. (1 Barr) 493; *Helster's Lessee v. Fortner* (Pa.) 2 Bin. 40, 46, 4 Am. Dec. 417; *Rodgers' Lessee v. Gibson* (Pa.) 4 Yeates, 111, 112.

#### **As legal representative.**

Purchaser at execution sale as, see "Legal Representative."

#### **Mortgagee.**

A mortgagee is not a purchaser of an estate, though for the purposes of the recording acts he is sometimes treated as one. He is simply a lien creditor, a holder of security with money, and his assignee takes the mortgage subject to all differences, unless he inquires of the mortgagor and learns that there are none, and he is in no better condition

than his assignee. *Hoffsomer v. Smith* (Pa.) 1 Kulp, 348, 349 (citing *Michener v. Cavender* [Pa.] 2 Wright, 338).

A mortgagee is not a purchaser of an estate. He is simply a lien creditor, holding the mortgage as security for the payment of the bonds therein recited. *Riddle v. Hall*, 99 Pa. 116, 122.

A mortgagee is a purchaser within the recording act. *Larned v. Donovan*, 32 N. Y. Supp. 731, 733, 84 Hun, 533; *Dorr v. Meyer*, 70 N. W. 543, 544, 51 Neb. 94; *Raymond v. Whitehouse*, 93 N. W. 292, 294, 119 Iowa, 132.

The term "purchaser," in the law of fraudulent conveyances, relative to the right of bona fide purchasers, includes a mortgagee. *Jones v. Light*, 30 Atl. 71, 73, 86 Me. 437.

Under Code Iowa, § 2442, providing that "the widow of a nonresident alien shall be entitled to the same rights in the property of her husband as a resident, except as against a purchaser from decedent," mortgagees of the property of such nonresident alien are purchasers, within the meaning of the section. In *re Gill's Estate*, 44 N. W. 553, 554, 79 Iowa, 296, 9 L. R. A. 126.

The act of 1811 gave a landlord a right to distrain the goods of his tenant or subtenant; but, if the tenant should have made a bona fide sale of his goods, they were not liable to distress. In construing this statute it was held that a mortgage by the tenant of his goods was a sale within the meaning of the act, and that a bona fide mortgagee, both before and after forfeiture, was a purchaser. *Snyder v. Hitt*, 32 Ky. (2 Dana) 204 (cited in *Halbert v. McCulloch*, 60 Ky. [3 Metc.] 456, 79 Am. Dec. 556).

#### **Purchaser at judicial sale.**

A purchaser at a judicial sale is a purchaser within the recording act of Illinois, providing that an unrecorded deed shall take effect as to subsequent purchasers without notice after the time of filing the same for record. *McNitt v. Turner*, 83 U. S. (16 Wall.) 352, 361, 21 L. Ed. 341.

#### **Vendee in contract of sale.**

Under Rev. St. § 2242, providing that the word "purchaser," as used in section 2241, which declares conveyances of real estate not recorded to be void as against subsequent purchasers in good faith, etc., shall be construed to embrace every person to whom any estate or interest in real estate shall be conveyed for a valuable consideration, and also every assignee of a mortgage or lease or conditional sale, a person who holds a mere executory contract for the sale or purchase of land is not a purchaser. *First Nat. Bank of Stevens Point v. Chafee*, 73 N. W. 318, 319, 98 Wis. 42.

A purchaser, *ex vi termini*, is one who has acquired the title, and the term cannot in legal propriety be applied to one who claims under an unexecuted contract to convey. *Gilpin v. Davis*, 5 Ky. (2 Bibb) 416, 418, 5 Am. Dec. 632.

#### **PURCHASER FOR VALUABLE CONSIDERATION.**

The term "purchaser for a valuable consideration" is defined by the court in *Fullenwider v. Roberts*, 20 N. C. 420, as for "a fair and reasonable price according to the common mode of dealings between buyers and sellers"; or, as said by Pearson, C. J., in *Worthy v. Caddell*, 76 N. C. 82: "The party assuming to be a purchaser for valuable consideration must prove a fair consideration, not up to the full price, but a price paid which would not cause surprise, or cause any one to exclaim: 'He got the land for nothing. There must have been some fraud about it.'" *Collins v. Davis*, 43 S. E. 579, 581, 132 N. C. 106.

#### **PURCHASER FOR VALUE.**

A mortgage taken for a precedent debt does not constitute the mortgagee a purchaser for value as against a person acquiring an interest in the property prior to the giving of the mortgage and subsequent to the incurring of the indebtedness. *Reeves v. Evans* (N. J.) 34 Atl. 477, 478.

An indorsee of a negotiable instrument, who takes it before maturity in part payment of a pre-existing debt and credits it thereon, is a purchaser for value in the due course of business. *Smith v. Thompson* (Neb.) 93 N. W. 678, 679.

#### **PURCHASER IN GOOD FAITH.**

See "Good Faith."

#### **PURCHASER WITHOUT NOTICE.**

The phrase "without notice," as used in *Mill & V. Code Tenn.* § 2890, providing that instruments not registered shall be void "as to existing or subsequent creditors or bona fide purchasers from the makers without notice," qualifies bona fide purchasers, and is not grammatically a qualification of the word preceding. Therefore a creditor of the grantor is not affected by an unregistered instrument, though he had notice of its existence. *Southern Bank & Trust Co. v. Folsom* (U. S.) 75 Fed. 929, 934, 21 C. C. A. 568.

The words "without notice," as used in *Code Civ. Proc.* § 2469, which provides that the receiver's title to personal property extends back by relation in certain cases, but not so as to "affect the title of a purchaser

in good faith without notice and for a reasonable consideration," mean without actual notice, or without a knowledge of such circumstances as may be deemed equivalent to notice. *Zimmer v. Miller*, 40 N. Y. Supp. 886, 890, 8 App. Div. 556.

A bona fide purchaser and a purchaser without notice stand on the same footing of equal protection, under *Rev. St.* 1879, § 2507, providing that conditional sales shall be void as to subsequent purchasers in good faith and creditors. *Coover v. Johnson*, 86 Mo. 533, 539.

#### **PURE.**

See "Chemically Pure"; "Technically Pure."

The word "pure" means wholesome, or ordinarily pure, as used in *Act* 1874, requiring water companies to furnish pure water. *Commonwealth v. Towanda Waterworks* (Pa.) 15 Atl. 440, 442.

#### **PURE ACCIDENT.**

In the discussion of questions of liability for negligence, the term "pure accident" is uniformly employed in contradistinction to culpable negligence, to indicate the absence of any legal liability. A purely accidental occurrence may cause damage without legal fault on the part of any one. *Fidelity & Casualty Co. v. Cutts*, 49 Atl. 673, 674, 95 Me. 162 (citing *Conway v. Lewiston & Auburn Horse R. Co.*, 90 Me. 199, 205, 38 Atl. 110).

#### **PURE CHARITY.**

A pure charity is one which bears a portion of the burden that would otherwise fall on the public, and which gratuitously cares for persons who would otherwise be a public charge; and hence a charitable institution which requires a payment of an admission fee and the making of a will in its favor by the applicant is not a pure charity. In *re Keech's Estate*, 7 N. Y. Supp. 321, 322.

An act exempting institutions organized for pure charity from taxation applies to any association to improve the condition of the poor, which dispenses its benefits without any charge whatever, and keeps a place where money is disbursed to the needy. It is not necessary that it should have a house where the poor are lodged, but it is sufficient if it has a place or office where it transacts its business, consisting of the dispensation of alms without discrimination. In *re Lenox's Estate*, 9 N. Y. Supp. 895, 896.

#### **PURE PLEA.**

A pure plea in equity must clearly and distinctly aver all the facts necessary to ren-

der it a complete equitable defense to the case made by the bill, so far as the plea extends. It should be direct and positive, and not state matters by way of argument, inference, or conclusion. Where its allegations, being taken as true, did not, so far as the plea purports to extend, make out a full and complete defense, or where the necessary facts are to be gathered by inference alone, it will not be sustained. *Da Costa v. Dibble*, 24 South. 911, 912, 40 Fla. 418.

### PURE SWEET WINE.

"Pure sweet wine" is fermented grape juice only, and shall contain no other substance of any kind whatever, introduced before, at the time of, or after fermentation, and such sweet wine shall contain not less than four per centum of saccharine matter, which saccharine strength may be determined by testing with Balling's saccharometer or must scale, such sweet wine, after the evaporation of the spirit contained therein, and restoring the sample tested to original volume by additional water: provided, that the addition of pure boiled or condensed grape must, or pure crystallized cane or beet sugar to the pure grape juice aforesaid, or the fermented product of such grape juice prior to the fortification provided for for the sole purpose of perfecting sweet wines according to commercial standard, shall not be excluded by the definition of pure sweet wine as aforesaid: provided, further, that the cane or beet sugar so used shall not be in excess of ten per centum of the weight of wines to be fortified. U. S. Comp. St. 1901, p. 2171.

### PURE TAX.

A pure tax is a burden imposed by the sovereign power on all property and persons alike, and compensated for by the equal protection which all receive from such power. *Dressman v. Farmers' & Traders' Nat. Bank*, 18 Ky. Law Rep. 1013, 1014, 38 S. W. 1052, 1053, 100 Ky. 571, 36 L. R. A. 121.

### PURE WINE.

As used in an act relating to the adulteration of wines, the words "pure wine" mean the fermented juice of the undried grapes, without the addition thereto of water, sugar, or any foreign substance whatever. *Bates' Ann. St. Ohio 1904*, § 4200-57.

### PURELY.

In connection with the phrase "purely public charity," and in its ordinary sense, the word "purely" means completely, entirely, unqualifiedly. *White v. Smith*, 42 Atl. 125, 126, 189 Pa. 222, 43 L. R. A. 498.

In the statute exempting from taxation institutions devoted to merely pure public

charity, it is held that the word "purely" is equivalent to the word "wholly." *Episcopal Academy v. Taylor*, 25 Atl. 55, 56, 150 Pa. 565; *Trustees Kentucky Female Orphan School v. City of Louisville*, 38 S. W. 921, 923, 100 Ky. 470, 40 L. R. A. 119.

### PURELY CHARITABLE INSTITUTION.

A "purely charitable institution," within the constitutional provision exempting certain classes of property from taxation, may be said to be an institution organized for the purpose of rendering aid, comfort, and assistance to the indigent and defective, open to the public generally, conducted without a view to profit, and supported and maintained by benevolent contributions. *State v. Bishop Seabury Mission*, 95 N. W. 882, 90 Minn. 92.

### PURELY CHARITABLE PURPOSE.

A Masonic lodge building, the first two stories of which are rented, and the third used as a lodge hall, is not used for purposes purely charitable, within Const. art. 10, § 6, and Rev. St. 1889, § 7504, exempting buildings in cities and towns from taxation, when used exclusively for purposes purely charitable, notwithstanding the rents received or paid on the building went to pay a debt on the building. There is a very material difference between what is denominated a public charity and what is meant by the words "for purposes purely charitable." In *Delaware County Institute of Science v. Delaware County*, 94 Pa. 163, it is said: "No corporation or institution is a purely public charity which is not under control or supervision of the public authorities, or at least subject to public visitation, or is founded and endowed so as to give the general public under reasonable restriction an absolute right to receive its benefits, and, in case of failure of managers, to follow it and compel compliance therewith by application to the court. In the case of the dissolution of such a charity, its property must vest in the public authorities for charitable uses." An institution may be used for purposes purely charitable by distributing alms to the poor, needy, and afflicted of certain sects or nationalities, or the members of certain organizations, and their widows and children. *Fitterer v. Crawford*, 57 S. W. 532, 533, 157 Mo. 51, 50 L. R. A. 191.

### PURELY MANUFACTURING PURPOSES.

"Purely manufacturing purposes," as used in 2 Starr & C. Ann. St. p. 2032, § 3, cl. 4, providing that the capital stock of all companies and associations, except those organized for purely manufacturing purposes, shall be assessed by the state board of equalization, does not apply to a corporation or-

ganized to carry on a general business of distilling liquors, and to deal in the same, and also to engage in dealing in cattle and other live stock, and in malting and dealing in malt. *Distilling & Cattle-Feeding Co. v. People*, 43 N. E. 779, 780, 161 Ill. 101.

### PURELY PUBLIC CHARITY.

A public charity is defined as whatever is done or given gratuitously in relief of the public burdens or for the advancement of the public good. When the public is the beneficiary, the charity is public; and when no private or pecuniary return is reserved to the giver, or to any particular person, but all the benefit resulting from the gift or act goes to the public, it is a purely public charity. *Kentucky Female Orphan School v. City of Louisville*, 36 S. W. 921, 923, 100 Ky. 470, 40 L. R. A. 119 (citing *Episcopal Academy v. City of Philadelphia*, 150 Pa. 565, 25 Atl. 55). Thus a religious denominational school, which does not limit the admission of children of members of its own denomination, though it gives a preference to such children, and is not maintained for pecuniary profit, is within the meaning of the term. *Episcopal Academy v. City of Philadelphia*, 25 Atl. 55, 56, 150 Pa. 565.

The Ohio act of 1864, exempting from taxation institutions of purely public charity, means buildings or property used exclusively for charitable objects. If an institution embraces other objects and uses, its buildings for other purposes, as, for instance, renting with a view to profit, it is not an institution of purely public charity. *Cleveland Library Ass'n v. Pelton*, 36 Ohio St. 253, 259.

Const. art. 9, § 1, exempting from taxation "institutions of purely public charity," cannot be construed to include an academy of learning whose chief source of maintenance is tuition fees. It is not enough that the institution be founded and endowed by public or private charity, but it must be substantially maintained by public or private charity. *Appeal of City of Philadelphia (Pa.)* 15 Atl. 683.

An institution of science, whose object is the promotion and diffusion of general and scientific knowledge among the community at large, and the establishment and maintenance of a library and museum, but the benefits of which are restricted to members, except upon conditions prescribed by a board of managers, is not a "purely public charity" within the meaning of the Pennsylvania Constitution, exempting such institutions from taxation. *Delaware County Institute of Science v. Delaware County*, 94 Pa. 163, 167.

An asylum established by will for the maintenance and education of white female

orphan children, open to the public, but to which the children of a certain religious faith were to be given a preference, and which asylum was to be under the religious auspices of such particular religious faith, is a "purely public charity," within the meaning of Const. art. 9, § 1, authorizing the exemption from taxation of institutions of purely public charity. *Burd Orphan Asylum v. School Dist. of Upper Darby*, 90 Pa. 21.

Under Const. art. 9, § 1, empowering the Legislature to exempt from taxation institutions of "purely public charity," an asylum for the maintenance and education of white female orphan children of not less than four years or more than eight, first, who shall have been baptized in the Protestant Episcopal Church in the city of Philadelphia; second, the same class of children baptized in said church in the state of Pennsylvania; third, all other white female orphan children between the said years, without respect to any other description or classification, except that at all times and in every case the orphan children of clergymen of the Protestant Episcopal Church shall have the preference—is a purely public charity. The word "purely," in this connection, is not to have its largest and broadest signification. It is not contended that a charity, to be purely public, must be open to the whole public, nor to any considerable portion of the public. Without doubt an asylum for the support of 50 blind men, or an equal number of paupers, would not be obnoxious to the objection that it was not purely public. A charity for the maintenance of disabled seamen, or of aged and infirm stonemasons, resident in the city of Philadelphia, would undoubtedly be a purely public charity; and so, also, would a charity for the maintenance of the children of such persons. As said in *Gerke v. Purcell*, 25 Ohio St. 229: "When a charity is public, the exclusion of all idea of private gain or profit is equivalent in effect to the force of 'purely' as applied to a public charity in the constitution." *Burd Orphan Asylum v. School Dist. of Upper Darby*, 90 Pa. 21, 28, 29, 30.

A Young Men's Christian Association, organized to endeavor to bring young men under moral and religious influences, to aid them in selecting suitable boarding places and securing employment, and by other means to surround them with Christian influences, and actually engaging in such work, and also furnishing instruction, keeping open libraries, gymnasiums, lists of boarding houses, etc., and membership in which is nontransferable, giving no property right, the membership fee being merely nominal, is an institution of "purely public charity," within Const. § 170, exempting property of such institutions from taxation. *Commonwealth v. Young Men's Christian Ass'n*, 76 S. W. 522, 25 Ky. Law Rep. 940.



Const. art. 9, § 1, providing that the General Assembly may exempt from taxation "institutions of purely public charity," means charities that are purely and entirely public. The phrase is intended to exclude those charities which are private, or only quasi public, such as many religious aid societies are. A library held in trust as the property of a corporation for the advancement of knowledge and literature in a city, not used in any way for the purpose of private profit, no distinction being made between the parties and the general public, except member's privilege of commutation by annual payment for the hire of books, which payment is for the increase and preservation of the library, the corporation is an "institution of purely public charity," within the meaning of the Constitution. *Philadelphia Library Co., v. Donohugh* (Pa.) 12 Phila. 284, 285.

#### Masonic lodge.

Const. § 170, providing that institutions of purely public charity shall be exempt from taxation, does not include a Masonic lodge, which provides for its members and their families, or the wives and orphans of those who are dead, for it is a private charity. The words "purely public" need no definition. They do not include any restricted or private charities. In *Morning Star Lodge No. 26, I. O. O. F., v. Hayslip*, 23 Ohio St. 144, the court said: "A charitable or benevolent association, which extends relief only to its own sick and needy members, and to the widows and orphans of deceased members, is not 'an institution of purely public charity.'" In *City of Philadelphia v. Masonic Home of Pennsylvania*, 160 Pa. 572, 28 Atl. 95, 23 L. R. A. 545, 40 Am. St. Rep. 736, the question was whether the property of the Masonic Home, open only to those who were Masons, was exempt; and the court said: "When the eligibility of those admitted is thus determined, it seems to us that the institution is withdrawn from public, and put in the class of private, charities. A charity may restrict its admissions to a class of humanity, and still be public. It may be for the blind, the mute, those suffering under special diseases, for the aged, for infants, for women, for men, or for different callings or trades by which humanity earns its bread; and as long as the classification is determined by some distinction which involuntarily affects or may affect any of the whole people, although only a small number may be directly benefited, it is public. But when the right to admission depends upon the fact of voluntary association with some particular society, then a distinction is made which concerns not the public at large. The public is interested in the relief of its members, because they are men, women, and children, not because they are Masons. A home without charge, exclusively for Presbyterians, Episcopalians, Catholics, or

Methodists, would not be a public charity; but then, to exclude every other idea of 'public' as distinguished from 'private,' the word 'purely' is prefixed by the Constitution. This is to intensify the word 'public,' not 'charity.' It must be purely public; that is, there must be no admixture of any qualification for admission, heterogeneous, and not solely relating to the public." *City of Newport v. Masonic Temple Ass'n*, 56 S. W. 405, 406, 108 Ky. 333, 49 L. R. A. 252.

#### PURGATORY.

Purgatory is defined by an authoritative expositor of the church's creed to be "a state of suffering after this life, in which those souls are for a time detained who depart this life after their deadly sins have been remitted as to the stain and guilt, and as to the everlasting pain that was due to them, but who have, on account of those sins, still some debt of temporal punishment to pay, as also those souls which leave this world guilty only of venial sins. In purgatory these souls are purified and rendered fit to enter into Heaven, where nothing defiled enters." *Harrison v. Brophy*, 59 Kan. 1, 3, 4, 51 Pac. 883, 40 L. R. A. 721 (quoting Catholic Belief [Lambert's Am. Ed.] 196).

#### PURGE.

If a disseisor take from the disseisee a naked release of all his interest in the land, no relation arises between them by which one is placed in subordination of the other, and the disseisin is not thereby purged. *Fox v. Widgery*, 4 Me. (4 Greenl.) 188.

#### PURGERY.

A purgery is a room in which hogsheads full of sugar are placed in a standing or upright position for the purpose of being drained. *Meyer v. Queen Ins. Co.*, 6 South. 899, 900, 41 La. Ann. 1000.

#### PURLOIN.

Purloin means to commit larceny, and hence, when used in a statute, it is synonymous with "steal." *McCann v. United States*, 2 Wyo. 291, 298.

#### PUROLINE.

Puroline and gasoline as sold and used for illuminating purposes, are both petroleum products, and both are gas generating fluids. From the testimony of chemists and other experts, and of dealers in such articles, it appears that the difference of danger between puroline and gasoline of 74° gravity, is so slight and insignificant that it is

hardly measurable, or even perceptible. It also appears that in the trade orders for puroline are frequently and almost usually filled by delivering 74° gasoline, and circulars issued and distributed all over the state by different dealers in these articles contained the statement that 74° gasoline is of the same gravity as puroline. In both, the danger is not from explosion while burning in lamps, but from handling in the proximity of a light, on account of the gas which they liberate and generate from packages which are not air-tight, and which gas is inflammable. *Socola v. Chess Carley Co.*, 1 South. 824, 826, 39 La. Ann. 344.

## PURPART.

A purpart is that part of an estate which, having been held in common, is by partition allotted to any one of the parties to it. The use of the word implies a common concurrent holding, whether in possession or remainder. *Selders v. Giles*, 21 Atl. 514, 516, 141 Pa. 93 (citing *Bouv. Law Dict.* 395).

## PURPORT.

The word "purport," as used in speaking of the purport of an instrument, means the substance thereof as it appears on the face thereof to every eye that reads it. *Dana v. State*, 2 Ohio St. 91, 93 (citing *Wharton*).

Purport imports what appears on the face of the instrument. *McClellan v. State*, 32 Ark. 609, 611. It is usually intended to express the substance and effect as appears from the face of the instrument, in distinction from "tenor," which means a copy or exactness. *State v. Callendine*, 8 Iowa, 288, 296.

A statute imposing a penalty for passing any false or forged instrument issued or purporting to have been issued by any corporation or company duly authorized for that purpose is designed to describe paper appearing on its face to be such as was calculated to defraud, and not to require proof of the actual legal existence and authority of the corporation whose name was used. *Snow v. State*, 14 Wis. 479, 483.

"Purporting," in a statute making it a felony for any person to counterfeit the lawful issue of any bank or corporation, or notes or bills purporting to be of any bank or corporation, means appearing on the face of the instrument. *Van Horne v. State*, 5 Ark. 349, 353; *State v. Harris*, 27 N. C. 287, 294.

Purport means the design or tendency, the meaning or import when used in the expression, "An instrument purports," etc. *State v. Burling*, 102 Iowa, 681, 684, 72 N. W. 295, 296 (citing *State v. Sherwood*, 90 Iowa, 550, 58 N. W. 911, 48 Am. St. Rep. 461).

### As design.

The term "purport," as used in Code 1873, § 3917, defining the crime of forgery, "if any person, with intent to defraud, falsely make, alter, forge, or counterfeit any note, being or purporting to be the act of another, by which any pecuniary demand or obligation, or any right or interest in or to any property whatever, is, or purports to be created," etc., means the design or tendency, meaning or import. Under the wording of the statute, the instrument need not in fact create any liability. The design of the instrument merely is material, and, if it be intended to create a legal liability on its face, it may be the subject of forgery within the statute. *State v. Sherwood*, 58 N. W. 911, 912, 90 Iowa, 550, 48 Am. St. Rep. 461.

### As indicating invalidity.

The word "purporting," as used in an instruction in a will contest in which an instrument is spoken of as one "purporting" to be a codicil, cannot be construed to intimate that the instrument was not a codicil, or to cast discredit upon its validity. *Smith v. Henline*, 51 N. E. 227, 232, 174 Ill. 184.

### As resembles.

An instrument purports to be a particular instrument which it more or less resembles, and this definition applies to a part, as well as the whole, of an instrument. *Reg. v. Keith*, 29 Eng. Law & Eq. 558, 560.

### As substance.

The purport of an instrument means the substance of it, as it appears on the face of it, in the eyes of all who read it. *Roberts v. State*, 16 South. 233, 234, 72 Miss. 110; *State v. Feely*, 18 Mo. 445, 454; *Thomas v. State*, 2 N. E. 808, 812, 103 Ind. 419; *State v. Chinn*, 44 S. W. 245, 246, 142 Mo. 507; *Fogg v. State*, 17 Tenn. (9 Yerg.) 392, 394.

The purport of an instrument means the substance of it, as it appears on its face to every person who might read it, and means the apparent, and not the legal, import. *State v. Pullens*, 81 Mo. 387, 392.

By setting forth an instrument according to its "purport and effect" in an indictment, only the import or substance of the instrument is indicated, and not an exact copy. *State v. Bounney*, 34 Me. 383, 384.

"Purport," as used in an indictment for libel, charging a person with an unlawful and malicious libel "according to the purport and effect, in substance, among other things, as follows," is not equivalent to "tenor," and does not necessarily import a strict recital of the words of the libel. The purport of a message or communication may be, and, indeed, generally is, stated without the use of

the identical words in which it is conceived. It is equivalent to "substance." *Commonwealth v. Wright*, 55 Mass. (1 Cush.) 46, 65.

#### Tenor distinguished.

"The purport" of an instrument means the substance as it appears on its face, and has a signification different from "tenor," which imports an exact copy. *State v. Atkins* (Ind.) 5 Blackf. 458; *Commonwealth v. Wright*, 55 Mass. (1 Cush.) 46, 65.

The word "tenor" imports an exact copy—that is, set forth in words and figures—whereas "purport" means only the substance or general import of the instrument. *Commonwealth v. Wright*, 55 Mass. (1 Cush.) 46, 65.

The word "purporting," in an indictment charging that defendants did create and put in circulation, and did issue, etc., divers notes, bills, etc., purporting that money would be paid to the receiver and holder thereof, is a word of technical meaning. *Buller, J.*, in delivering the opinion of the judges in *Reading's Case*, 2 Leach, 590, said: "It is clear that, where an instrument is thereby set forth, the description that it purports a particular fact necessarily means that what is stated as the purport of the instrument appears on the face of the instrument itself." Again, in *Gilchrist's Case*, 2 Leach, 657, *Buller, J.*, in delivering the opinion of the judges, said: "Old cases have given rise to much learning and argument on the words 'purport' and 'tenor,' and the books are full of distinctions as to the meaning of these words and the necessity of using the one or the other of them in indictments where written instruments are to be used. But among the many cases upon this subject I can find no judicial determination that the purport and the tenor should both be stated in any case whatever. Purport means the substance of an instrument, as it appears on the face of it to every eye that reads it. Tenor means the exact copy of it." *Russell* says: "But with respect to the word 'purport,' it should be well observed that it imports what appears on the face of the instrument, as a want of attention to this meaning of the word has been fatal to many indictments." 2 Russ. Cr. 345 (\*364). *Archbold*, in his *Criminal Pleadings* (page 58), says: "If an indictment describe a written instrument as purporting to be so and so, the instrument, when produced in evidence, must appear upon the face of it to be what it is described as purporting to be; otherwise the defendant will be acquitted for variance." In the case of *King v. Jones*, Doug. 289, *Lord Mansfield* says: "The representations of the prisoner to *Royner*, after the note was made, could not alter the purport, which is what appears on the face of the instrument itself." The indictment in the case at bar can only be sustained by the production and giving in evidence of a note,

bill, check, or ticket which upon its own face declares that money will be paid to the receiver or holder thereof, or that it will be received in payment of debts. *State v. Page*, 19 Mo. 213-217.

"Purport" means the substance of an instrument, as it appears on the face of it to every eye that reads it, and "tenor" means an exact copy of it; and, where an instrument is stated according to its tenor, the purport of it must necessarily appear. *Fogg v. State*, 17 Tenn. (9 Yerg.) 392, 394; *Myers v. State*, 101 Ind. 379, 381. Where an indictment charges the forgery of a certain order, purporting to have been made and executed by one W., and following this charge the order is set out in *hæc verba*, and according to its tenor it was signed W., the purport clause will be regarded as surplusage, and disregarded. *Myers v. State*, 101 Ind. 379, 381. See, also, *State v. Johnson*, 26 Iowa, 407, 413, 96 Am. Dec. 158.

#### PURPOSE.

See "Agricultural Purposes"; "Boarding House Purposes"; "Building Purposes"; "Business Purposes"; "Church Purposes"; "City Purpose"; "Corporate Purpose"; "County Purpose"; "Courthouse Purposes"; "Educational Purposes"; "Engineering Purpose"; "Extraordinary Purpose"; "For the Purpose of"; "General Purposes"; "Governmental Purposes"; "Incidental Purposes"; "Judicial Purposes"; "Lawful Purpose"; "Local Purpose"; "Mining Purposes"; "Municipal Purposes"; "Objectionable Purpose"; "On Purpose"; "Ordinary Purposes"; "Philanthropic Purposes"; "Philosophical Purposes"; "Police Purposes"; "Private Purpose"; "Public Purpose"; "Railroad Purposes"; "Religious Purposes"; "Saloon Purposes"; "School Purposes"; "Special Purpose"; "State Purpose"; "Unlawful Purpose."

All purposes, see "All."

Breeding purposes, see "Breeding."

Charitable purposes, see "Charity."

Domestic purposes, see "Domestic Purpose."

Like purpose, see "Like Purpose."

Other purposes, see "Other."

Purposes of road or otherwise, see "Otherwise."

The word "purpose," from the Latin "propositum," means "that which a person sets before himself as an object to be reached or accomplished; the end or aim to which the view is directed in any plan, manner, or execution; end, or the view itself; design; intention." An amendment to a bill which limits or extends its scope, but embraces no new matter not germane, is not within *Const.*

art. 5, § 21, providing: " \* \* \* No bill shall be so altered or amended on its passage \* \* \* as to change its original purpose." *Loftin v. Watson*, 32 Ark. 414, 420 (quoting *Webst. Dict.*).

"Purpose," as used in an ordinance of the city of Wilmington, Del., prohibiting any person from occupying any land or building for the purpose of producing or preparing meat for sale or market, but providing that it should not apply to any farmer, unless such farmer should exercise the business of farming for the purpose of producing or preparing meat, means "that which a person sets before himself as an object to be reached or accomplished; the end or aim to which the view is directed in any plan, measure, or exertion; intention; design; end; effect; consequence." *Homewood v. City of Wilmington (Del.)* 5 Houst. 123, 127.

The purpose of legislation is to be determined by its natural and reasonable effect, and not by what may be supposed to have been the motives upon which the legislators acted. *People v. Roberts*, 19 Sup. Ct. 70, 76, 171 U. S. 658, 43 L. Ed. 323.

#### As effect.

"Purpose," as used in a statute requiring a mortgage to express the purpose for which it is given, means the effect which the instrument is intended to have upon the rights of the contracting parties and the status of the subject-matter. *Ford v. Burks*, 37 Ark. 91, 94.

#### As intent.

"Intent and purpose," as used in an indictment charging that defendants conspired for the unlawful, malicious, and felonious purpose, and with fraudulent and malicious intent and purpose, to obtain, etc., is equivalent to "design." *State v. Grant*, 53 N. W. 120, 121, 86 Iowa, 216.

#### PURPOSELY.

"Purposely" means on purpose. *State v. Dolan*, 50 Pac. 472, 473, 17 Wash. 499.

"Purposely" is defined by Webster to mean, "by purpose or design; intentionally; with premeditation." *Whitman v. State*, 22 N. W. 459, 460, 17 Neb. 224.

"Purposely," as used in an instruction that, if defendant purposely killed deceased after reflection, etc., he was guilty of murder in the first degree, meant intentionally or willfully. *Lang v. State*, 4 South. 193, 195, 84 Ala. 1, 5 Am. St. Rep. 324.

"Purposely," as used in Act 1843, defining murder in the second degree as a homicide committed purposely and maliciously, etc., should be construed to mean intentionally and designedly, and therefore to make the act murder in the second degree, the in-

tention or design or purpose to perpetrate it must be formed before the act is committed. The word "purposely," however, should not be construed as synonymous with "premeditatedly" or "deliberately." *Fahnestock v. State*, 23 Ind. 231, 262.

The word "purposely," in a declaration against a railroad company for killing plaintiff's intestate alleging that defendant purposely violated the speed ordinance, did not charge that defendant purposely killed the intestate; the allegation amounting to no more than a killing through negligence. *Hancock v. Lake Erie & W. R. Co.*, 51 N. E. 369, 372, 21 Ind. App. 10.

The epithets "unfairly and secretly computed," "unjustly and unfairly attempted," and "artfully and purposely framed," used in regard to the official acts of the cashier of a bank, did not necessarily imply moral obliquity, and therefore are not slanderous per se. *Kerr v. Force (U. S.)* 4 Fed. Cas. 386, 396.

The words "unlawfully, feloniously, purposely, and with premeditated malice," in an information for assault and battery, as descriptive of the manner in which the alleged assault and battery was perpetrated, carry with them and import that it was done in either a rude manner, or in an insolent manner, or in an angry manner, and, if not, that it was done in all of them. If it was done unlawfully, and also feloniously, purposely, and with premeditated malice, it was done in an angry manner; and more, because malice is defined to mean enmity of heart, malevolence, ill will, a spirit desiring harm or misfortune to another, a disposition to injure others, unprovoked malignity of spirit. Such an allegation sufficiently describes the offense created by Rev. St. 1894, §§ 1983, 1984, providing that whoever in a rude, insolent, or angry manner unlawfully touches another is guilty of assault and battery. *Chandler v. State*, 39 N. E. 444-447, 141 Ind. 106.

#### PURPOSES OF COMMERCE.

Where owners of land abutting on a navigable stream accept grants from the state conveying to them land under water, conditioned on their erecting docks thereon for the purpose of promoting commerce, the phrase "purposes of commerce" means a public and general commerce; and hence, on the erection of docks thereon, the owners conferred on the public the right to pass over their abutting land as far as necessary to go to and from the docks. *Thousand Island Steamboat Co. v. Visger*, 83 N. Y. Supp. 325, 331, 86 App. Div. 126.

#### PURPOSES OF NAVIGATION.

See "Actual Purposes of Navigation."

**PURPOSES OF PROFIT.**

A mutual benefit society, which had a joint stock fund raised by subscriptions, portions of which were advanced to members by way of a loan at a certain rate of interest on competitions by bids, but the dealings of which society were exclusively with the members and for the benefit of members, was not a "society established for purposes of profit," within St. 7 & 8 Vict. c. 110, § 2, and therefore did not need to be registered. *Beal v. Bromley*, 11 Eng. Law & Eq. 414, 416.

**PURPRESTURE.**

"'Purpresture' cometh of the French word 'pourprise,' which signifieth a close, or enclosure; that is, where one encroacheth or maketh several to himself that which ought to be common to many." Co. Litt. 277b; Co. Magna Charta, 38, 272 (quoted in *State v. Kean*, 45 Atl. 256, 69 N. H. 122, 48 L. R. A. 102).

An invasion of the king's private property in the soil covered by water is a purpresture. It is laid down by all old writers that it might be committed either against the king, the lord of the fee, or any other subject. A purpresture is not a nuisance, unless it also interferes with navigation. *Cobb v. Lincoln Park Com'rs*, 67 N. E. 5, 7, 202 Ill. 427, 63 L. R. A. 264, 95 Am. St. Rep. 258.

A purpresture is an invasion of the right of property in the soil, while the same remains in the king or in the people. A purpresture may ripen into a title, because the sovereign power might make a grant of the property in question. *Timpson v. City of New York*, 5 N. Y. App. Div. 424, 430, 39 N. Y. Supp. 248.

"A purpresture signifies an enclosure; that is, when one encloseth and maketh that several to himself which belongs to many. It is when there is a house builded or an enclosure made of any part of the king's domain, or of a highway or a common street or public water." *City of Columbus v. Jaques*, 30 Ga. 506, 512 (quoting 3 Co. Litt.); *State v. Kean*, 45 Atl. 256, 69 N. H. 122, 48 L. R. A. 102; *Moore v. Jackson* (N. Y.) 2 Abb. N. C. 211, 213; *People v. Park & O. R. Co.*, 18 Pac. 141, 143, 76 Cal. 156.

Purpresture is a clandestine encroachment and appropriation on land or waters that should be common or public. *Coke*, Litt. 277b (cited in *Hoey v. Gilroy*, 14 N. Y. Supp. 159, 161); *People v. Mould*, 52 N. Y. Supp. 1032, 1033, 24 Misc. Rep. 287; *Hoey v. Gilroy*, 14 N. Y. Supp. 159, 161.

An intrusion on the right of property in tide water and in the soil thereof is designated at common law a "purpresture"; but the word in its ordinary acceptation at the

present day means any encroachment on the sovereign right within a highway, river, street, harbor, or wharf. *Sullivan v. Moreno*, 19 Fla. 200, 228.

A purpresture is an invasion of the right of property in the soil while the same remains in the people. *Knickerbocker Ice Co. v. Shultz*, 22 N. E. 564, 565, 116 N. Y. 382; *The Idlewild* (U. S.) 64 Fed. 603, 605, 12 C. C. A. 328.

A purpresture is defined to be an encroachment upon lands, or rights and easements incident thereto belonging to the public, and to which the public have a right of access or of enjoyment, which includes encroachments upon navigable streams. *United States v. Debs* (U. S.) 64 Fed. 724, 740.

A purpresture is an inclosure or appropriation for private use of that which belongs to the public. *Lexington & O. R. Co. v. Applegate*, 38 Ky. (8 Dana) 299, 33 Am. Dec. 497.

A purpresture is an inclosure by a private person of a part of that which belongs to, and ought to be open and free to the enjoyment of, the public at large. *City of Grand Rapids v. Powers*, 50 N. W. 661, 89 Mich. 94, 14 L. R. A. 498, 28 Am. St. Rep. 276. The appropriation by an individual of a part of a public common may therefore be a purpresture; and, as it would constitute an invasion of a public right, it would be proper that proceedings for its abatement should be taken on behalf of the state. *Attorney General v. Evarts Booming Co.*, 34 Mich. 462, 472. The remedy to prevent its erection or to compel its removal from waters within the evident flow of the tide of a navigable stream is suit on behalf of the people by the Attorney General. *People v. Mould*, 52 N. Y. Supp. 1032, 1033, 24 Misc. Rep. 287.

**Encroachment on highway.**

"A purpresture is an encroachment by any person, by building or otherwise, on a street or some part of it, or such an inclosure, impediment, or obstruction of it thereby as to amount to the exclusion and hindrance of the citizens and the public from the full and beneficial use and enjoyment of it as a public street." *Drake v. Hudson River R. Co.* (N. Y.) 7 Barb. 508, 548.

A permanent encroachment upon public streets for a private use is a purpresture, and is in law a nuisance. *People v. Harris*, 67 N. E. 785, 789, 203 Ill. 272, 96 Am. St. Rep. 304.

A purpresture is any permanent or habitual obstruction of a public street, although room enough be left to pass. *Hoey v. Gilroy*, 14 N. Y. Supp. 159, 161.

A railroad through a city, not occupying any part of the road or street exclusive-

ly, is not a purpresture. *Lexington & O. R. Co. v. Applegate*, 38 Ky. (8 Dana) 299, 33 Am. Dec. 497.

An unauthorized inclosure of a part of a highway may also be a purpresture and a public wrong, whether the highway be one by land or by water. *Attorney General v. Evert Booming Co.*, 34 Mich. 462, 472.

A purpresture is a clandestine encroachment or appropriation upon land or water that should be common or public. Any permanent or habitual obstruction of a public street is included. *Hoey v. Gilroy*, 14 N. Y. Supp. 159, 161.

#### Encroachment on navigable water.

An unauthorized encroachment on the soil of the shore is termed a "purpresture," though not injurious, nor a public nuisance, and may be enjoined and prohibited on the information of the Attorney General. *Revell v. People*, 52 N. E. 1052, 1056, 177 Ill. 468, 43 L. R. A. 790, 69 Am. St. Rep. 257.

At the common law any encroachment upon a public stream was considered to be a purpresture; that is to say, the making of that several and private which ought to be common to many. A crib or pier, erected in the waters of the harbor of New York, is a public nuisance and purpresture, unless the party erecting the same is by some competent power authorized to build it at such place. *People v. Vanderbilt*, 28 N. Y. 396, 399, 84 Am. Dec. 351.

The term "purpresture" includes the act of a person in constructing a wharf on the Hudson river between high-water mark and the navigable part of the stream, without first obtaining a grant of such land. *People v. Mould*, 55 N. Y. Supp. 453, 454, 37 App. Div. 35.

Any erection under tide waters without license is an encroachment on the property of the sovereign, or, as it is termed in the language of the law, a "purpresture," which he may remove at pleasure, whether it tends to obstruct navigation or otherwise. *Eisenbach v. Hatfield*, 26 Pac. 539, 542, 2 Wash. St. 236, 12 L. R. A. 632.

A purpresture exists where a riparian owner has unlawfully intruded into the water of a navigable stream beyond the point of navigability, to fill up the bed of the stream beyond that point for the sole purpose of extending his possessions, so as to obstruct and interfere with the public right of navigation, and the public would have a right to abate it as a public nuisance; for it would give no rights to the person who made it, and it would not forfeit or destroy his riparian rights as they existed before. *Union Depot St. Ry. & Transfer Co. of Stillwater v. Brunswick*, 17 N. W. 626, 629, 31 Minn. 297.

A partial obstruction of a navigable stream by rafts of lumber moored in it is such an obstruction, irrespective of any question of the degree of inconvenience caused. *Moore v. Jackson* (N. Y.) 2 Abb. N. C. 211, 213.

A structure built on the bed of a lake, not in aid of navigation, such as a building in which to store and repair boats, is a purpresture. *Askew v. Smith*, 85 N. W. 512, 514, 109 Wis. 532.

A purpresture is not a term that applies to a wharf built upon the shore of a navigable stream by the proprietor of the soil, but only so when carried so far into the channel, or so far beyond his title, as to become a nuisance. This doctrine is as well settled law as that a purpresture is per se a nuisance. *Delaware & H. Canal Co. v. Lawrence* (N. Y.) 2 Hun, 163, 181.

#### Nuisance distinguished.

A purpresture is an invasion of the right of property in the soil, while the same remains in the king or the people. A nuisance is an injury to the common right of the public to navigate the waters. There is, therefore, a wide difference between the two, and, though they may coexist, yet either may exist alone without the other. *People v. Vanderbilt*, 26 N. Y. 287, 292.

Purpresture is a particular kind of nuisance. An unauthorized invasion of the rights of the public to navigate the water flowing over the soil is a public nuisance, and an unauthorized encroachment on the soil itself is known in law as a purpresture. *People v. Gold Run Ditch & Mining Co.*, 4 Pac. 1152, 1155, 66 Cal. 138, 56 Am. Rep. 80.

There is a wide difference between a purpresture and a nuisance. Although they may coexist, yet either may exist alone without the other. *The Idlewild*, 64 Fed. 603, 605, 12 C. C. A. 328.

Every purpresture is not a nuisance. It may or may not be. *People v. Park & O. R. Co.*, 18 Pac. 141, 143, 76 Cal. 156.

## PURSE.

Distinguished from bet. see "Bet."

A "purse, prize, or premium" is ordinarily some valuable thing, offered by a person for the doing of something by others, into the strife for which he does not enter. He has not a chance of gaining the thing offered, and, if he abide by his offer, he must lose it, and give it over to some of those contending for it. *Harris v. White*, 81 N. Y. 532, 539; *Morrison v. Bennett*, 52 Pac. 553, 557, 20 Mont. 560, 40 L. R. A. 158; *Hankins v. Ottinger*, 47 Pac. 254, 255, 115 Cal. 454, 40 L. R. A. 76; *Porter v. Day*, 37 N. W. 259, 261, 71 Wis. 296. The term does not include

betting on horse races. *Morrison v. Bennett*, 52 Pac. 553, 557, 20 Mont. 560, 40 L. R. A. 158.

Rev. St. 1846, c. 40, § 3, enacts that every person who shall contribute or collect any moneys, goods, or things in action for the purpose of making up a purse, plate, or other valuable thing to be raced for by any animal contrary to law shall forfeit a certain sum. A certain association under its articles of association held a horse fair for the purpose of testing the speed of horses by trotting, etc. Handbills were distributed specifying the various races and the respective premiums to be awarded. The premium fund was raised by assessment on the owners of horses and by an admittance fee to the fair grounds. It was held that "premium" was but another name for "purse," "stakes," or "reward" to the owner of the animal which should excel in speed, and the mode of raising this premium came within the express prohibitions of the third section. *Bronson Agricultural & Breeders' Ass'n v. Ramsdell*, 24 Mich. 441, 444.

## PURSER.

A purser of a ship is the fiscal agent of the owners. *Spinette v. Atlas S. S. Co. (N. Y.)* 14 Hun, 100, 105.

## PURSUANCE.

See "In Pursuance Of."

## PURSUANT.

A decree reciting that it was made pursuant to the last will and testament of the deceased and the laws of the state import that the court did determine and adjudge the party's rights to the property then being distributed as given and fixed both by will and the laws of the state. *Ward v. Congregational Church*, 29 Atl. 770, 772, 66 Vt. 490.

## PURSUANT TO LAW.

"Pursuant to law," as used in a statute providing that witnesses in attendance at a federal court pursuant to law are entitled to witness fees, etc., should not be construed to exclude those who attend voluntarily and without being subpoenaed. The object of the law is to reimburse the prevailing party for the necessary expenses of his evidence, and whether the witnesses come voluntarily or under a compulsory writ is immaterial. *Eastman v. Sherry (U. S.)* 37 Fed. 844, 845; *Hanchett v. Humphrey (U. S.)* 93 Fed. 895, 896; *Spaulding v. Tucker (U. S.)* 22 Fed. Cas. 899, 900; *Lillenthal v. Southern Cal. R. Co. (U. S.)* 61 Fed. 622, 623.

"Pursuant to law," as used in Code Cal. § 848, providing that for each day's attend-

ance in court pursuant to law a witness is entitled to a certain amount per mile going and coming, etc., means to attend court upon the requirement of or in obedience to the law, all contained under the obligatory requirements or pursuant to the commands of law, and does not include a voluntary attendance. *Haines v. McLaughlin (U. S.)* 29 Fed. 70, 71.

## PURSUING.

"Pursuing or engaging in the occupation of selling liquors," which is taxable under the statutes, does not characterize the act of making one sale of intoxicating liquors. *Merritt v. State*, 19 Tex. App. 435, 436.

## PURSUIT.

See "Agricultural Pursuits"; "Fresh Pursuit"; "Immediate Pursuit"; "Industrial Pursuit"; "Mechanical Pursuit."

"Pursuit," as used in the general incorporation statutes of Oregon, authorizing the formation of corporations for the purpose of engaging in any lawful enterprise, business, pursuit, or occupation, is not restricted in meaning to a scheme for making money, but includes any object consistent with the interest of society, and may engage the attention of men and invite their co-operation; and a corporation may lawfully be organized under such statute for the purpose of guaranteeing bonds of an educational institution to strengthen its credit. *Maxwell v. Akin (U. S.)* 89 Fed. 178, 180.

## PURSUIT OF HAPPINESS.

The term "pursuit of happiness," as used in the statute declaring that all men have certain inalienable rights, and providing that among them are life, liberty, and the pursuit of happiness, includes the right of a citizen to follow his individual preference in the choice of an occupation. "The right of every man to choose his own occupation, profession, or employment, though not expressly guaranteed by the Constitution, is included in the right to the pursuit of happiness." *Ruhstrat v. People*, 57 N. E. 41, 43, 185 Ill. 133, 49 L. R. A. 181, 76 Am. St. Rep. 30 (citing *Black, Const. Law*, p. 411).

The right to the pursuit of happiness, guaranteed by the Constitution, includes the right to pursue any lawful business or vocation in any manner not inconsistent with the rights of others. *Hooper v. California*, 15 Sup. Ct. 207, 210, 211, 213, 155 U. S. 648, 39 L. Ed. 297.

The pursuit of happiness includes the right of private contract. *State v. Kreutzberg*, 90 N. W. 1098, 1101, 114 Wis. 530, 58 L. R. A. 748, 91 Am. St. Rep. 934.

The clause of the Declaration of Independence affirming the right of men to pursue happiness means "the right to pursue any lawful business or vocation, in any manner not inconsistent with the equal rights of others, which may increase their prosperity or develop their faculties, so as to give them the highest enjoyment." *Butchers' Union Slaughter House, etc., Co. v. Crescent City Live Stock Landing, etc., Co.*, 4 Sup. Ct. 652, 660, 111 U. S. 746, 28 L. Ed. 585.

## PURVEYANCE.

The prerogative of "purveyance," in England, was that "whereby the crown enjoyed the right of buying up provisions and other necessities for the use of the royal household at an appraised valuation, and in preference to all others, even without the consent of the owner." At one time it prevailed pretty generally throughout Europe, and was regulated in England by *Magna Charta*, but is now abolished there. *In re Barre Water Co.*, 20 Atl. 109, 110, 62 Vt. 27, 9 L. R. A. 195.

## PURVIEW.

The meaning usually attached to the term "purview" by writers on law seems to be "the enacting part of a statute, in contradistinction to the preamble; and we think the provisions of the act repealing all acts or parts of acts coming within its purview should be understood as repealing all acts in relation to all cases which are provided for by the repealing act, and that the provisions of no act are thereby repealed in relation to cases not provided for by it. *Payne v. Conner*, 6 Ky. (3 Bibb) 180, 181; *Patterson v. Caldwell*, 58 Ky. (1 Metc.) 489, 493; *Grigsby v. Barr*, 77 Ky. (14 Bush) 330, 339; *Commonwealth v. Watts*, 2 S. W. 123, 126, 84 Ky. 537; *State v. Reynolds*, 9 N. E. 287, 289, 108 Ind. 353.

Where a statute repeals a prior statute so far as the prior statute comes within the purview of the later one, the word "purview" applies to the enacting part, the body or subject of the act, in contradistinction from the other parts thereof, such as the preamble, the saving, and the proviso; and hence the repeal is not confined merely to such parts of the former act as are inconsistent with the provisions of the repealing act. *The San Pedro*, 15 U. S. (2 Wheat.) 132, 139, 4 L. Ed. 202.

In construing the meaning of a statute providing that all laws and parts of laws coming within its purview and meaning were thereby repealed, the Supreme Court of Tennessee reasons as follows: "It cannot be perceived that the addition of the word 'purview' makes any difference in the meaning of the Legislature. Lord Coke informs us that the purview is all that part of an act

which lies between the caption and the repealing clause. Thus it seems that it means nothing more than the body of the act. But what is the meaning of the body or purview of the act? \* \* \* All such parts of former acts as were within the purview or body of this act are repealed. The word 'purview,' in this place, is a mere expletive. Either that, or the word 'meaning' must be useless. \* \* \* If the provisions of a subsequent statute are commensurate with the evils redressed by the former, it operates as an entire repeal; otherwise, it is a repeal pro tanto. In this view of the subject it is essential that not only every part of the same act should be taken into consideration, but all statutes made on the same subject, in order that it may be seen how far one statute repeals another, as well as to ascertain the meaning of the Legislature by comparing different parts of the same and other acts on the same subject. Lord Coke, in *Foster's Case*, 11 Coke, 63, 64, lays down the rule to be that, if a subsequent act can be reconciled with a former one, it shall not be a repeal." *Smith v. Hickman's Heirs*, 3 Tenn. (Cooke) 330, 337.

The word "purview," as used in the repealing clause of an act stating that all laws within the purview of this act are repealed, etc., means within the limit or scope of the act. *Hirth v. City of Indianapolis*, 48 N. E. 876, 878, 18 Ind. App. 673.

## PURVIEW OF THE RULE.

By purview of the rule is meant the spirit of the rule. *Fidelity & Deposit Co. v. United States*, 23 Sup. Ct. 120, 122, 187 U. S. 315, 47 L. Ed. 194.

## PUSHERS.

The means for ejecting horse-shoe nails from the die after they have been sheared are termed "pushers." *Bensley v. Northwestern Horse Nail Co.* (U. S.) 26 Fed. 250, 254.

## PUSHING.

As the term is used in railroad parlance in relation to the switching of cars, "pushing" means the act of an engine in the rear of a car in pushing it into the position which it is to occupy. *Mark v. St. Paul, M. & M. Ry. Co.*, 20 N. W. 131, 132, 32 Minn. 208.

## PUT.

A will directing the executors to "put" a sum on interest, to be well secured, means to loan money at the legal rate of interest on the security of a mortgage or judgment. The testator had in his mind a loaning on real estate and in no other mode, for that is its common and ordinary acceptance, and is



the sense in which it is received by the mass of the community in which the testator resided, which was an agricultural district and among farmers. In common parlance, neither among agriculturalists, traders, nor dealers in stock do the words "put on interest" convey the idea of a purchase of bank or other corporation shares. In *re Nyce's Estate* (Pa.) 5 Watts & S. 254, 257, 40 Am. Dec. 498.

The words "put and keep," in a lease in which the landlord agrees to put and keep a roof in repair, do not imply a confession that it is out of repair, in the absence of any circumstances to indicate a probability of its being out of repair, and therefore the covenant does not impose on the landlord the duty of repairing without notice to him of the necessity of repairs. *Thomas v. Kingsland*, 14 N. E. 807, 108 N. Y. 616.

The word "put," as used in a lease giving the lessor a lien as security for the payment of the rent on all goods, implements, stock, fixtures, tools, and other personal property put on the leased premises, is used in its broad general sense, and includes crops planted on the premises, and also includes the hay, though, while in the form of growing grass, it was a part of the realty. *McCaffrey v. Woodin*, 65 N. Y. 459, 469, 22 Am. Rep. 644.

#### PUT IN CIRCULATION

The term "issued or put in circulation," in a statute providing that no banking association shall issue or put in circulation any bill or note, have a restricted, special, and almost technical meaning, relating exclusively to the moneyed currency of the country, and, in the language of the general banking law, to circulating notes in the similitude of banking notes. *Curtis v. Leavitt* (N. Y.) 17 Barb. 309, 341.

#### PUT INTO HIS HANDS.

"Put into his hands," as used in a declaration in an action against a constable for neglecting and refusing to serve a writ, the allegation being that the writ was put into the hands of the constable, means that the writ was offered to the constable and made subject to his control, and would include, in case the constable is unable to manually take the writ, the putting of it into his pocket, or in fact in his possession in any way. *Patten v. Sowles*, 51 Vt. 388, 391.

#### PUT OUT.

The words "ejected, expelled, put out, and removed" relating to trespass, may be satisfied under some circumstances by proof that the house was destroyed in the plaintiff's absence, and by his being prevented from returning to it and re-entering it because finding it existing no longer as a hab-

itable house, but not so where the pulling down and expelling was contemporaneous. *Perry v. Fitzhowe*, 8 Q. B. 757, 779.

#### PUTS HIMSELF UPON THE COUNTRY.

The form, "And of this he puts himself on the country," used as the concluding part of an answer under the old system of pleading, means that the pleader desired to have the truth of the alleged facts tried by a jury. *Bell v. Yates* (N. Y.) 33 Barb. 627, 629.

#### PUTTING AWAY.

Where the master of a parish apprentice proposed to him that he should go to a farm in a different parish occupied by the master's sister, and the apprentice assented and worked for the sister for four years, there was a "putting away" of the apprentice without the consent of the justices, within the meaning of St. 56 Geo. III, c. 139, § 9. *Rex v. Inhabitants of Shipton*, 8 Barn. & C. 88.

Where a parish apprentice, bound for seven years to A., served him for four years, when A. agreed with B., who carried on the same business in another parish, that the pauper should work for B., B. to pay A. a certain sum out of the pauper's earnings, there was a "placing out or putting away" of the apprentice within St. 57 Geo. III, c. 139 § 9, and no settlement was gained by the service under B. *Reg. v. Inhabitants of Wainfleet All Saints*, 11 Adol. & El. 656.

#### PUTTING CHARACTER IN ISSUE.

An action putting character in issue is an action in which the character of the parties, or some of them, is of particular importance. Actions for criminal conversation, slander, etc., are of such a character. *Ward v. Herndon* (Ala.) 5 Port. 382, 386.

"Putting character in issue" is a technical expression, which does not mean simply that the character may be affected, but that it is of particular importance in the suit itself, as the character of the plaintiff in an action of slander, or that of a woman in a suit for seduction. In those excepted cases character affects the amount of the recovery. The jury was by law bound to consider it in assessing damages, and it is in that sense that it is said that "the nature of the action puts the character in issue." *Stark v. Publishers: George Knapp & Co.*, 61 S. W. 669, 674, 160 Mo. 529.

"Putting character in issue," as was said in *Porter v. Sellar*, 23 Pa. (11 Harris) 424, 62 Am. Dec. 341, "is a technical expression, which does not signify merely that personal reputation is incidentally involved in the consequences or results of the action, but that the action in its nature directly involves the question of character." *American Fire Ins Co. v. Hazen*, 1 Atl. 605, 608, 110 Pa. 530.

**PUTTING IN FEAR.**

The words "putting in fear," as used in the definition of robbery as the felonious and forcible taking of the property of another from his person against his will by violence or by putting in fear, is equivalent to constructive violence, and the demands of the law are met by proof of fear excited with respect to apprehended injuries to the person, property, or character. Though there need be no great degree of terror or fright for personal safety excited in the person robbed, the fact must be attended with such circumstances of terror or intimidation, such threatening by word, gesture, or manner, as in common experience is likely to create an apprehension of danger, and induce one to part with his property for the safety of his person. The terror which would lead the person robbed to apprehend an injury to his character was never deemed sufficient to support an indictment for robbery, except in the particular instance of its being excited by means of insinuations against or threats to destroy the character by accusations of sodomical practices. *Simmons v. State*, 25 South. 881, 882, 41 Fla. 316.

Property obtained by a trick, or by threats of illegal arrest, criminal prosecution, or insinuation against character, is not a taking by putting in fear, within the meaning of Rev. St. 2398, defining robbery. *Simmons v. State*, 41 Fla. 316, 318, 25 South. 881, 882.

In a robbery in the first degree it is indispensable that the putting in fear be a fear of some immediate injury. *State v. Howerton*, 59 Mo. 91, 92.

**PUTATIVE.**

Reputed; supposed; commonly esteemed. Applied in Scotch law to creditors and proprietors. 2 Kames, Eq. 105, 107, 109; Black, Law Dict.

**PUTATIVE FATHER.**

In bastardy proceedings the sworn father is called the "putative father," because he is supposed to be the father of the child. *State v. Nestaval*, 75 N. W. 725, 72 Minn. 415.

The word "father," in the chapter relating to the support of the poor, includes the putative father of an illegitimate child. Code Iowa, 1897, § 2250.

**PUTATIVE MARRIAGE.**

Mourlon defines a putative marriage as "a marriage which is in reality null, but which has been contracted in good faith by the two parties, or by one of them." Such marriages are so far valid as to impose a civil liability upon either party to the other

party, if innocent. In re Hall, 70 N. Y. Supp. 406, 410, 61 App. Div. 268.

In El Diccionario de Legislacion putative matrimony is defined to be a marriage which, being null on account of some dissolving cause, is held notwithstanding for a true marriage, because of its having been contracted in good faith by both or one of the spouses in ignorance of the dissolving cause. *Smith v. Smith*, 1 Tex. 621, 628, 46 Am. Dec. 121.

**PUTS.**

As used in reference to transactions on boards of trade, a "put" is defined to be the privilege of delivering or not delivering the thing sold. *Pearce v. Foote*, 113 Ill. 228, 234, 55 Am. Rep. 414; *Pixley v. Boynton*, 79 Ill. 351, 353; *Wolcott v. Heath*, 78 Ill. 433, 437; *Osgood v. Bauder*, 39 N. W. 887, 890, 75 Iowa, 550, 1 L. R. A. 655; *Minnesota Lumber Co. v. Whitebreast Coal Co.*, 43 N. E. 774, 778, 160 Ill. 85, 31 L. R. A. 529; *White v. Barber*, 8 Sup. Ct. 221, 230, 123 U. S. 392, 31 L. R. A. 243.

A speculative option, where the object of the parties is not a sale and delivery of the goods, but a settlement in money on differences, is commonly called a "put." In re Chandler (U. S.) 5 Fed. Cas. 443, 444.

"Put" is a term used by stockbrokers to designate a contract by which one of the parties thereto purchases a privilege to deliver certain stock at any time within a certain period and receive a certain sum therefor; "so that, in case the market should decline to any point below that figure, the person owning the privilege under the protection thus secured could deliver the stock at the agreed price." *Hopper v. Sage*, 47 N. Y. Super. Ct. (15 Jones & S.) 77, 78.

"Puts," or the privilege, for a nominal consideration, of delivering a large quantity of grain within a certain time at a specified price, where no delivery of the grain was contemplated by the parties, and they expected to settle the differences as established at future prices, are simple wagers, and void as against public policy. *Ex parte Young* (U. S.) 30 Fed. Cas. 828, 831.

The true idea of an option is what are called, in the peculiar language of the dealers, "puts" and "calls." A "put" is defined to be the privilege of delivering or not delivering the thing sold, and a "call" is defined to be the privilege of calling for or not calling for the thing bought. *Carroll v. Holmes*, 24 Ill. App. 453, 456 (citing *Pearce v. Foote*, 113 Ill. 228, 55 Am. Rep. 414).

"Put" is distinguished from "call," which is the privilege of calling for or not calling for the thing bought. *Minnesota Lumber Co. v. Whitebreast Coal Co.*, 43 N. E. 774, 778, 160 Ill. 85, 31 L. R. A. 529.

## Q

**QUACK.**

To speak of a physician in his professional capacity as a "quack" is to call him a mere pretender, a person boasting of attainments which he does not possess, and is libelous per se. *Elmergreen v. Horn*, 91 N. W. 973, 974, 115 Wis. 385.

**QUAD BALLOTS.**

"Quad ballots" has been used to designate official ballots on which unauthorized marks are affixed, as if made by the printer's quad. The marks do not import design, and are by themselves just as consistent with mistake as design. *People v. Dutchess County Sup'rs*, 32 N. E. 242, 245, 135 N. Y. 522.

**QUADROON.**

In the French and Spanish American colonies and in Louisiana, the descendant of a mulatto—that is, a person of an equal mixture of European and negro blood—and a white person is called a "quadroon." The term has never been adopted in South Carolina, but such a person is legally included in the term "mulatto" or "person of color." *State v. Davis* (S. C.) 2 Bailey, 558, 559.

**QUALIFY.**

As the word "qualify" is used in Const. § 5, requiring state officers to "qualify," etc., it means the taking of the oath or affirmation also constitutionally provided for. *Arch-er v. State*, 22 Atl. 8, 9, 74 Md. 443, 28 Am. St. Rep. 261. See, also, *People v. McKinney*, 52 N. Y. 374, 380.

The word "qualify," in St. Okl. 1890, § 3821, providing that officers shall qualify and enter upon the duties of their office on a certain date, unless otherwise provided, does not mean that an officer is required both to take the oath of office and give bond, as there is no statute requiring such officer to give bonds. *Logan County Com'rs v. Harvey*, 52 Pac. 402-404, 6 Okl. 629.

"Qualify," in its legal use, means to take an oath to discharge the duties of an office; and when an executor named in a will alleges that he desires to qualify as such, and the court orders that letters testamentary issue to him upon his complying with the requisites of the law, they are to be issued to him when he shall have taken oath well and faithfully to discharge the duties of his trust. *Hale v. Salter*, 25 La. Ann. 320, 324.

In holding Purity of Elections Act, § 4, requiring a successful candidate to swear to

a statement of his expenses as a qualification to taking office to be a violation of Const. art. 20, § 3, describing the oath which a successful candidate shall take, and providing that no other qualification shall be taken, the court quotes *State v. Bemenderfer*, 96 Ind. 374, 376, as saying: "The term 'qualify,' as used in the statute, does not mean possessed of the necessary political, mental, and moral endowments, but means the acts performed after election, as taking the official oath and executing an official bond. 'Eligible' means capable of being chosen, while 'qualified' refers to the performance of the acts which the person chosen is required to perform before he can enter into office. Abbott, in defining the word 'qualified,' says it means to take the oath and give the bond required by law from an administrator, executor, public officer, or the like, before he may enter into the discharge of his duties." *Bradley v. Clark*, 65 Pac. 395, 396, 133 Cal. 196.

"Qualify," as used in Const. art. 3, § 12, providing that all judicial officers shall hold their offices until their successors shall have qualified, means to take such steps as the statute requires before the person elected or appointed to an office is allowed to enter on the discharge of its duties, such as to file a sufficient bond, to be approved by the proper officer, and to take and subscribe the official oath. *State v. Albert*, 40 Pac. 286, 287, 55 Kan. 154.

**As probate.**

The word "qualify," as used in Comp. Laws, § 1393, providing that "probate judges in their respective counties are authorized to qualify wills by receiving the evidence of the witnesses who were present at the time of the making of the same and all other acts in relation to the investigation of the validity thereof," is equivalent to the word "probate," and is intended to convey the same meaning. *Bent v. Thompson*, 5 N. M. 408, 422, 23 Pac. 234.

**QUALIFICATION.**

See "Certificate of Qualification."

Qualifications relate to the fitness or capacity of the party for a particular pursuit or profession. Webster defines the term "qualifications" to mean "any natural endowment or any acquirement which fits a person for a place, office, or employment, or enables him to sustain any character with success." *Cummings v. Missouri*, 71 U. S. (4 Wall.) 277, 319, 18 L. Ed. 356; *Meffert v. State Board of Medical Registration and Examination*, 72 Pac. 247, 252, 66 Kan. 710.

**Qualification in one sense** means fitness for; a doing of some act as a condition of taking or holding office; qualify; to make oath to any fact; to take oath of office before entering into its duties. Cent. Dict. Qualification is that which qualifies a person and renders him admissible to or acceptable for a place or an office or appointment; and, as used in Const. art. 12, declaring that the oath to be taken by public officers shall be the only oath or test required as a qualification for office, is used in the sense of something to be done before taking office as a condition of holding it, in the sense of taking an oath of office, not in the sense of fitness. *People v. Palen*, 26 N. Y. Supp. 225, 228, 74 Hun, 289.

**Elector.**

The words "any person not having all the qualifications of an elector," used in Rev. St. 1858, c. 169, § 42, providing that inspectors of election who shall knowingly receive the vote of any person not having all the qualifications of an elector shall be guilty of a crime, mean any person disqualified, incapacitated, or disentitled to vote from any of the causes fixed by law, and refer to the condition of the person at the time his vote is received. *Bryne v. State*, 12 Wis. 519, 527.

**Instruction.**

"Qualification," as used in reference to one instruction as a qualification of another, does not imply contradiction, but a limitation or modification, so that, where one instruction is a contradiction of another, one of them must be untrue, and can only have the effect of confusing the minds of the jury. *People v. Kennett*, 45 Pac. 994, 996, 114 Cal. 18.

**Jury duty.**

"The definition and touchstone of qualification for jury duty, at the time of the adoption of the Constitution and its amendments, was the ancient phrase, 'Liber et legalis homo.' It vested the qualifications on a threefold basis, freedom, law, and humanity; in other words, the juror must be free, lawful, and of the human race. This definition was rigid as far as freedom and humanity were concerned, but elastic as to lawfulness." There is nothing in the provisions in the Constitution and laws of the United States preserving to the citizen the right of juries, grand and petit, as known to the common law, which renders invalid a statute allowing unmarried women to serve on juries. *Hayes v. Territory*, 5 Pac. 927, 2 Wash. T. 286.

**Office.**

"Qualification for office," as defined by the most approved lexicographers, is the endowment or accomplishment that fits for an

office; having the legal requisites; endowed with qualities fit or suitable for the purpose. *State ex rel. Attorney General v. Seay*, 64 Mo. 89, 101, 27 Am. Rep. 206.

"Qualification," with reference to an office, has a double meaning, one of which is the endowment or acquirement which renders one eligible to place or position, and the other relates to the act whereby he is installed in his office. *Hyde v. State*, 52 Miss. 665, 672.

**QUALIFIED.**

See "Duly Qualified"; "Failure to Qualify."

"Qualified" has a double sense, and may mean a condition or status of an officer, and is also often used to describe his act of taking an oath. *People v. Crissey*, 91 N. Y. 616, 636.

Const. art. 5, § 2, as amended November 5, 1867, declares that no person who has ever voluntarily borne arms against the United States shall be qualified to hold office until such disability be removed by a law passed by two-thirds of the Legislature. Held, that the word "qualified" refers to the holding of the office, and not to the election, and hence one not qualified at an election would be entitled to enter upon the office if his disability were removed before the issuance of the certificate. *Privett v. Bickford*, 26 Kan. 52, 53, 40 Am. Rep. 301.

The word "qualified," when applied to any person elected or appointed to office, shall be construed to mean the performance by such person of those things which are required by law to be performed by him previous to his entering upon the duties of his office. *Rev. St. Wis. 1898*, § 4971.

**As not disqualified.**

In the Constitution, the words "qualified" and "qualifications" are employed in their most comprehensive sense, to signify not only the circumstances that are requisite to render a citizen eligible to office or that entitle him to vote, but also to denote an exemption from all legal disqualifications for either purpose. *Commonwealth v. Jones*, 73 Ky. (10 Bush) 725, 744.

**Eligible distinguished.**

See "Eligible."

**As taking oath.**

The word "qualified," in 2 Rev. St. p. 438, § 67, providing that the power of a former sheriff does not cease until the new sheriff has qualified and given the proper security, means nothing more than taking the oath of office. "If the term 'qualified' was intended to embrace everything necessary

to be done by the sheriff in order to entitle him to enter on the duties of his office, then it was unnecessary to say anything about the giving of security." *Curtis v. Kimball* (N. Y.) 12 Wend. 275, 276.

The word "qualified," in Const. art. 3, § 2, providing that the Governor shall hold his office for two years, and until his successor shall be chosen and qualified, means that such successor shall take the oath of office. *Ex parte Smith*, 8 S. O. (8 Rich.) 495, 519, 520.

**As taking oath and giving bond.**

"Qualified," as used in Act Jan. 31, 1852, providing that the office of clerk pro tempore of the court of common pleas terminates whenever the successor elected at the regular election shall have qualified, imports nothing more than that the person elected has complied with the requirements of the statute by giving bond and taking the oath of office. *State v. Neibling*, 6 Ohio St. 40, 46.

"Qualified," in the constitutional provision in reference to a public officer holding over till his successor is elected and qualified, does not mean possessed of the necessary political, mental, and moral endowments, but means the acts performed after election, as taking an official oath and executing an official bond. It is distinguished from "eligible," which means capable of being chosen, while "qualified" means the performance of the acts which the party chosen is required to perform before he can enter into the office. Abbott, in defining the word "qualified," says it means to take the oath and give the bond required by law from an administrator, executor, public officer, or the like before he may enter on the discharge of his duties. *Abb. Law Dict. In Steinback v. State*, 38 Ind. 483. It was said: "The term 'qualified' was not used in its ordinary or popular signification, as possessed of endowments or accomplishments or intellectual capacity or moral worth to discharge the duties of an office; but the framers of the Constitution intended that the person who had been elected to an office, and had taken the oath of office and given bond, where a bond is required, was qualified, and had the right to assume and discharge the duties of such office." *State v. Bemenderfer*, 96 Ind. 374, 376.

**QUALIFIED ACCEPTANCE.**

In Story, Bills, § 239, it is said an acceptance is general when it imports an absolute acceptance precisely in conformity to the tenure of the bill itself. It is unqualified when it contains no qualification, limitation, or condition different from what is expressed on the face of the bill or from

what the law implies upon a general acceptance. It is qualified when the drawee absolutely accepts the bill, but makes it payable at a different time or place, or to a different firm, or in a different mode from that which is the tenure of the bill. *Todd v. Bank of Kentucky*, 66 Ky. (3 Bush) 626, 628.

An acceptance is qualified which is (1) conditional, that is to say, which makes payment by the acceptor dependent on the fulfillment of a condition therein stated; (2) partial, that is to say, an acceptance to pay part only of the amount for which the bill is drawn; (3) local, that is to say, an acceptance to pay only at a particular place; (4) qualified as to time; (5) the acceptance of some one or more of the drawees, but not of all. *Ann. Codes & Sts. Or.* 1901, § 4543; *Neg. Inst. Law N. D.* § 141; *Rev. Codes N. D.* 1899, § 1055.

**QUALIFIED ELECTOR.**

The term "qualified electors," as used in the chapter relating to elections, includes all male persons of the age of 21 years or upwards, belonging to either of the following classes, who have resided in the territory for a period of six months, in the township sixty days and in the voting precinct thirty days next preceding any election: (1) Citizens of the United States; (2) persons of foreign birth who shall have complied with the provisions of the laws of the United States on the subject of naturalization; (3) civilized persons of Indian descent, not members of any tribe. *Rev. St. Okl.* 1903, § 2907.

**As actually voting person.**

In Act Cong. March 4, 1898, authorizing municipal corporations to issue bonds, and providing that no person shall be qualified to vote on the question of issuing such bonds except he be a qualified voter, and in case two-thirds of the qualified voters shall vote affirmatively the bonds shall issue, the term "qualified voters" means, not those qualified and entitled to vote, but those qualified and actually voting. In that connection a voter is one who votes, not one who, although qualified to vote, does not vote. *Cronly v. City of Tucson (Ariz.)* 56 Pac. 876, 877.

The phrase "qualified electors voting thereon," in Const. art. 9, prescribing the manner for the submission of constitutional amendments, and providing that the proposed amendment shall become part of the Constitution if a majority of the qualified electors voting thereon vote in favor of the amendment, does not mean a majority of the electors of the state, or those whose names appear on the poll books as voting at such an election, but only a majority of the electors actually voting on the question of amendment. *Bott v. Secretary of State*, 40 Atl. 740, 741, 62 N. J. Law, 107.

**As those voting effectively.**

The "qualified voters voting," in the constitutional amendment of 1898 (section 36, art. 4), providing for the submission to vote of new municipal charters, and that they may be adopted by an affirmative vote of four-sevenths of the voters voting, does not include voters attempting to vote, but whose ballots are spoiled, and which cannot be counted. "We hold that the bare attempt to vote, by depositing a blank ballot or an unintelligible ballot, is not effected, and should be excluded in the total count upon which the required four-sevenths is to be estimated." *Hopkins v. City of Duluth*, 83 N. W. 536, 538, 81 Minn. 189.

**As person entitled to vote.**

"Qualified elector," as used in a statute, means a person who is legally qualified to vote. *Sanford v. Prentice*, 28 Wis. 358, 362.

"Qualified elector," as used in the Constitution, prohibiting the election to any civil or military office in the state of any person except a qualified elector, was employed in its broadest sense, meaning a person qualified to vote generally. In re House Bill No. 166, 21 Pac. 473, 9 Colo. 628.

The words "qualified elector," in Pol. Code, § 1083, which, after enumerating the constitutional qualifications of a voter, provided that persons having such qualifications and whose names shall be enrolled on the great register of such county 15 days prior to an election shall be qualified electors, etc., are used in the sense of "elector who has the right to vote." It appears plain that the Legislature recognized the fact that there might be electors who were not so qualified. *Bergevin v. Curtz*, 59 Pac. 312, 313, 127 Cal. 86.

The words "qualified electors," as used in Const. art. 14, § 2, providing that the Legislature shall have power to remove the county seat, but that it shall not be removed unless a majority of the qualified electors of the county vote therefor, means those qualified to vote at elections for public officers, and therefore a statute which permits only resident taxpayers to vote on the question of the removal of the county seat is unconstitutional. *Eagle County Com'rs v. People*, 57 Pac. 1080, 1083, 26 Colo. 297.

**Legal voter distinguished.**

"Qualified electors," used in an act authorizing the submission of a question to vote, means a person who is legally qualified to vote, while "legal voter," unless a different meaning appears from other language in the act, means a qualified elector who does in fact vote. *Sanford v. Prentice*, 28 Wis. 358, 363.

**As registered voters.**

"Qualified electors," as used in the Constitution, means those who have been determined by the registrars as having the requisite qualifications by enrolling their names, etc. *Carroll County Sup'rs v. Smith*, 4 Sup. Ct. 539, 543, 111 U. S. 556, 28 L. Ed. 517.

By the term "qualified elector" we do not mean simply a registered voter, for we conceive that one may be a qualified elector, entitled to hold office, sit on a jury, etc., and yet not be entitled to vote, under the law, for want of certificate of registration. *White v. Reagan*, 25 Ark. 622, 623.

**Women.**

Under a statute providing that every qualified elector of the state is a qualified juror of the county in which he resides, it is held that women, though citizens, are not qualified electors; the right to vote being restricted by the Constitution to male citizens. *State v. Ah Chew*, 16 Nev. 50, 58, 40 Am. Rep. 488.

**QUALIFIED FEE.**

See, also, "Base Fee."

The term "qualified fee," rather than "fee simple," is properly to be used in designating the estate of one owning a reversion or remainder in lands. *Brackett v. Ridlon*, 54 Me. 426, 434.

A qualified or base fee is confined to a person as tenant of a particular place. *Paterson v. Ellis' Ex'rs* (N. Y.) 11 Wend. 259, 277.

The term "qualified fee" includes the interest acquired by a county in real estate conveyed by a deed providing that the conveyance is for the use of the people of the county as long as the premises shall be used for a county site for the courthouse, jail, and clerk's office, but shall revert to the grantor if the county ceases to use it for such purpose. *Gillespie v. Broas* (N. Y.) 23 Barb. 370, 381.

A qualified, base, or determinable fee is an interest which may continue forever, but the estate is liable to be determined by some act or event circumscribing its continuance and existence. *Moody v. Walker*, 3 Ark. (3 Pike) 147, 190. It is the uncertainty of the event and the possibility that the fee may last forever that renders the estate a fee, and not merely a freehold. If the condition attached to the fee is one which is certain to happen, then there is a reversion. If such condition is one which may never happen, there is not a reversion, but only a possibility of reversion. *United States v. Reese* (U. S.) 27 Fed. Cas. 742, 744.

Where an estate limited to a person and his heirs has a qualification annexed to it

by which it must determine whenever the qualification is at an end, it is a qualified or base fee; in other words, a qualified, base, or determinable fee is an interest which may continue forever, but is liable to be ended by some act or event circumscribing its continuance or extent. This is what in modern, and especially in American, parlance is properly called a "fee with a conditional limitation annexed." *Bryan v. Spires* (Pa.) 3 Brewst. 580, 583.

### QUALIFIED OWNERSHIP.

The ownership of property is qualified:

(1) When it is shared with one or more persons; (2) when the time of enjoyment is deferred or limited; (3) when the use is restricted. Civ. Code Cal. 1903, § 680; Rev. Codes N. D. 1899, § 3280, Civ. Code S. D. 1903, § 193.

### QUALIFIED PERSONS.

"Qualified persons," as used in a court order requiring the sheriff to summon "qualified persons" to complete the grand jury, means residents of the county, since only residents were authorized to act. *Stewart v. State*, 13 South. 319, 98 Ala. 70.

### QUALIFIED PRIVILEGE.

"Qualified privilege" in the law of libel extends to all communications made bona fide upon any subject-matter in which the party communicating has any interest, or in reference to which he has a duty to a person having a corresponding interest or duty. And the privilege embraces cases where the duty is not a legal one, but where it is of a moral or social character of imperfect obligation. *Bacon v. Michigan Cent. R. Co.*, 33 N. W. 181, 183, 66 Mich. 166.

Qualified privilege exists in cases where some communication is necessary and proper in the protection of a person's interest, but this privilege may be lost if the extent of its publication be excessive. *Smith v. Smith*, 41 N. W. 499, 500, 73 Mich. 445, 3 L. R. A. 52, 16 Am. St. Rep. 594.

A qualified privilege is extended to a communication made in good faith upon any subject-matter in which the party communicating has an interest, or in reference to which he has a duty, either legal, moral, or social, if made to a person having a corresponding interest or duty; and the burden of proving the existence of malice is cast upon the person claiming to have been defamed. *Wagner v. Scott*, 63 S. W. 1107, 1111, 164 Mo. 289 (*quoting Finley v. Steele*, 60 S. W. 108, 159 Mo. 299, 52 L. R. A. 852; *Sullivan v. Strathan-Hutton Evans Commission Co.*, 53 S. W. 912, 152 Mo. 268, 47 L. R. A. 859).

A plea of qualified privilege in slander or libel does not go to the extent of justification for the alleged slander or libel. It means nothing more than that the occasion of making it rebuts the prima facie inference of malice arising from the publication of matter prejudicial to the character of the plaintiff, and throws upon him the onus of proving malice in fact, but not of proving it by extrinsic evidence only. He has still the right to require that the alleged libel itself shall be submitted to the jury, that they may judge whether there is evidence of malice on the face of it. *Evening Post Co. v. Richardson* (Ky.) 68 S. W. 665, 668.

As against an absolute privilege, no action of libel can be maintained at all for the alleged libelous words; but if it be only a qualified privilege the action may be maintained unless the thing written had relation to the subject-matter undergoing judicial investigation. Under these definitions it is not material whether the privilege invoked be considered an absolute or a qualified one in an action for libel for statements contained in a petition by a receiver against his co-receiver, to the effect that such co-receiver was unlawfully withholding a portion of the assets and obstructing their collection, and that he was acting in contempt of court, and had embezzled some of the trust money, since, even though the privilege be considered as qualified, it will be sufficient in such a case. *Bartlett v. Christliff*, 14 Atl. 518, 520, 69 Md. 219.

### QUALIFIED VOTERS.

All qualified voters, see "All."

A "qualified voter" is defined in Rev. St. 1899, § 9798, to be one who, under the general laws of the state, would be allowed to vote in any county for state and county officers, and who has resided in the district 30 days preceding the school district meeting at which he offers to vote. *State ex rel. Sutton v. Fasse* (Mo.) 71 S. W. 745.

### As persons actually voting.

The term "qualified voters," in Const. Mo. art. 11, § 14, prohibiting a subscription by townships to railroads unless two-thirds of the qualified voters of the township at a regular or special election to be held therein shall assent thereto, means the qualified voters voting at such election. *Cass County v. Johnston*, 95 U. S. 360, 365, 24 L. Ed. 416.

"Qualified voters," as used in Const. Miss. art. 12, § 14, providing that the Legislature shall not authorize any county, city, or town to become a stockholder in, or to lend its credit to, any company, association, or corporation, unless two-thirds of the "qualified voters" of such county, city, or town, at a special election or regular election to

to held therein, shall assent thereto, "must be taken to mean not those qualified and entitled to vote, but those qualified and actually voting." *Carroll County v. Smith*, 4 Sup. Ct. 539, 544, 111 U. S. 556, 28 L. Ed. 517.

"Qualified voters," as used in Const. Miss., requiring the assent of two-thirds of the "qualified voters" of a county at an election lawfully held for that purpose, to a proposed issue of municipal bonds, meant the vote of two-thirds of the qualified voters present and voting at such election as determined by the official return of the result, and not all those qualified and entitled to vote in the county. *Carroll County v. Smith*, 4 Sup. Ct. 539, 544, 111 U. S. 556, 28 L. Ed. 517.

**As persons potentially qualified.**

"Qualified voters," as used in Sand. & H. Dig. § 945 et seq., which authorizes the county court to submit the question of the removal of a county seat to the voters on petition of one-third of the qualified voters of the county, and to order such removal when a majority of the qualified voters vote in favor of the place named in the petition, and providing that, to ascertain the number of qualified voters for the purposes of the act, the county court should be governed by the number of persons liable to pay a poll tax as returned upon the assessor's book, does not mean those only that have paid a poll tax, but extends to all citizens of the county who would have the right to vote upon the payment of a poll tax. *Dunn v. Lott*, 58 S. W. 375, 376, 67 Ark. 591.

Const. art. 7, § 7, declares that no county, city, town, or other municipal corporation shall contract any debt, pledge its faith, or loan its credit, etc., unless by a vote of a majority of the "qualified voters" therein. In *Chester & L. N. G. R. Co. v. Caldwell County Com'rs*, 72 N. C. 486, this clause was held to require a majority vote of all those competent to vote, whether registered or not. Rodman, J., says: "A qualified voter is one who is entitled to register as a voter, and who is qualified to vote upon registration." It was held in the case at bar that the section, construed in connection with article 6, § 2, declaring that no person shall be allowed to vote without registration, only required a majority of the registered voters in order to authorize a municipal corporation to contract a debt, the court saying that registration "is an indispensable condition of the right to vote, without compliance with which the elector, whatever his personal qualification may be, cannot exercise his franchise." *Southerland v. City of Goldsboro*, 1 S. E. 760, 96 N. C. 49.

**As registered voters.**

A qualified voter is one who by law is entitled to vote at an election. Where elect-

ors are required to register, an elector who fails to so register is not a qualified voter, although he possesses every other qualification. *State ex rel. Woodson v. Brassfield*, 67 Mo. 331, 337.

The term "qualified voters," in Const. art. 7, § 7, prohibiting municipal corporations from contracting any debts, etc., except for necessary expenses, unless by a vote of the majority of the qualified voters therein, means those whose names are registered as qualified voters, as required by Const. art. 6, § 2. *Southerland v. City of Goldsboro*, 1 S. E. 760, 96 N. C. 49.

"Qualified voters," as used in Const. art. 7, § 7, prohibiting counties, cities, etc., from incurring debts except on a vote of the majority of the qualified voters therein, means a class of persons whose competency to vote has been passed upon in their admission to registration. Qualified voters are those only who have been lawfully registered. *McDowell v. Massachusetts & S. Const. Co.*, 2 S. E. 351, 358, 96 N. C. 514.

The term "qualified voters," in Act 1898, § 99, p. 8, authorizing the permanent location of the county seat of Calhoun county by the vote of the qualified electors thereof, means those qualified to vote according to the provisions of the act, and therefore persons who have not registered as required by the act are not entitled to vote. The meaning of the term is to be determined from the statute in which it is found, and not alone from the general law governing the qualification of voters. *State v. Crook*, 28 South. 745, 749, 126 Ala. 600.

"Every definition of the qualification of voters," said Mr. Drake, the author of the Law of Attachment, arguing in *Blair v. Ridgely*, 41 Mo. 63, 97 Am. Dec. 248, "is but a statement of the terms on which men may vote; and in every instance such definitions refer to what a party has done, as well as to what he is. They say to the voter: 'If you have done certain things, you can vote.' He who does not register is not qualified to vote, and hence is not a 'qualified elector,' a phrase that is used five times in the Constitution to signify those who are entitled to go to the polls on election day and legally vote." It was held that a law requiring a registration before election day fixed a qualification for voting, and therefore was in violation of the clause of the Constitution which fixed the qualification of electors, and which did not require registration. *White v. Multnomah County Com'rs*, 10 Pac. 484, 486, 13 Or. 317, 57 Am. Rep. 20.

**QUALIFIED VOTERS VOTING.**

"Qualified voters voting," within the meaning of a statute providing that a township may subscribe to the capital stock of



a railroad whenever two-thirds of the qualified voters of such town, voting at an election held for that purpose, are in favor of such subscription, is not the same as the "qualified voters of the township," and therefore the statute is in conflict with the clause of the Constitution prohibiting the General Assembly from authorizing such subscription unless two-thirds of the qualified voters consent thereto. *State ex rel. Woodson v. Brassfield*, 67 Mo. 331, 347.

The term "qualified voters voting," in the township aid act of Missouri of March 23, 1868, authorizing a subscription by a township to the capital stock of railway companies on a vote of not less than two-thirds of the qualified voters of the township voting at an election on such question, means the voters actually voting, as the voters not voting are presumed to assent to the expressed will of the majority of those voting. *Cass County v. Johnston*, 95 U. S. 360, 365, 24 L. Ed. 416.

## QUALITY.

In defining "a," Webster says it is placed before nouns of the singular number, denoting an individual object or "quality" individualized; and "quality" is defined as (1) "the condition of being of such a sort, as distinguished from others; (2) special or temporary character; profession; occupation." *State v. Martin*, 30 S. W. 421, 423, 60 Ark. 843, 28 L. R. A. 153.

As used in the rule that no one can acquire the exclusive right to the use as a trade-mark of a generic word indicating or denoting merely quality of the article, "quality" is employed as denoting the grade, ingredients, or properties of the article. In some of the cases the word indicates generally the merit or excellence of the article as associated with or coming from a source, and when used in such sense there may be a valid trade-mark as indicating quality. *Dennison Mfg. Co. v. Thomas Mfg. Co.* (U. S.) 94 Fed. 651, 657.

The word "quality," as used in a contract providing that, if the engineer on board a certain steamship would approve the quality of coal for use on board that vessel, certain parties were to receive the same, etc., imports adaptiveness, suitability, and fitness for the purpose specified, and in their most comprehensive sense. *Heron v. Davis*, 16 N. Y. Super. Ct. (3 Bosw.) 336, 344.

### Evidence.

In an instruction that the jury, from the weight of testimony, should take into consideration not so much the number of witnesses that testified to any one given fact, but the "quality" of the testimony, and in weighing the quality of the testimony they

will take into consideration the interest of the witnesses and their appearance on the witness stand, the word "quality" may have meant the better evidence, and, if so, the court invaded the province of the jury. *Gilmore v. Seattle & R. R. Co.*, 69 Pac. 743, 744, 29 Wash. 159.

### Land.

The partial failure of consideration in the quality of the land for which the vendee may recoup damages in a suit for the purchase money must be understood as embracing not only qualities essentially inherent in the lands, as fertility of soil, but also qualities extrinsically added, such as preparation for cultivation, or any other material improvement made upon the land. In this case the court said: "To confine the term 'quality,' in this connection, to natural qualities, such as fertility of soil and the like, would be a narrow construction. It must be understood in a more comprehensive sense, as embracing not only qualities essentially inherent in the land itself, but also adventitious qualities—qualities extrinsically added, such as preparation for cultivation, or any other material improvement made on the land. This is the received sense in which the term is used when applied to reality." Thus it is laid down that in an "action brought for recovery of real property its quality should be shown, as whether it consists of houses, lands, or other hereditaments; and in general it should be stated whether the lands be meadow, pasture, or arable," etc. See *Steph. Pl.* p. 296; *Bouv. Law Dict.* "Quality." *Barnes v. Anderson*, 21 Ark. 125, 126.

## QUANTITY.

See "Definite Quantity."

The term "quantity," as used in Rev. St. 476, § 2504, Schedule M, relating to duties on imported fruit, and making an allowance for loss on decay which exceeds 25 per cent. of the quantity, relates to the whole importation of fruit, and not to the quantity in each particular package damaged. *Scattergood v. Tutton* (U. S.) 2 Fed. 28, 29.

A "quantity," when used in an indictment charging the larceny of various articles of property of the same kind, is a sufficient description thereof, without stating any specific number of the articles stolen. *Commonwealth v. Butts*, 124 Mass. 449, 452.

### Lumber.

"Quantity" may include "weights" or "amounts," but neither of these latter terms are accurately synonymous with "quantity." Under Rev. St. 1879, art. 280, imposing a penalty on a carrier for a failure to furnish to a shipper on demand a bill of lading stat-

ing the quantity of the shipment, a demand by the shipper of lumber of a bill of lading stating the weight or amount is insufficient to warrant an infliction of the penalty for its refusal. *Sherman, S. & S. Ry. Co. v. Conly* (Tex.) 37 S. W. 253, 254.

"Quantity," as used in Rev. St. 1879, art. 280, imposing a penalty on common carriers for refusing to give, when demanded, a bill of lading stating the quantity, character, and condition of the goods received, according to Webster is that which answers the question how much. It has the attribute of being so much, and not more or less. In the case of lumber, quantity might be ascertained with certainty by measurement or by weight. Describing lumber as "a car load" does not state the quantity. *Texas & P. Ry. Co. v. Cuteman* (Tex.) 14 S. W. 1069, 1070.

#### QUANTITY GUARANTIED.

A bill of lading acknowledging the receipt of a specific quantity of grain, and containing the words "quantity guarantied," and also providing that damage or deficiency in quantity as specified should be deducted from charges by the consignees, amounts to a guaranty that the carrier will deliver the amount specified in the bill of lading, or be responsible for the shortage. *Bissel v. Campbell*, 54 N. Y. 353, 358.

#### QUANTUM.

"Quantum," according to Webster, means quantity, amount; and amount, the sum total of two or more particular sums or quantities; the aggregate; the whole quantity; a totality. Where a telegraph company failed to deliver a message promptly, and the plaintiff proved his right to recover damages for the delay, the jury could consider mental anguish occasioned by such delay in fixing the "quantum" of damages. *Connolly v. Western Union Tel. Co.*, 40 S. E. 618, 622, 100 Va. 51, 58 L. R. A. 663, 93 Am. St. Rep. 919.

#### QUANTUM MERUIT.

A "quantum meruit" is in the nature of an action for the value of services rendered. *Bills v. Polk*, 72 Tenn. (4 Lea) 494, 495.

#### QUARANTINE.

##### Police regulation.

Vaccination distinguished, see "Vaccination."

To "quarantine" persons means to keep them, when suspected of having contracted or been exposed to an infectious disease, out of the community, or to confine them to a given place therein, and to prevent intercourse be-

tween them and the people generally of such community; and the authority granted by Const. art. 7, § 6, par. 2, to county officials to levy a tax for the purpose of "quarantine," does not authorize such officials to incur an indebtedness and levy taxes for the purchase of vaccine points for the use of the county in preventing the spread of smallpox within its borders. *Daniel v. Putnam Co.*, 38 S. E. 980, 981, 113 Ga. 570, 54 L. R. A. 292.

Under a general statute providing quarantine as the means to prevent the introduction of infectious or contagious disease, and a city charter authorizing the council to pass and enforce all ordinances deemed necessary or proper to prevent the introduction of infectious diseases, an ordinance providing "that it shall be unlawful for any person to import, sell or otherwise deal in cast-off garments, blankets, bedding or bedclothes in said city, provided that this ordinance shall not apply to the sale of said articles not imported, and that have not been used by persons having infectious diseases," is not authorized as a quarantine regulation, but is an unwarranted restraint of trade. *Town of Greensboro v. Ehrenreich*, 80 Ala. 579, 582, 2 South. 725, 60 Am. Rep. 130.

In the absence of an epidemic showing an apparent necessity therefor, an ordinance prohibiting any one from bringing second-hand clothing into a town, or exposing it for sale therein, without furnishing proof to the mayor that it did not come from an infected district, is not a valid exercise of a power to establish and enforce quarantine regulations, but is an unreasonable restraint of trade. *Town of Kosciusko v. Slomberg*, 9 South. 297, 68 Miss. 469, 12 L. R. A. 528, 24 Am. St. Rep. 284.

A "quarantine" is defined to be (1), properly, the space of 40 days; appropriately, the term of 40 days during which a ship arriving in port, and suspected of being infected with a malignant or contagious disease, is obliged to forbear all intercourse with the city or place. This time was chosen because it was supposed that any infectious disease would break out, if at all, within that period. (2) Hence the word means restraint of intercourse to which a ship may be subjected, on the presumption that she may be infected, either for 40 days or for any other limited period. Webster's Dict. The very idea of a quarantine implies that it is for a definite, limited time. *Gibson v. The Madras*, 5 Hawaii, 109, 116, 120.

##### Widow's right.

The right of the widow to remain in the capital message is in law called a "quarantine." *Davis v. Lowden*, 38 Atl. 648, 650, 56 N. J. Eq. 126.

By the common law the widow has the right to tarry in the mansion for 40 days

after the death of her husband, which is called her "quarantine." *Reagan v. Hodges*, 69 S. W. 581, 582, 70 Ark. 563; *Scrib. Dower*, 14. It is said that this provision was made in consideration of the destitute situation in which the widow was placed by the death of her husband. *Glenn v. Glenn*, 41 Ala. 571, 580.

A widow's "quarantine," at common law, was a right to remain in and to hold and enjoy the mansion house of her husband after his death, without being liable to pay any rent for the same, until dower should be assigned to her. This right was, however, limited by statute to the space of 40 days after the death of her husband, though it appears that by the ancient common law a widow was entitled to remain in her husband's mansion house for a year after his death. The widow's quarantine is regarded as a privilege, a benefit, but not as a freehold estate on the land. The interest given to her was temporary and fugitive in its purpose, and not designed for continuance beyond the expressed time, and as a means to constrain the heir to assign her dower without unreasonable delay. *Spinning v. Spinning*, 10 Atl. 270, 271, 43 N. J. Eq. (16 Stew.) 215.

A widow's right to quarantine is a possessory right on which an action of ejectment may be maintained, and is assignable, and carries with it all the incidents that belong to it prior to the transfer. *Phillips v. Presson*, 72 S. W. 501, 502, 172 Mo. 24 (citing *Fischer v. Siekmann*, 125 Mo. 165, 28 S. W. 435; *Carey v. West*, 139 Mo. 146, 176, 40 S. W. 661).

## QUARREL

"Quarrel," as used in an ordinance forbidding persons to quarrel, is a very comprehensive term, which would include a difficulty in which the owner of a store engaged in an attempt to eject a person from his premises who refused to go when ordered, though the ancient law would have given him a right to use force. *Metcalf v. People*, 30 Pac. 39, 2 Colo. App. 262.

Quarreling is the exchange of angry utterances between two or more persons, and not the mere use, in an ordinary tone, of vituperative and threatening words by one to another, who remains silent. It takes two to make a quarrel. *Carr v. City of Conyers*, 10 S. E. 630, 631, 84 Ga. 287, 20 Am. St. Rep. 357.

The term "quarrel," within the meaning of an accident policy which provides that if death occurs from assault provoked by quarreling no recovery can be had, cannot be construed to include every frivolous controversy which might in some sense be termed a "quarrel," although not a dispute or quarrel from

which the insured might reasonably expect anger to be provoked or injury to result. *Accident Ins. Co. v. Bennett*, 16 S. W. 723, 725, 90 Tenn. (6 Pickle) 256, 25 Am. St. Rep. 685.

## QUARRY.

Mine distinguished, see "Mine."

To "quarry" means to cut, dig, or take out, as from a quarry. A "quarry" is defined to be an excavation or other place from which stone is taken by cutting, blasting, or the like, and usually distinguished from a mine by being open widely at the top and front. *Ruttledge v. Kress*, 17 Pa. Super. Ct. 490, 495.

A "quarry" means, not an indefinite extent of stone or rock which may be worked, but the spot where the rock is quarried. *Shaw v. Wallace*, 25 N. J. Law (1 Dutch.) 453, 462.

"Quarries" are pits or excavations in the earth from which stones only are taken, as distinguished from "mines," from which metallic ores or other mineral substances are taken. *Marvel v. Merritt*, 6 Sup. Ct. 207, 208, 116 U. S. 11, 29 L. Ed. 550.

A "quarry" is a work for the excavation of minerals, where the whole excavation is open. *Murray v. Allred*, 43 S. W. 355, 358, 100 Tenn. 100, 39 L. R. A. 249, 66 Am. St. Rep. 740.

Since a quarry is an excavation or pit from which the slate is taken, the meaning of the phrase "working the quarry," as used in a lease requiring the forfeiture thereof for not working the quarry for a certain length of time, means the doing of any work necessary to the proper and convenient use of the pit, such as the removal of earth, debris, water, ice, or snow, as much as blasting and removal of the slate and rock, for the latter cannot be done unless the quarry is kept reasonably free from obstruction. *Miller v. Chester Slate Co.*, 18 Atl. 565, 566, 129 Pa. 81.

## QUARRYING.

A pledge, in a lease, to do such quarrying on the demised premises as is necessary to carry on the lessee's business as a boat builder, gives him a property in the rocks so quarried, and therefore the lessee is not required to account to the landlord for the stone so quarried. *McKee v. Brooks*, 20 Mo. 526.

## QUARTER.

"Quarter of corn," as used in renewed lease, by which the lessee was to yield up so many "quarters of corn," will be understood

to mean legal quarters, reckoning the bushel at eight quarters, although at that time the tenants paid by composition, reckoning the bushel at nine quarters. *Hospital St. Cross v. Lord Howard De Walden*, 6 Term R. 338, 343.

"Quarter," as used in descriptions of land, according to the government subdivisions, calling them the southeast "quarter," or the northeast "quarter," etc., designates a square piece of land; but such fact does not render a description of land as the south "quarter" indefinite, since the south one-quarter may be as accurately determined as the southeast one-quarter. *McCartney v. Dennison*, 35 Pac. 766, 767, 101 Cal. 252.

The word "quarter," as used in an ordinance providing that a license for running a barroom, drinking shop, etc., shall be paid each quarter, means a quarter of a year, and is not indefinite or uncertain. In re *Schneider*, 8 Pac. 289, 291, 11 Or. 288.

#### QUARTER CORNER.

A "quarter corner," as distinguished from a "section corner," in the government surveys means the corner on a section line midway between the section corners. *Rud v. Pope County Com'rs*, 68 N. W. 1062, 66 Minn. 358.

#### QUARTER OF A YEAR.

A "quarter of a year" is 91 days. *Pol. Code Cal.* 1903, § 3257.

#### QUARTER SCALE.

"Quarter scale," in reference to timber, is the rule employed to determine the amount of square-edged boards contained in any log, without regard to its quality. The log is squared at its smallest end, and the number of feet found by taking three-fourths of the diameter of the smallest end of the log and squaring it; thus, if a log is 40 inches in diameter and 12 feet long, 30 inches of the diameter, or three-fourths, is taken and squared, making 900 feet. *Bullock v. Consumers' Lumber Co. (Cal.)* 31 Pac. 367, 368.

#### QUARTER SECTION.

The general and proper acceptance of the term "quarter section," as well as its construction by the general land department, denotes the land in the subdivisional lines, and not the exact quantity which a perfect admeasurement of an unobstructed surface would declare. *Brown v. Hardin*, 21 Ark. 324, 327.

#### QUARTER SECTION LINE.

A "quarter line," as distinguished from a "section line," means a line running from

one quarter corner to another through the center of the section. *Rud v. Pope County Com'rs*, 68 N. W. 1062, 66 Minn. 358.

"Quarter section line," as used in a description of certain lands relative to the location of a certain public highway, means the east one of three straight lines, running north and south in the section, which divide it into three equal parts. *Jackson v. Rankin*, 30 N. W. 301, 303, 67 Wis. 285.

#### QUARTERS.

See "Public Quarters."

#### QUARTERONES.

"Quarterones," as used in the Spanish and French West Indies, applies to the issue of a white person and a tercerone; that is, a person possessing the blood of a white person and a mulatto. *Daniel v. Guy*, 19 Ark. 121, 131.

#### QUARTZ LODGE.

"Quartz lode" is a fissure or seam in the country rock, filled with quartz matter, bearing gold or silver, and may be wide or narrow; it varies in width from 1 inch, or even less, to 100 feet, or much more. The sides of the lode are represented and defined by the walls of the country rock, and these walls must be discovered, and the lode identified thereby, before it can be located and held as a lode. *Foot v. National Min. Co.*, 2 Mont. 402, 404.

#### QUASH.

See "Motion to Quash."

The word "quash," according to Bouvier, means to overthrow. The Century and Webster's Dictionaries define its legal meaning to be to abate, annul, overthrow, or make void. *Holland v. Webster*, 29 South. 625, 627, 43 Fla. 85; *Jones v. Wolfe*, 60 N. W. 563, 42 Neb. 272.

Mr. Abbott, in his Law Dictionary, defines "quash" to mean to annul, overthrow, or vacate by judicial acts. *Hood v. French*, 19 South. 165, 167, 37 Fla. 117.

The term "quash," when applied to writs of error or other writs, means to abate for some defect in the writ itself or in the form of the writ, which defect does not reach the merits of the case. *Bosley v. Bruner*, 24 Miss. (2 Cushm.) 457, 462.

Where proceedings are irregular, void, or defective, the courts will quash them both in civil and criminal cases. An indictment which is so defective that no judgment can be given on it, or where there is no juris-

diction of the offense, will be quashed. The remedy is applicable only to irregular, defective, or improper proceedings. Therefore it is error to quash the writ in an action brought in the name of a county treasurer, as obligee on a surplus bond given on the purchase of land for taxes, though the interest of the equitable owner did not appear. *Crawford v. Stewart*, 38 Pa. (2 Wright) 34, 36.

## QUASI.

The word "quasi" is a Latin word, signifying "as if; almost." It marks the resemblance, and supposes a little difference, between two objects. *People v. Bradley*, 60 Ill. 390, 402 (citing 2 Bouv. Law Dict. 411).

## QUASI CONTRACT.

The whole theory of the law of implied contracts was originated for the purpose of giving a remedy *ex contractu* for certain wrongs. *Nevada Co. v. Farnsworth* (U. S.) 89 Fed. 164, 165.

In contracts it is the consent of the contracting parties which produces the obligation. In quasi contracts there is not any consent. The law alone, or natural equity, produces the obligation by rendering obligatory the fact from which it results. Therefore these facts are called "quasi contracts," because, without being contracts, they produce obligations in the same manner as actual contracts. *McSorley v. Faulkner*, 18 N. Y. Supp. 460, 462.

Implied or constructive contracts are similar to constructive trusts of courts of equity, and in fact are not contracts at all. They are called "quasi contracts," because, without being contracts, they produce obligations in the same manner as contracts. *Munger Vehicle Tire Co. v. Rubber Goods Mfg. Co.*, 81 N. Y. Supp. 302, 303, 39 Misc. Rep. 817 (citing *People v. Speir*, 77 N. Y. 144, 150).

What is often termed an "implied contract," though it is more properly denominated a "quasi contract," is a matter of law. 1 Swift, Dig. 175. Such a contract rests merely on construction of law. It is one which the law, from the existence of facts, presumes the party has made. *Brackett v. Norton*, 4 Conn. 517, 524. A true implied contract, on the other hand, is one which may be inferred from the conduct of the parties, though not expressed in words. *Weinhouse v. Cronin*, 36 Atl. 45, 68 Conn. 250.

The term "quasi contract," which term is borrowed from the civil law, is correctly applied to cases where no true contract in fact exists, but where the law creates an ob-

ligation. Thus, in a large class of cases, where suit is brought to recover money which is paid by mistake or which has been obtained by fraud, it is said the law implies a promise to repay the money, when it is well understood that the promise is a mere fiction, in most cases without any foundation whatever in fact. The same practice has been adopted where necessities had been furnished to an insane person or to a neglected wife or child. The term "implied contract" cannot be correctly applied to such obligations, but it has been frequently so applied, arising from the fact that obligations generically different have been classed as such, not because of any real analogy, but, where the procedure of common law prevails, by the adoption of fiction in pleadings—that of a promise where none in fact exists, or can reasonably be supposed to exist—the favorite remedy of applied *assumpsit* exists. Quasi contracts are to be distinguished from implied contracts in that the latter arise from facts and circumstances in which a court or jury may fairly infer as a matter of fact that a contract exists between the parties. *Columbus, H. V. & T. Ry. Co. v. Gaffney*, 61 N. E. 152, 153, 65 Ohio St. 104.

## QUASI CORPORATION.

See "Public Quasi Corporation"; "Quasi Public Corporation."

The term "quasi corporations" is generally used to designate counties and other political divisions of a state possessing only a low order of corporate existence. *Scates v. King*, 110 Ill. 456, 466.

"Quasi corporation" is a phrase generally applied to a body which exercises certain functions of a corporate character, but which has not been created a corporation by any statute, general or special. *School Dist. No. 56 v. St. Joseph Fire & Marine Ins. Co.*, 103 U. S. 707, 708, 26 L. Ed. 601.

"Quasi corporations" are counties and hundreds in England, and counties, towns, etc., in this state. *Adams v. Wiscasset Bank*, 1 Me. (1 Greenl.) 361, 363, 10 Am. Dec. 88.

Towns, parishes, and proprietors of common lands, who hold meetings and regulate their proceedings under divers provisions of statutes enacted upon those subjects, are said to be quasi corporations. *Hayden v. Middlesex Turnpike Corp.*, 10 Mass. 397, 400, 6 Am. Dec. 143.

Quasi corporations are associations having the attributes of corporations, though not being such in the strict sense of the term, as a county. *Lawrence County v. Chattrol R. Co.*, 81 Ky. 225, 227.

The term "quasi corporations" is applied to such bodies as school districts or counties,

which are given such designation by reason of the limited number of their corporate powers. The designation is used to distinguish them from corporations aggregate and from municipal corporations proper, such as cities and towns acting under charters or incorporating statutes. *Kennedy v. Queens County*, 62 N. Y. Supp. 276, 279, 47 App. Div. 250.

Quasi corporations include inhabitants of any district who are invested with particular powers without their consent, such as counties and hundreds in England, and counties, towns, etc., in Massachusetts. Although quasi corporations are liable to information or indictment for public duty imposed on them by law, yet no private action can be maintained against them for breach of their corporate duty unless such action is given by statute. *Riddle v. Merrimac River Locks & Canals*, 7 Mass. 169, 187, 5 Am. Dec. 35.

The term "quasi corporations" includes involuntary corporations, as counties, towns, school districts, and a township in New England. There is a distinction between the liability of a municipal corporation made by the acceptance of a village or city charter and such quasi corporations. The liability of the former is greater than that of the latter, even when invested with corporate capacity and the power of taxation. The latter are auxiliary to the state, merely, and corporations of the very lowest grade, and invested with the smallest amount of power. Whether the distinction and liability is based upon sound principle or not, it is so well settled that it cannot be disturbed. *Barnes v. District of Columbia*, 91 U. S. 540, 552, 23 L. Ed. 440.

Towns, school districts, municipal societies, and boards of commissioners, etc., appointed to perform public service may be considered under our institutions as quasi corporations with limited powers coextensive with duties imposed on them by a statute or usage, but restrained from the general use of the authority which belongs to corporations under the common law. They are not bodies politic and corporate, with the general powers of corporations. *English v. Jersey City*, 42 N. J. Law (13 Vroom) 275, 277.

Quasi corporations, as distinguished from private corporations, are aggregate corporations, such as the inhabitants of a district, who by statute are invested with particular powers without their consent. Of this description are counties and hundreds in England. Such a corporation is not liable to individuals for an omission or malfeasance of its corporate duties, in the absence of any statute creating such liability. A city, therefore, is not liable to an action

for an injury to plaintiff in having his house blown up during a fire, by the command of the authorities, to prevent the further spreading of the fire, though the fire was extinguished before it reached his house; there being no statutory liability in such a case. *White v. City Council of Charleston (S. C.)* 2 Hill, 571, 574.

#### As agencies of state.

Quasi corporations are that class of governmental institutions, such as school districts, etc., which possess some corporate functions and attributes, but are primarily political subdivisions—agencies in the administration of civil government—and their corporate functions are granted to enable them more readily to perform their public duties. *Freeland v. Stillman*, 30 Pac. 235, 236, 49 Kan. 197.

Quasi corporations are auxiliaries of the state, such as incorporated school districts, counties, etc., which owe their creation and all their powers and liabilities to the statutes of the state. They are called "quasi corporations" because, when considered with reference to the limited number of their corporate powers, they rank low down in the scale of corporate existence. *Powder River Cattle Co. v. Johnson County Com'rs*, 29 Pac. 361, 365, 3 Wyo. 597 (quoting *Dill. Mun. Corp.* pp. 30-33).

#### Counties.

See, also, "County."

The term "quasi corporations" includes counties, for the reason that, considered with respect to their powers, duties, and liabilities, they stand low down in the scale or grade of corporate existence. This designation is employed to distinguish them from private corporations aggregate, and from municipal corporations proper, such as cities acting under general or special charters. *Burnett v. Maloney*, 37 S. W. 689, 693, 97 Tenn. 697, 34 L. R. A. 541.

#### As political subdivision.

The term "quasi corporation" or "civil corporation" includes public corporations, like counties, townships, school districts, and the like, which organizations are mere territorial and political divisions of the state, established exclusively for public purposes connected with the administration of local government. They are involuntary corporations, because created by the state without the solicitation or even consent of the people within their boundaries, and made depositories of limited political and governmental functions, exercised for the public good, in behalf of the state, and not for themselves. They are no less than public agencies of the state. They are not liable in a private ac-

tion in damages for negligence in the performance of their public duties, except when made so by legislative enactment. *Dunn v. Brown County Agricultural Soc.*, 18 N. E. 496, 497, 46 Ohio St. 93, 1 L. R. A. 754, 15 Am. St. Rep. 556.

#### **School district.**

School districts are quasi corporations of the most limited powers known to the law. *Denman v. Webster*, 73 Pac. 139, 140, 139 Cal. 452.

The inhabitants of a school district may be considered as a quasi corporation, with limited powers, coextensive with the duties imposed on them by statute or usage, but restrained from a general use of the authority which belongs to these metaphysical persons by the common law. The same may be said of all the numerous corporations which have been from time to time created by various acts of the Legislature; all of them enjoying the power which is expressly bestowed on them, and, perhaps, in all instances where the act is silent, possessing, by necessary implication, the authority which is requisite to execute the purposes of their creation. The inhabitants of a school district have sufficient corporate powers to maintain an action on a contract to build a school-house, and to make a lease of land to them. *Inhabitants of Fourth School Dist. v. Wood*, 13 Mass. 193, 199.

School districts are by the general laws declared a body corporate, and are quasi corporations, invested with corporate powers *sub modo*, and for a few specified purposes only. *Town of Sauk Centre v. Moore*, 17 Minn. 412, 417, (Gil. 391, 396) (citing *Goodnow v. Ramsey County*, 11 Minn. 31, 41 [Gil. 12, 19]).

School districts are not municipalities, but mere territorial divisions for limited purposes, and belong to the class of quasi corporations which exercise some of the functions of a municipality within a prescribed sphere. *Briegel v. City of Philadelphia*, 19 Atl. 1038, 135 Pa. 451, 20 Am. St. Rep. 885.

#### **Township.**

A township is a quasi corporation, and not a municipal corporation proper. *Atina Life Ins. Co. v. Pleasant Tp.* (U. S.) 53 Fed. 214, 217; *Madden v. Lancaster County* (U. S.) 65 Fed. 188, 191, 12 C. C. A. 566.

#### **QUASI CRIMINAL.**

The Constitution requiring that the criminal court of Cook county shall have jurisdiction of cases of a quasi criminal nature was intended to embrace and include all

offenses not crimes or misdemeanors, but offenses in the nature of crimes, which are punishable, not by indictment, but by forfeitures and penalties, such as *qui tam* actions, prosecutions for bastardy, informations in the nature of *quo warranto*, and suits for the violation of city ordinances. *Wiggins v. City of Chicago*, 68 Ill. 372, 375.

"Quasi criminal," in a statute giving courts jurisdiction of causes of a quasi criminal nature, means relating to or having the character of crime. It therefore includes every species of case relating to crime, and such as are regarded by the law as if a crime, although a little different. *People v. Bradley*, 60 Ill. 390, 402.

"Quasi criminal nature," as used in a constitutional provision to the effect that the criminal court of Cook county shall have jurisdiction in cases of the quasi criminal nature, means all offenses not crimes or misdemeanors, but in the nature of crimes, and which are punished, not by indictment, but by forfeitures and penalties. *Wiggins v. City of Chicago*, 68 Ill. 372, 375.

An action under Rev. St. § 1571, to recover the price paid for intoxicating liquors sold in violation of the statute, is a civil action, and not quasi criminal in character, although the constitutionality of the statute punishing as a crime the unlawful sale of intoxicating liquors is sustained under the general power to make proper police regulation. But the provision which takes away the right to recover the price of liquors unlawfully sold is assimilated to the statute denying the right to recover usurious interest. And the conferring the right to recover the price of liquors paid is of like character. The remedy is enforced by a civil action, and is in all respects governed by the rules applicable to such action. *Woodward v. Squires*, 39 Iowa, 435, 438.

#### **QUASI DERELICT.**

A quasi derelict is a vessel which, though not abandoned, is unable to continue on its voyage by reason of the disability of its crew to navigate it; one whose crew is disabled by sickness, etc. *Sturtevant v. George Nicholas* (U. S.) 23 Fed. Cas. 333, 334.

#### **QUASI DWELLING HOUSE.**

The term "quasi dwelling houses" is sometimes used to designate barns and other outhouses which are in such proximity to the mansion house as to render a person breaking and entering such barns or outhouses, etc., guilty of burglary. *Quinn v. People*, 71 N. Y. 561, 568, 27 Am. Rep. 87.

**QUASI INDIVIDUAL.**

The term "quasi individual" has been used to designate a private corporation. Such a corporation is a pure creation of the legislative will, having only such powers as are conferred expressly or by necessary implication. It has no inherent or natural right, like a citizen. *State v. Haun*, 54 Pac. 130, 133, 7 Kan. App. 509.

**QUASI JUDICIAL.**

When the law commits to an officer the duty of looking into facts and acting upon them, not in a way which it specially directs, but after a discretion in its nature judicial, the function is quasi judicial. *Mitchell v. Clay County* (Neb.) 96 N. W. 673, 678.

The action of the comptroller of the currency in ordering an assessment on the stockholders of an insolvent national bank involves a determination of the necessity for such assessment, which is quasi judicial, and is conclusive on the stockholders. *De Weese v. Smith* (U. S.) 97 Fed. 309, 317.

The insurance statutes vest the Commissioner of Insurance with discretionary power, and give him authority to see that all laws relating to insurance companies are enforced. Held, that the commissioner's duties are quasi judicial, so that mandamus will not lie to compel him to issue a certificate of admission to a foreign insurance company, which has been refused after a hearing. *American Casualty Ins. & Security Co. v. Fyler*, 22 Atl. 494, 60 Conn. 448, 25 Am. St. Rep. 337.

**QUASI JURISDICTIONAL FACTS.**

With respect to quasi jurisdictional facts which are necessary to be alleged and proved in order to set the machinery of the law in motion, the finding of the court is as conclusively presumed to be correct as its findings with respect to any other matter in issue between the parties. Examples of quasi jurisdictional facts are the allegations and proof of the requisite diversity of citizenship, or the amount in controversy, in a federal court, which, when found by such court, cannot be questioned collaterally; the existence and amount of the debt of a petitioning debtor in an involuntary bankruptcy; the fact that there is insufficient personal property to pay the debts of a decedent when application is made to sell his real estate; the fact that one of the heirs of an estate had reached his majority, when the act provided that the estate should not be sold if all the heirs were minors. Quasi jurisdictional facts are those facts which do not go to the subject-matter or to the parties, but to a preliminary fact necessary to be proven to au-

thorize the court to act. *Noble v. Union River Logging R. Co.*, 13 Sup. Ct. 271, 273, 147 U. S. 165, 37 L. Ed. 123.

**QUASI MUNICIPAL CORPORATION.**

Quasi municipal corporations are corporations commonly known as counties, townships, and school districts. The common-law rule is that no private law action can be maintained against municipal corporations for the neglect of a public duty imposed on it by law for the benefit of the public, and from the performance of which the corporation receives no pecuniary profit. As respects what are called "quasi municipal corporations," this is the rule, without exception; but as respects what are called "municipal corporations proper," such as cities and incorporated villages, the general current of the authorities is to the effect that, even in the absence of an express statute, they may be impliedly liable for acts of negligence in the performance of duty imposed on their officers and agents, while for the same or a similar wrong there is no liability resting on quasi municipal corporations. *Snider v. City of St. Paul*, 51 Minn. 466, 471, 53 N. W. 763, 18 L. R. A. 151.

**QUASI PUBLIC CORPORATION.**

Railroad company as, see "Railroad Company."

Quasi public corporations partake in many respects of the nature of both public and private corporations, and are such as have concern with some of the expensive duties of the state, the trouble and charge of which are undertaken and defrayed by them in consideration of a certain emolument allowed and secured to their members. *McKim v. Odom* (Md.) 3 Bland, 407, 419.

The general term "corporation" is divided into those which are private only, formed by voluntary agreement for private purposes, and those which are created by the state for the purposes of government and management of public affairs, which are public or quasi public corporations. *Murphy v. Board of Chosen Freeholders*, 31 Atl. 229, 232, 57 N. J. Law (28 Vroom) 245.

A bank of deposit and discount is a quasi public institution, and properly subject to statutory regulations for the benefit of depositors. *Campbell v. Watson*, 50 Atl. 120, 124, 62 N. J. Eq. 396.

**QUASI USUFRUCT.**

Imperfect or quasi usufruct is that which is of things which would be useless to the usufructuary if he did not consume or ex-



pend them, or change the substance of them, as money, grain, and liquors. Civ. Code La. 1900, art. 534.

## QUAY.

A quay is a vacant space between the first row of buildings and the water's edge, used for the reception of goods and merchandise imported or to be exported, and designates a space of ground appropriated to the public use—such use as the convenience of commerce requires. *City of New Orleans v. United States*, 35 U. S. (10 Pet.) 662, 715, 9 L. Ed. 573. A space of ground appropriated to the public use—such use as the convenience of commerce requires. With regard to location, it is usually a vacant space along the shore of navigable waters, between the first row of buildings and the water's edge, and is used for the reception of goods and merchandise imported or to be exported. *Fleitas v. City of New Orleans*, 24 South. 623, 631, 51 La. Ann. 1.

A quay is a landing place, a place where vessels are loaded and unloaded, a wharf, usually constructed of stone, but sometimes of wood, iron, etc., on a line of coast or the river bank, or around a harbor or a dock. *St. Anna's Asylum v. City of New Orleans*, 29 South. 117, 121, 104 La. 392.

## QUESTION.

See "Judicial Question"; "Political Question"; "Specific Question"; "Sum in Question."

Other question, see "Other."

A question to be decided by a judge implies something in controversy, or which may be the subject of controversy. An order by a county judge that a day be assigned for a hearing on the allowance of the probate of a will was the determination of no question, but was only preliminary to the making of questions. *McFarlane v. Clark*, 39 Mich. 44, 46, 33 Am. Rep. 346.

Rev. St. § 652, declaring that when a judgment or decree is entered in a civil suit in a circuit court held by two judges, in the trial whereof any question has arisen upon which the opinions of the judges are opposed, the point, etc., shall be certified, should be construed to mean a question of law which must be capable of being presented in a single point. *California Artificial Stone Pav. Co. v. Molitor*, 5 Sup. Ct. 618, 621, 113 U. S. 609, 28 L. Ed. 1106 (cases cited).

## QUESTION ARISING UNDER PATENT LAWS.

There is a clear distinction between a case arising under the patent laws and a

question arising under the patent laws. The former arises when the plaintiff, in his opening pleading, be it a bill, complaint, or declaration, sets up a right under the patent laws as ground for a recovery. The latter may appear in the plea or answer or in the testimony. The determination of such question is not beyond the competency of the state tribunals. *Carleton v. Bird*, 47 Atl. 154, 156, 94 Me. 182.

## QUESTION OF CONSTITUTIONAL LAW.

"Question of constitutional law," as used in Const. art. 6, § 11, providing that the Legislature may require the Supreme Court to give an opinion on "important questions of constitutional law on solemn occasions," means questions of law only, arising on the Constitution alone. It can scarcely be any other than some question of the proper construction or true meaning of some provision, clause, or words contained in the Constitution; and it must be, in its own nature, a judicial question, the final determination of which by the organic frame of our government properly belongs to the judiciary. In calling for such opinions to be given in a manner somewhat novel and extrajudicial, and in matters not in litigation between contending parties, it must have been understood by the framers of the Constitution, and would seem to be the clear intent of the section, that such question should be important in reference to the public interest, and the necessary and immediate action of the executive or legislative branch of the government on some matter of unusual magnitude and solemn concern for the public good, and on a pure question of law, which could only be finally determined by the Supreme Court as a judicial question. Answer to Questions by Senate, Dec. 9, 1895, 37 Mo. 135, 137.

## QUESTION OF FACT.

See "Particular Question of Fact."

## QUESTION OF FRAUDULENT INTENT.

"Question," as used in Pub. St. c. 51, § 4, relating to fraudulent contracts and conveyances, and providing that "the question of fraudulent intent" shall be deemed a question of fact, and not of law, means the question of the existence of fraudulent intent. *Gere v. Murray*, 6 Minn. 305, 317 (Gil. 213).

## QUESTION OF LAW AND FACT.

See "Mixed Question of Law and Fact."

## QUESTION TO BE TRIED.

Some distinction was made in early cases between the term "defense" and "question

to be tried." But under the Code, providing that two or more actions in favor of the same defendant for causes of action which may be joined may be consolidated by the court, to authorize the consolidation the defense or question to be tried must be substantially the same. There is no distinction between the terms "defense" and "question to be tried." *Perkins v. Merchants' Lithographing Co.*, 47 N. Y. Supp. 712, 713, 21 Misc. Rep. 516.

### QUESTIONED.

By the words "if the title is questioned by a suit, either prosecuted or threatened," is not meant an idle suit brought or threatened when there is really no ground for such suit or such threat. They mean a bona fide claim set up, on which a suit is brought or threatened. *Kinports v. Rawson*, 2 S. E. 85, 90, 29 W. Va. 487.

### QUI TAM ACTION.

As civil action, case, or suit, see "Civil Action—Case—Suit—Etc."

A qui tam action is an action brought under a statute which gives a certain penalty, to be recovered by action by any person who will sue for the same, and which gives the person so suing a portion of the penalty. In re *Barker*, 56 Vt. 14, 20.

An action against an overseer of a road for neglect of duty must be a qui tam action. *Harris v. Moore*, 1 N. J. Law (Coxe) 44, 52.

Qui tam or popular actions are those given by a statute for the recovery, in whole or in part, of forfeitures or penalties, to any person who may sue for the same. *Grover v. Morris*, 73 N. Y. 473, 478 (citing 3 Bl. Comm. 160).

### QUIA TIMET.

See "Bill Quia Timet."

### QUICK.

Living; alive. "Quick chattels must be put in pound overt, that the owner may give them sustenance; dead need not." Bl. Law Dict. (quoting Finch, Law, b. 2, c. 6).

### QUICK DISPATCH.

See "Customary Quick Dispatch."

An agreement for quick dispatch in discharging a vessel overrides any customary mode of discharging vessels by which they take their turn at the wharf. *Davis v. Wallace* (U. S.) 7 Fed. Cas. 182. So that, under

a charter providing for quick dispatch in discharging, the charterer is liable to demurrage if the vessel from the crowded condition of the port was delayed in procuring a berth. *Mott v. Frost* (U. S.) 47 Fed. 82, 84; *Thacher v. Boston Gaslight Co.* (U. S.) 23 Fed. Cas. 874.

A charter party provided that the cargo should be loaded and discharged with all quick dispatch, as fast as the captain can receive and deliver. Held, that such clause obligated the charterer to receive the cargo as fast as the master could deliver it, and they thereby took upon themselves the risk of being able, without delay, to provide a suitable berth for the vessel, and could not excuse themselves from demurrage by showing that they used reasonable diligence, and discharged the vessel within a reasonable time, considering the crowded condition of the port. *Bjorkquist v. Certain Steel Rail Crop Ends* (U. S.) 3 Fed. 717, 718.

### QUICK WITH CHILD.

"Quick with child" means having conceived. *Reg. v. Wycherley*, 8 Car. & P. 262, 263.

A woman is quick with child from the period of conception and the commencement of gestation. *Evans v. People*, 49 N. Y. 86, 89.

A woman is quick with child, within the meaning of the rule that an abortion cannot be produced till such time, the moment the womb is instinct with embryonic life and gestation has begun. *Mitchell v. Commonwealth*, 78 Ky. 204, 207, 39 Am. Rep. 227.

### Big with child synonyms.

See "Big with Child."

### As feeling child alive.

The common understanding of the words is that a woman is not quick with child until she has felt the child alive and quick within her. *Commonwealth v. Parker*, 50 Mass. (9 Metc.) 263, 266, 43 Am. Dec. 396 (citing *Rex v. Phillips*, 3 Campb. 73).

"Quick with child" expresses the time subsequent to the mother feeling the child quicken. Quickening is the incident, not the inception, of vitality. It was formerly held that quickening was the commencement of vitality with the fetus, before which it could not be considered as existing. But this view is no longer held by our most eminent writers. Dr. Beck says: "The motion of the fetus when felt by the mother is called 'quickening.' It is important to understand the sense attached to it formerly and at the present day. The ancient opinion, and on which, indeed, the laws of our country have been founded, was that the fetus became

animated at this period; that it acquired a new mode of existence. This is altogether abandoned. The fetus is certainly, if we speak physiologically, as much a living being immediately after conception as at any other time before delivery, and its future progress is but the development and increase of those constituent principles which it then receives." *Commonwealth v. Reid* (Pa.) 1 Leg. Gaz. 182, 199.

#### **Pregnant distinguished.**

A woman is said to be quick with child from the period of conception and the commencement of gestation, but is only pregnant with a quick child when the child has become quickened in the womb. *Evans v. People*, 49 N. Y. 86, 89.

The distinction between a woman being pregnant and being quick with child is applicable mainly, if not exclusively, to criminal cases, and it does not apply to cases of descents, devises, and other gifts. *Hall v. Hancock*, 32 Mass. (15 Pick.) 255, 257, 26 Am. Dec. 598.

#### **As with quick child.**

The phrase "quick with child" is synonymous with the phrase "with quick child," both importing that the child has quickened in the womb. *State v. Cooper*, 22 N. J. Law (2 Zab.) 52, 57, 51 Am. Dec. 248; *Reg. v. Wycherley*, 8 Car. & P. 262, 263.

#### **QUICKSAND.**

Quicksand is a fine-grained, loose sand, into which a ship sinks by her own weight as soon as the water retreats from her bottom. *The Sandringham* (U. S.) 10 Fed. 556, 562 (citing *Admiral Smyth*, Dict. Nautical Terms).

#### **QUIET.**

An article which stated that plaintiff was arrested for drunkenness and disturbance, but that a \$10 note "quieted" the affair, imported that the charge subsided or the arrest was abandoned for the sum named. *Stacy v. Portland Pub. Co.*, 68 Me. 279, 286.

#### **QUIET ENJOYMENT.**

See "Covenant for Quiet Enjoyment."

#### **QUIET HOUSE.**

A quiet house or place of business, within the meaning of the chapter relating to the taxation of the sale of liquors, is one in which no music, loud or boisterous talking, yelling, or indecent or vulgar language is allowed, used, or practiced, or any other noise calculated to disturb or annoy any persons residing or doing business in the vicinity of

such house or place of business, or those passing along the streets or public highways. *Rev. St. Tex.* 1895, art. 5060g; *State v. Austin Club*, 89 Tex. 20, 25, 33 S. W. 113, 30 L. R. A. 500; *State v. Drake*, 86 Tex. 329, 335, 24 S. W. 790.

#### **QUIETUS.**

The term "quietus" was a name given to a process in Rhode Island by which an administrator might be fully discharged by the probate court. *White v. Ditson*, 4 N. H. 606, 607, 140 Mass. 351, 54 Am. St. Rep. 473.

#### **QUINTERONES.**

"Quinterones," as used in the Spanish and French West Indies, applies to persons who are the issue of a white person and a quarterone, the latter being the issue of a white person, and of the issue of a white person and a mulatto. *Daniel v. Guy*, 19 Ark. 121, 131.

#### **QUIT.**

See "Notice to Quit."

Where defendants entered on another's land and went to work tearing down a fence, and the owner told them to quit, and not to break the lumber, the word "quit," as so used, meant to leave off or desist, and was not equivalent to notice to depart. There is a material distinction between a notice to desist from the commission of an unlawful act and a notice to depart from the premises. *Ryan v. State*, 31 N. E. 1127, 1128, 3 Ind. App. 396.

To quit, as used in Comp. Laws 1879, c. 55, § 7, requiring a landlord to give a tenant notice to quit, is synonymous with the words "to leave," as used in a notice given under the statute to a tenant to leave rented premises. *Douglas v. Anderson*, 4 Pac. 257, 32 Kan. 350.

#### **As sell.**

The phrase "quit all my right and title," in a deed which, with the husband's grantor, in consideration, etc., quit under the grantee all right and title to the premises, was considered tantamount to the word "sell" or "release," and to be sufficient to pass the husband's interest or title to the land in question to the grantee. *Gordon v. Haywood*, 2 N. H. 402, 404.

#### **QUITCLAIM.**

Under a power given to the selectmen of a town to execute a release of title to lands, a deed purporting to grant, sell, and quitclaim is a substantial execution of the au-

thority; the word "quitclaim" being of equivalent meaning with the term "release." *Hill v. Dyer*, 3 Me. (3 Greenl.) 441, 445.

Though the word "quitclaim" may be used in a deed, if the deed nevertheless purports to convey the land itself, and not the mere right or title of the grantor, and if the grantee pay the purchase money without notice of any claim by a third person, he will be protected, as an innocent purchaser, against an unregistered deed of the latter. *Dycus v. Hart*, 21 S. W. 299, 2 Tex. Civ. App. 354.

The use of the word "quitclaim" in a conveyance does not restrict it, if the other language employed in the instrument indicates the intention to convey the land itself. *Garrett v. Christopher*, 74 Tex. 453, 12 S. W. 67, 15 Am. St. Rep. 850.

### QUITCLAIM AND CONVEY.

The words "quitclaim and convey," in a contract whereby the owner of real estate agreed to quitclaim and convey the same, meant convey by a quitclaim, and only called for a quitclaim deed. *Braune v. Towne*, 56 Minn. 126, 128, 57 N. W. 454.

### QUITCLAIM DEED.

See "Remise, Release, and Quitclaim."

A quitclaim deed is a form of deed in the nature of a release, containing words of grant as well as release. Mr. Anderson, in his Law Dictionary, defines a quitclaim deed as a deed in the nature of a release, containing words of release. *State v. Kemmerer*, 84 N. W. 771, 773, 14 S. D. 169.

A quitclaim deed is as much a conveyance as any other kind of deed, and it will convey what the grantor has, just as well as any other deed. It is generally held, however, that a quitclaim deed will convey nothing more than what the grantor actually owns. *Utey v. Fee*, 7 Pac. 555, 560, 33 Kan. 683.

A quitclaim deed contains no covenants, and does not purport to convey anything more than the interest of the grantor at the time of its execution. *Balch v. Arnold*, 59 Pac. 434, 435, 9 Wyo. 17.

Quitclaim deeds operate as primary or original conveyances. *Smith v. Pendell*, 19 Conn. 107, 112, 48 Am. Dec. 146.

A deed by several persons described as heirs, and therefore presumably having undivided interests, though in words undertaking only to "quitclaim all our, and each of our, right, title, claim, and interest," and in the habendum clause using the words "above-released premises," does not signify an intention to convey only a chance of title, and is not a quitclaim deed. *Moore v.*

*Swift*, 67 S. W. 1065, 1066, 29 Tex. Civ. App. 51.

The effect of a quitclaim deed at common law is probably the same as that prescribed by statute to a quitclaim deed in statutory form; that is to say, it has "the effect of a conveyance in fee simple to the grantee, his heirs and assigns, of all right, title, interest, and estate of the grantor, either in possession or expectancy, in and to the premises therein described, and all rights, privileges, and appurtenances thereto belonging" (Rev. St. 633, § 2208). *Martin v. Morris*, 22 N. W. 525, 530, 62 Wis. 418.

A quitclaim or release deed is one of the regular modes of conveying property, and is almost the only mode in practice where a party sells, and does not wish to warrant the title. Webster says, "In law, a release, or deed of release, is a conveyance of a man's right in lands or tenements to another who has the same estate in possession." This is a strictly technical definition, by long established practice. It makes no difference whether the releasor has an existing estate in possession or not. The release will convey whatever interest the releasor has in the property. *Ely v. Stannard*, 44 Conn. 528, 533, 534.

"Quitclaim deed" is defined by Bouvier as a form of deed in the nature of a release. "It may be construed to be a bargain and sale, or any other lawful consequence by which the estate may pass, and the intention of the parties be effected, the recording of the deed being equivalent to livery and seizin." *Nathans v. Arkwright*, 66 Ga. 179, 186 (citing *Oliver's Conveyancing*, 225, 228; 61 Ga. 608).

A quitclaim or release deed is one of the regular modes of conveying property known to the law. It is almost the only mode in practice where a party sells property, and does not wish to warrant the title. Formerly the release was required to be to one having some estate in possession, but, by long-established practice, it makes no difference now whether he has an existing estate in possession or not. The release will convey to him, under any circumstances, whatever interest the releasor has in the property. Under this principle a quitclaim deed of "all right, title, interest, claim, and demand whatsoever which I, the said releasor, have or ought to have in or to" a certain tract of land, is sufficient to pass a right of entry for the breach of covenants contained in a former deed by the same grantor, though the quitclaim deed also contained the statement that the property had been theretofore mortgaged to the grantor. *Hoyt v. Ketcham*, 5 Atl. 606, 608, 54 Conn. 60.

A quitclaim deed is sufficient to invest the grantee with all the rights of his grantor. In principle, there is but little difference in this respect between a quitclaim deed and

the deed of a special master under a decree of foreclosure, which conveys only the right, title, and interest of the defendant mortgagor. Both conveyances pass the same estate in extent—that is, whatever the grantor or the mortgagor has, whether it be fee simple, life estate, or remainder. *Johnson v. Johnson*, 70 S. W. 241, 246, 170 Mo. 34, 59 L. R. A. 748.

**A quitclaim deed is not a mere release.** It has the effect of completely transferring whatever title the grantor had to the persons named as grantees, and of giving to each the interest specified. Any kind of a legal tenure may be built up by such a conveyance. Such a conveyance affects only the liability of the grantor if the grantees do not acquire a good title. *Chew v. Kellar*, 71 S. W. 172, 175, 171 Mo. 215.

#### **After-acquired interest.**

A quitclaim deed or release of all one's right, title, and interest purports to convey and does convey no more than the present interest of the grantor, and does not operate to pass an interest afterward acquired. *Harrison v. Boring*, 44 Tex. 255, 262.

#### **As color of title.**

See "Color of Title."

#### **As conveyance or grant.**

See "Conveyance"; "Grant."

#### **Conveyance of grantor's interest.**

An allegation in a petition that a certain person, for a valuable consideration, sold and conveyed to the defendant, by a good and sufficient deed, all his right, title, and interest in and to the lands, does not show that the deed was a quitclaim deed. A deed by which a party sells and conveys all his right, title, and interest in land is not necessarily a quitclaim deed. *Southern Pac. R. Co. v. Townsend* (U. S.) 62 Fed. 161, 164.

#### **Definite estate conveyed.**

Where the granting clause of a quitclaim deed is quitclaim in form, but there are expressions in other parts of the instrument which indicate an intention to do more than merely release any claim which the grantor may have, the intention of the parties is to be ascertained by considering all the provisions of the deed; and, if it appear that it was the intention of the parties to convey the fee simple or any definite estate in the land, effect will be given to such intention, and the deed will operate by way of estoppel, so that any estate subsequently acquired by the grantor will inure to the benefit of the grantee. *Balch v. Arnold*, 59 Pac. 434, 435, 9 Wyo. 17.

#### **Doubtful title implied.**

A quitclaim deed implies a doubtful title in the grantor, and, such being its character,

it should not be held to pass anything more than a doubtful title. A complaint alleged that plaintiff had a docketed judgment against R., and that certain unpatented mining claims were conveyed by deed absolute from D. to R., who on the same day gave a quitclaim deed to F., and that the property was sold to plaintiff at judgment sale. F. was in the possession of the property at the time the quitclaim deed was made. Held, that there being neither an allegation that R. ever owned the property, nor that F. ever got any property or title from him, and there being an implication of doubt as to the title from R., owing to his having given a quitclaim deed to one in possession, the complaint was insufficient to sustain a suit on the theory that the judgment sale of the land to plaintiff transferred to him title to the claims.—*Butte Hardware Co. v. Frank*, 65 Pac. 1, 4, 25 Mont. 344.

#### **Warranty of right to convey.**

A quitclaim deed purports to release and quitclaim only what interest the grantor possesses at the time. By the use of this form of conveyance he does not thereby affirm the possession of any title, and is not precluded from subsequently acquiring a valid title, and from attempting to enforce it. *Morrison v. Whiteside*, 42 S. E. 729, 730, 116 Ga. 459.

#### **QUITCLAIM, REMISE, AND RELEASE.**

As used in a deed, the words "forever quitclaim, remise, and release" are not words of release only, but are operative words of conveyance, though the grantor has no prior estate. Thus, in *Wilson v. Albert*, 1 S. W. 209, 89 Mo. 537, the same operative words were used in a deed of quitclaim then under consideration, and it was ruled that the deed contained sufficient operative words of conveyance. The same rule was subsequently announced in *Bray v. Conrad*, 13 S. W. 957, 101 Mo. 331, and must be regarded as the settled law of this state. *McAnaw v. Tiffin*, 45 S. W. 656, 657, 143 Mo. 667.

#### **QUO WARRANTO.**

See "Information in the Nature of Quo Warranto."

The old common-law writ of quo warranto was a prerogative writ, to be applied for on behalf of the crown, as a matter of right, as against one who had usurped franchises or liberties, and for the purpose of inquiring by what right he claimed to do so. *Buckman v. State*, 15 South. 697, 699, 34 Fla. 48, 24 L. R. A. 806; *State ex rel. Weed v. Meek*, 31 S. W. 913, 915, 129 Mo. 431; *State v. Allen* (Tenn.) 57 S. W. 182, 190; *Territory v. Ashenfelter*, 12 Pac. 879, 884, 4 N. M. (Johns.) 85; *Attorney General v. Sands*, 44 Atl. 83, 85, 68 N. H. 54; *Attorney General v.*

McCaughy, 43 Atl. 646, 648, 21 R. I. 341; *Casey v. Chase*, 44 Atl. 872, 64 N. J. Law, 207; *State v. Dayton Traction Co.*, 60 N. E. 291, 64 Ohio St. 272; *Commonwealth v. Lexington & H. Turnpike Road Co.*, 45 Ky. (6 B. Mon.) 397, 398; *State v. Graham*, 13 Kan. 136, 144; *People v. Platt*, 10 N. Y. St. Rep. 717, 719. And to vacate the charter or annul the existence of a corporation for violations of its charter, or for omitting to exercise its corporate powers. *People v. Miner* (N. Y.) 2 Lans. 396, 398.

The writ of quo warranto was an ancient writ to try the right of one holding an office. *Nichols v. MacLean*, 101 N. Y. 526, 534, 5 N. E. 347, 54 Am. Rep. 730 (citing 2 Bl. Comm. 263).

The writ of quo warranto was the ancient method of proceeding against those who exercised franchises in derogation of the rights of the crown. *Banton v. Wilson*, 4 Tex. 400, 406.

Quo warranto is a writ commanding defendant to show by what warrant he exercises any franchise; having never had a grant of it, or having forfeited it by sale, neglect, or abuse. *Vandenhoevel v. United Ins. Co.* (N. Y.) 2 Johns. Cas. 127, 148 (2 Bl. Comm. 262; *Thompson v. People* [N. Y.] 23 Wend. 537).

Quo warranto is a means to oust an illegal incumbent from office, not to induct a legal one to it. *State v. Fowler*, 32 Atl. 162, 164, 66 Conn. 294.

The original scope of quo warranto was much broader than use merely in cases of intrusion into public office; it being a writ maintainable against any person who usurps any office, franchise, or liberty. *People v. Loew*, 44 N. Y. Supp. 42, 44, 19 Misc. Rep. 248.

Quo warranto is in no sense a writ of correction or review. *State ex inf. Crow v. Fleming*, 59 S. W. 118, 119, 158 Mo. 558.

Quo warranto, in its nature, involves a possession and user of the office by another than the relator. *Conklin v. Cunningham*, 38 Pac. 170, 171, 7 N. M. 445.

One purpose of a quo warranto was to go beyond the record to the very truth of the appointment. *State v. Kennedy*, 37 Atl. 503, 505, 69 Conn. 220.

Quo warranto, in its nature involves a possession and user of an office by another than the relator, for, without such foundation, such a writ should not be issued, and cannot be maintained. *Conklin v. Cunningham*, 38 Pac. 170, 171, 7 N. M. 445.

The writ of quo warranto seems first to have been used in 1198 against the incumbent of a church to require him to show by

what authority he held the church. It was used for the purpose of extortion by the sovereigns of England until its scope was checked by statute. The first of these statutes was known as the statute of Gloucester. By its provisions there was an opportunity given the party affected to be heard. Writs of quo warranto fell into disuse about the sixteenth year of Richard II. The substitution therefor of the information in the nature of quo warranto was attributed by Blackstone to the length of the process on the proceeding in quo warranto. *State v. Moores*, 76 N. W. 530, 56 Neb. 1; *State v. Elliot*, 44 Pac. 248-250, 13 Utah, 200; *State ex rel. McIlhany v. Stewart*, 32 Mo. 379, 381; *Lindsey v. Attorney General*, 33 Miss. 508, 523.

A writ of quo warranto cannot be maintained, except at the instance of the government, whatever may be the right of the prosecutor or person claiming the office. *United States v. Lockwood* (Wis.) 1 Pin. 359, 363.

Quo warranto is not a remedy to determine disputes between private persons and a corporation, but it is to determine by what right the corporation exercised wrongfully or illegally a certain franchise, or to oust it from the right to be a corporation, for an abuse or nonuser of franchise granted. In a word, it will only lie against a corporation for some violation of its charter. *State ex inf. Crow v. Atchison, T. & S. F. Ry. Co.*, 75 S. W. 776, 780, 176 Mo. 687, 63 L. R. A. 761.

From the earliest times the legal remedy for trying a title to an office was by the writ of quo warranto, now a direct action by the Attorney General. In Blackstone's Commentaries it is stated that the writ of quo warranto was an initial writ to try the right of one holding a title to office. *Greene v. Knox*, 67 N. E. 910, 912, 175 N. Y. 432 (citing *People v. City of Yonkers Police Com'rs*, 174 N. Y. 450, 67 N. E. 78, 95 Am. St. Rep. 596).

A writ of quo warranto is in the nature of a writ of right for the state against any person who claims or exercises any office to inquire by what authority he supports his claim in order to determine the right. Blackstone. The writ of quo warranto, in consequence of the length of its process, has long since become obsolete in the English law, and information in the nature of a quo warranto, wherein the process is speedier, has been substituted in its place. Tomlin, Law Dict. A writ of quo warranto is in the nature of a writ of right. It issues on demand of the proper officer of the state as a matter of course, and there is no more necessity for an application to the Supreme Court for this writ than there would be for a summons in a circuit court when the state is about to commence an action of debt against one of her debtors. *State v. St. Louis Per-*

petual Marine, Fire & Life Ins. Co., 8 Mo. 330, 331.

The writ of quo warranto at common law was a high prerogative writ, in the nature of a writ of right for the King against him who claimed or usurped any office, franchise, or liberty of the crown, and also lay in case of nonuser or any neglect, misuser, or abuse of a franchise. It was a civil proceeding prosecuted by the King's Attorney General at the suit of the King, without relation, to try a civil right; and the judgment, if for the King, was of seizure into the King's hands. No fine was imposed or punishment inflicted on the defendant. *State v. Ashley*, 1 Ark. (1 Pike) 279, 310.

Quo warranto proceedings are brought in the name and on behalf of the people to determine whether the incumbent has unlawfully usurped or intruded into, or is unlawfully holding, an office. They are not primarily in the interest of any individual, but are intended to protect the public generally against the unlawful usurpation of offices and franchises. Such proceedings deal mainly with the right of the incumbent to the office, independent of the question who shall fill it, and differ materially from election contests in the primary and principal purpose for which they are brought, as well as in their procedure. *People v. Londoner*, 22 Pac. 764, 765, 767, 13 Colo. 303, 6 L. R. A. 444.

In theory the King was the fountain of honor, of office, or of privilege; and, whenever a subject undertook to exercise a public office or franchise, he was, when called upon by the crown through a writ of quo warranto, compelled to show his title, and, if he failed to do so, judgment passed against him. The foundation of the rule may have been that, as all offices and franchises are the gift of the King, they are deemed to be possessed by him, and, until his grant is shown, there can be no presumption that he had parted with them, or invested his subject with the right to exercise any part of the royal prerogative. *State v. Allen* (Tenn.) 57 S. W. 182, 190.

Quo warranto is the proper proceeding to determine disputed questions of title to public office, and for deciding the proper person entitled to hold the office and exercise its functions. Though brought in the name of the state, it is usually upon the relation of the real party plaintiff—the claimant to the office—and the judgment rendered, in case the relator succeeds, is that the defendant be ousted, and he be placed in possession of the office. *State v. Owens*, 63 Tex. 261, 270; *Roberson v. City of Bayonne*, 33 Atl. 734, 735, 58 N. J. Law (29 Vroom) 325.

#### As an action.

See "Action"; "Civil Action—Case—Suit—Etc."

#### As civil proceeding.

See "Prosecution."

A proceeding by information in the nature of a quo warranto is a civil, and not a criminal, proceeding. *State ex rel. Brisson v. Lingo*, 26 Mo. 496, 498.

Informations in quo warranto, though originally criminal proceedings, have long been regarded as purely of a civil character, and therefore are not criminal informations, in the sense of the fourteenth section of the Bill of Rights, prohibiting criminal informations for indictable offenses. *State ex rel. Attorney General v. Vail*, 53 Mo. 97, 107.

Quo warranto is a quasi criminal proceeding, instituted in the name of the people, in the discretion of the district attorney, against a usurper of any public office or franchise, for the purpose of primarily ousting him as provided by Civ. Prac. Act, § 276. *People v. Green*, 1 Idaho, 235.

The original common-law writ of quo warranto was a civil writ at the suit of the crown, and not a criminal prosecution. It was in the nature of a writ of right by the King against one who usurped or claimed franchises or liabilities, to inquire by what right he claimed them. This writ, however, fell into disuse in England centuries ago, and its place was supplied by an information in the nature of a quo warranto, which in its origin was a criminal method of prosecution, as well to punish the usurper by a fine for the usurpation of the franchise, as to oust him or seize it for the crown. Long before our Revolution, it lost its character as a criminal proceeding in everything except form, and was applied to the mere purposes of trying the civil right, seizing the franchise, or ousting the wrongful possessor, the fine being nominal only; and such, without any special legislation to that effect, has always been its character in many of the states of the Union, and it is therefore a civil remedy only. *Ames v. Kansas*, 4 Sup. Ct. 437, 442, 111 U. S. 449, 28 L. Ed. 482; *People v. Dashaway Ass'n*, 24 Pac. 277, 278, 84 Cal. 114.

Quo warranto is properly a criminal method of prosecution, as well to punish the usurper by a fine for the usurpation of a franchise, as to oust him or seize it for the crown; but it hath long been applied to the mere purposes of trying a civil right, seizing a franchise, and ousting the wrongful possessor, the fine being nominal only. 3 Bl. Comm. 263. It is a remedy given to the crown against such as have usurped any office or franchise, being properly a criminal prosecution in order to fine a defendant for his usurpation, as well as to oust him from his office, yet at present is considered as merely a civil proceeding. 4 Bl. Comm. 310. The old writ passed away, and the information, the nature and character of which, ex-

cept as to form, was essentially a civil as contradistinguished from a criminal proceeding, took its place; that is to say, the information in the nature of a quo warranto took its place, being applied to the purpose of trying the civil right; the fine being for the most part a fiction, as it was nominal only. *State v. Gleason*, 12 Fla. 190.

The history of the remedy of quo warranto (see 3 Bl. Comm. §§ 262, 263, and *Shortt*, Inform. §§ 110, 111, note 1) shows that it was originally a civil proceeding by writ of right for the crown; but afterwards, in the time of Edward III, or later, in order to obtain a speedier process, this form fell into disuse, and the proceeding by information was substituted. Of this latter form, Blackstone says: "This is properly a criminal method of prosecution, as well to punish the usurper by a fine for the usurpation of the franchise, as to oust him or to seize it for the crown, but hath long been applied to the mere purposes of trying the civil right, seizing the franchise, or ousting the wrongful possessor, the fine being nominal only." Mr. Heard, in the note cited above, says that long before our Revolution it lost its character as a criminal proceeding in everything except form. Prior to the statute of 9 Anne, c. 20, the remedy only extended to encroachments upon the royal prerogative. High, Extr. Rem. 434. That statute extended it to usurpation of municipal offices and corporate franchises, and authorized the imposition of a fine. In some states the statute of Anne has been recognized as a part of their system of laws, and in others special statutes have been passed. We are not aware that the statute has been so recognized in this state, and it was not named among the English statutes declared to be in force in this colony in February, 1749-50. The only case which seems to recognize it, although not expressly so, is *State v. Brown*, 5 R. I. 1, in the closing sentence of which the court say: "As there is no pretense of improper motives, the nominal fine of ten cents only will be imposed." The implication here is that, if improper motives were found, a larger fine might be imposed. But there was no discussion of the question in the case, and no authority for the imposition of the larger fine is stated. There are cases in other states—e. g., *People v. Rensselaer & S. R. Co.* (N. Y.) 15 Wend. 113, 30 Am. Dec. 33, and *Attorney General v. City of Salem*, 103 Mass. 138—where the dictum of judges may be found to the effect that the judgment is ouster and fine; but an examination of numerous cases discloses no instance of the rendition of such a judgment, except in cases where a statute specially authorizes the imposition of a fine. Considering the remedy, as it is now generally regarded, as practically a civil remedy, we do not think the court, in the absence of statutory authority, is justified in imposing a fine. Even the nominal fine spoken of

by Blackstone is now generally disregarded. See form of judgment in *Commonwealth v. Fowler*, 11 Mass. 339, and note to *People v. Richardson* (N. Y.) 4 Cow. 97, 100; High, Extr. Rem. § 633. This may well be so, since such a fine is but the dim shadow of the criminal nature of the proceeding. *State v. Kearn*, 22 Atl. 1018, 1020, 17 R. I. 391.

Quo warranto, at common law, was a criminal proceeding; and, in addition to the judgment of seizure or of ouster, there was judgment that the defendant be taken to make a fine to the King for the usurpation. The information in the nature of quo warranto, under the statute, is also strictly a criminal proceeding, being for the usurpation of a state prerogative; and the statute authorizes a fine to be imposed, as well as to oust the party from his assumed franchise. *Attorney General v. Utica Ins. Co.* (N. Y.) 2 Johns. Ch. 371, 377.

#### As information in nature of quo warranto.

The phrase "quo warranto," as used in Gen. St. c. 63, § 1, refers to an information in the nature of quo warranto. *State v. Tracy*, 51 N. W. 613, 48 Minn. 497.

The words "writ of quo warranto," as used in Const. art. 8, § 3, authorizing the Supreme Court to issue the writ of quo warranto, mean the information in the nature of a writ of quo warranto used in modern times as a substitute for the ancient and obsolete writ of quo warranto. *State v. West Wisconsin R. Co.*, 34 Wis. 197.

The phrase "writ of quo warranto," in constitutional provisions, is held to mean the modern information in the nature of such writ. *State v. Gardner*, 3 S. D. 553, 556, 54 N. W. 606.

At common law the writ of quo warranto was a civil writ at the suit of the King. Whatever the origin of the writ, whether civil or criminal, it is certain now that it is but a civil suit. The phrase "writ of quo warranto," in Const. art. 6, § 3, where the Supreme Court is given power to issue writs of quo warranto, means information in the nature of quo warranto, since courts, laws, and text-writers had been accustomed for hundreds of years to use the phrase "quo warranto" as the legal synonym of "information in the nature of quo warranto." *State ex rel. Walker v. Equitable Loan & Investment Ass'n*, 41 S. W. 916, 919, 142 Mo. 325.

#### QUOD PERMITTAT PROSTERNERE.

A writ commanding the defendant to permit the plaintiff to abate the nuisance complained of, and, unless he so permits, to summon him to appear in court and show cause why he will not, and that the plaintiff shall have judgment to abate the nuisance, and to recover damages against the defendant. Con-



*bocton Stone Road v. Buffalo, N. Y. & E. R. Co.*, 51 N. Y. 573, 579, 10 Am. Rep. 648.

Quod permittat prosternere was a common-law writ in the nature of a writ of right, commanding defendant to permit the plaintiff to abate the nuisance, or show cause against the same, and plaintiff could have judgment to abate the nuisance, and for damages against the defendant. *Powell v. Bentley & Gerwig Furniture Co.*, 34 W. Va. 804, 807, 12 S. E. 1085, 1086, 12 L. R. A. 53.

The writ of quod permittat prosternere does not merely give satisfaction for a past injury sustained by reason of a nuisance, but it also strikes at the root of the evil, by removing the cause of the mischief itself. *Miller v. Truehart (Va.)* 4 Leigh, 569, 577.

## QUORUM.

See "Full Quorum."

A majority of a board of school directors constitutes a quorum. *Decker v. School Dist.* No. 2, 74 S. W. 390, 391, 101 Mo. App. 115.

The word "quorum," in a general sense, means a majority of the whole body. *Berlin v. Nominations*, 22 Pa. Co. Ct. R. 615, 616.

The general rule is that to make a quorum of a select and definite body of men, possessing the power to elect, a majority, at least, must be present, and then a majority of the quorum may decide. *Ex parte Willcocks (N. Y.)* 7 Cow. 402, 409, 17 Am. Dec. 525.

It is now well settled that in all cases the majority of a legislative body is a quorum entitled to act for the whole body, unless the power that creates it has otherwise directed. *Zeller v. Central R. Co.*, 35 Atl. 932, 934, 84 Md. 304, 34 L. R. A. 469.

A quorum is such a number of members of a body as is competent to transact business in the absence of other members. *State v. Trustees of Wilkesville Tp.*, 20 Ohio St. 288, 293.

"Quorum," as used in Const. U. S. art. 4, § 8, providing that a majority of each house shall constitute a quorum to do business, is, for the purposes of the General Assembly, not less than a majority of the whole number of which the house may be composed. Vacancies from death, resignation, or failure to elect cannot be deducted in ascertaining the quorum. *Opinion of Justices*, 12 Fla. 653.

In determining how many judges shall constitute a court, or a quorum of a court, no distinction can be drawn between the words "quorum" and "court." Each term implies a body capable of exercising the function of a whole body not otherwise reserved.

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Therefore the rule that in the House of Lords, the Supreme Court of England, a small minority may sit in deciding appeals, is applicable to show the propriety of the statutory provision that a minority of the Supreme Court judges may constitute a quorum of such court for the transaction of certain business. *Floyd v. Quinn*, 52 Atl. 880, 882, 886, 24 R. I. 147.

The quorum of a body may be defined to be that number of the body which, when assembled in their proper places, will enable them to transact their proper business, or, in other words, that number that makes the lawful body, and gives them power to pass a law or ordinance. But when, in the case of a municipal corporation, the statute law creating it is silent as to what shall constitute a legal assembly, the common law, both in England and in this country, is well settled that a majority of the members shall constitute a legal body. In *Blacket v. Blizard*, 9 Barn. & C. 851, the court recognized the general rule of law prevailing in England, that a public trust committed to a definite number of persons should be executed at a meeting where the majority of those are present. So, in this country, Mr. Dillon states that the common-law rules as to quorums and majorities, established with reference to corporate bodies consisting of a definite number of corporators, have, in general, been applied to the common council or select governing bodies of our municipal corporations, where the matter is not regulated by charter or statute. 1 Dill. Mun. Corp. 278. For the body itself to attempt to fix a greater number as necessary to constitute a quorum is for the body to attempt to change a rule of the common law, and the rule of procedure of the common council prescribing that two-thirds of its members shall be necessary to constitute a quorum is void. *Heiskell v. City of Baltimore*, 4 Atl. 116, 119, 65 Md. 125, 57 Am. Rep. 308.

The word "quorum," now in common use, is from the Latin. It was anciently used in the commissions by which the King of Great Britain designated certain justices "jointly and severally to keep the peace, and any two or more of them to inquire of and determine felonies and other misdemeanors, in which number some particular justices, or one of them, are directed to be always included, and no business to be done without their presence." The persons so designated as essential to the transaction of business were called "justices of the quorum." Hence the term "quorum" has come to signify "such a number of the officers or members of any body as is competent by law or constitution to transact business." 1 Bl. Comm. 351; Webster's and Worcester's Dictionaries. For example, our Constitution provides: "The Senate shall consist of twenty-six, and the House of Representatives of

forty-nine, members," and again: "A majority of each house shall constitute a quorum, but a smaller number may adjourn from day to day, and compel the attendance of absent members." Article 5, §§ 11, 46. Here we have the same language, "shall consist," as in section 5 of the judiciary article. Can it for a moment be supposed that if a vacancy should occur in the Senate or in the House of Representatives, by the death or resignation of a member during the legislative session, the General Assembly, or either house thereof, would no longer be legally constituted for the transaction of business? Such vacancies are of common occurrence, and yet such legislative bodies, so long as they have a quorum in attendance, proceed regularly with the transaction of business. *Snider v. Rinehart*, 31 Pac. 716, 718, 18 Colo. 18.

### QUORUM UNUS.

The term "quorum unus" is derived from England. In England all the justices for a county are appointed and named in one commission, under the great seal. This appoints them all, jointly and severally, to keep the peace. In accordance with this commission, an assembly of two justices or more, quorum unus, makes a session, not only for inquiry, but to hear and determine. Where a statute confers certain powers upon, or requires certain duties to be performed by, any two justices, quorum unus, it is only necessary that one should be of the quorum. *Gilbert v. Sweetser*, 4 Me. (4 Greenl.) 483, 484.

### QUOTA.

"Quota," as used in Laws 1865, c. 29, providing that a bounty should be paid to any person furnishing an acceptable substitute to apply on the quota under the call of December 19, 1864, means the whole number of men assigned to the district, without regard to deductions on account of credits. The gross quota is meant. *Taber v. Erie County Sup'rs*, 14 N. Y. Supp. 211, 214, 59 Hun, 627.

"Quota," as used in St. 1878, c. 190, § 1, cl. 10, providing that any person duly enlisted and mustered into the military service of the United States as a part of the quota of any city or town under any call of the President during the Civil War, and who has continued in such service for a time not less than one year, and has not been proved guilty of willful desertion, and received an honorable discharge, shall be deemed to have acquired a settlement in such city or town, should be construed to include every person duly enlisted and mustered into the service of the United States, and the Legislature intended to include every man who served and made a part of that quota. *Inhabitants*

of *Millford v. Inhabitants of Uxbridge*, 130 Mass. 107.

In St. 1865, c. 30, § 1, providing that a soldier or sailor, to gain a settlement in a city or town, must have been duly enlisted and mustered into the military service of the United States as a part of the quota of the city or town in which the settlement is claimed under a call of the President of the United States during the Civil War, the term "quota" should not be construed in any legal or technical signification, but, according to its natural sense and import, to designate the proportion or share of the common burden which from the beginning belonged to each place. The Legislature intended the act to embrace every man who at any time served and went to make up the quota, though his services may have begun and ended before the quota was ascertained, or even before it was fastened by the statute as a legal obligation upon the respective cities and towns. And every soldier who was eventually credited to any municipality as a part of its quota rendered to it the public service, in return for which the privileges of a legal settlement therein have been conferred by the act. The same benefit has been received by the town, and the same rights were given by the statute, whatever may have been the date of the enlistment and mustering into the army. *Inhabitants of Bridgewater v. Inhabitants of Plymouth*, 97 Mass. 382, 388.

### QUOTATION MARKS.

As marks of punctuation, see "Mark of Punctuation."

### QUOTIENT VERDICT.

A quotient verdict is where each juror marks down an amount, and then the total amount thus marked down is added together, and that sum divided by the number of jurors in order to reach the amount of the verdict. *Hamilton v. Owego Waterworks*, 48 N. Y. Supp. 106, 107, 22 App. Div. 573.

Quotient verdict is a verdict rendered by agreement for one-twelfth of the aggregate amount of the several estimates by the jurors. *Moses v. Central Park, N. & E. R. Co.*, 23 N. Y. Supp. 23, 3 Misc. Rep. 322.

### QUOTING LISTS.

The quoting lists of a packing company were names of persons to whom the company quoted prices of commodities with the expectation of doing business with them. They had been compiled with much expense, and were valuable on that account, as well as because of the use made of them in the course of business. *Torsch v. Dell*, 41 Atl 903, 88 Md. 459.

## R

## R.

"R., as used in a deed describing land as "Secs. 22 & 28, Tp. 79, R. 13, Poweshiek County," is not uncertain or indefinite. It is a contraction in almost universal use in describing lands, and everybody understands it to mean "range." Ottumwa, C. F. & St. P. R. Co. v. McWilliams, 32 N. W. 315, 316, 71 Iowa, 164.

## R. R.

"R. R." is a well-understood abbreviation of the word "railroad." West Chicago St. R. Co. v. People, 40 N. E. 599, 600, 155 Ill. 299.

## RACE.

See "Selling Race."

A provision in a note given in the purchase of a horse that it is not to become due and payable until after the horse has won a race does not render the note invalid as being based on a wager, as it does not require a race for a wager, but is satisfied by winning a race for a premium, which is not illegal. Treacy v. Chinn, 79 Mo. App. 648, 651.

There can be no just distinction taken between the "trotting" and "racing" of horses. Ellis v. Beale, 18 Me. (6 Shep.) 337, 339, 36 Am. Dec. 726.

## RACE FIELD.

"Race field," as used in an indictment for unlawful gaming at cards, is the open space between quarter race paths at a time when two or more horses were exercised in training on the track and several persons had assembled to see the training, at which time bets on the running of the horses were made, though the racing for which the training was preparatory took place some days afterward, and though no company, club, or other person had the right to race there without the owner's permission. Commonwealth v. Wilson (Va.) 9 Leigh, 648, 649.

## RACE MEETING.

The term "race meeting," as used in Act March 5, 1895, regulating holding of race meetings, and prescribing the penalty for violation of its provisions, etc., means meetings for horse races, and hence is not unconstitutional as embracing a subject not embraced in the title of the act, which declares the act to be for the purpose of regulating horse racing. State v. Roby, 41 N. E. 145, 150, 142

Ind. 168, 33 L. R. A. 213, 51 Am. St. Rep. 174.

"Race meeting," as used in Act March 5, 1895, forbidding a race meeting for a longer period than fifteen days at one time and less than thirty days subsequent to the last race meeting at the same place, regardless of the person, company, or association holding either of such meetings, should be construed to embrace meetings held on three different tracks, two of which are separated by a highway only, and the other being less than one-half mile distant, and that meetings held on such tracks constituted one race meeting within the meaning of the statute. State v. Forsythe, 44 N. E. 593, 595, 147 Ind. 466, 33 L. R. A. 221.

## RACEWAY.

"Raceway," as used in a deed excepting the water privilege of a stream to be carried through the land conveyed in a raceway, means an artificial canal dug in the earth, leading from the dam of a stream to the machinery which it drives, and also a similar water course leading from the bottom of the water wheel. Wilder v. De Cou, 1 N. W. 48, 51, 28 Minn. 10.

## RADIUS.

The term "radius" means "a right line drawn or extended from the center of a circle to its periphery," so that an agreement not to practice dentistry within a radius of ten miles of town means from the center of the town; the town as a whole not being suitable as the center implied by the term "radius." Cook v. Johnson, 47 Conn. 175, 177, 36 Am. Rep. 64.

## Of six squares.

"Radius," as used in Acts 1878, No. 100, prohibiting the keeping of a private market within "a radius of six squares" of a public market in New Orleans, signifies the length of the distance within which the prohibition was to be enforced. A radius is a straight line drawn from the center of a circle to any point of the circumference. Its length is half the diameter of that circle, or is the space between the center and the circumference. The center for measurement from which the radius would shoot was not required to be located in the middle of the space occupied by a public market, which is usually not a square, but some other geometrical figure, as a parallelogram or triangle; for the space between the center and the external boundaries would have to be included in the length of the distance, and

this would shorten that length. *State v. Berard*, 3 South. 463, 464, 40 La. Ann. 172.

The provision of Act 1878, No. 100, which prohibits private markets within a "radius of six squares" from a public market, does not contemplate or justify the prohibited distance to be measured on an air line, but its true meaning is to prohibit private markets in all directions projecting from the nearest public market within a distance of six squares, over which customers would be able to walk from one market to another. *State v. Barthe*, 6 South. 531, 532, 41 La. Ann. 46.

## RAFFLE.

See "Grand Raffle."

As a lottery, see "Lottery."

A "raffle" is a game of perfect chance, in which every participant is equal with every other in proportion to his risk and prospect of gain. The prize is a common fund, or that which is purchased by a common fund. Each is an equal actor in developing the chances in proportion to his risk. Whether they be developed with dice or other instruments is not material. The successful party takes the whole prize, and all the rest lose. The element of one against the many, the keeper against the bettors, either directly or indirectly, is not to be found in it. It has no keeper, dealer, or exhibitor. *Prendergast v. State*, 57 S. W. 850, 851, 41 Tex. Cr. R. 358; *Stearnes v. State*, 21 Tex. 692, 699; *Riseln v. State*, 71 S. W. 974, 975, 44 Tex. Cr. R. 413; *Long v. State*, 2 S. W. 541, 542, 22 Tex. App. 194, 58 Am. Rep. 633.

Where a person set up watches of which he fixed the value, which was equally apportioned among certain adventures, and the chance as to who should take them was determined by the throwing of pieces of coin, the adventure or hazard is a "raffle," and not a lottery. *State v. Pinchback* (S. C.) 2 Mill, Const. 128, 130.

A "raffle," as we understand it, is where one owning real or personal property of a certain value, say worth \$100, sells 10 chances to 10 parties at \$10 each, and the party drawing the capital prize takes the article. *Dalton v. State* (Tex.) 74 S. W. 25, 27.

Webster defines "raffle," when used as a verb, to mean to cast dice for a prize, for which each person concerned in the game lays down a stake, or at least a part of the value, as to raffle for a watch. Used as a noun, it means a game of chance or lottery in which several persons deposit a part of the value of the thing in consideration of the chance of getting it. *State v. Kennon*, 21 Mo. 262, 264.

Sections 30, 31, Rev. St., entitled "Of Raffleing and Lotteries," have reference only

to the distribution of money or valuable things to be determined by law of chance, which shall be dependent upon the drawing of a lottery over which the parties to the distribution have no control; and the distribution among the members of an art union or its works of art by a lot, conducted by themselves, is not embraced within it. *People v. American Art Union*, 7 N. Y. (3 Seld.) 240, 241.

## RAFT.

"A 'raft' may be made by lashing together two pieces of plank; and the word comprehends not only this, but a floating structure of timber of great value and extent." The term does not imply which, and a finding that a stream is navigable for rafts does not show that it is navigable in a commercial sense. *State v. Town of Gilmanton*, 14 N. H. 467, 479.

"Rafts," as used in an act of assembly declaring a creek to be a public stream or highway for the passage of boats and rafts, should be construed to include a number of logs not fastened together, but floated in the stream contiguous to each other. The term "raft" is used to express a body of timber held together by attraction or the force of external pressure. Walker, in his Dictionary, says it is a frame or float made by laying pieces of timber across each other; which, though differing from that given by Webster, may be accepted as equally expressive of the usual acceptance of the term. *Dedrick v. Wood*, 15 Pa. (3 Harris) 9, 13.

As vessel.

See "Vessel."

## RAFTING.

"Sorting and rafting," as used in Act 1891, c. 174, establishing the rule by which to fix the price for sorting and rafting logs and timber rafted and secured at a certain boom, means substantially the same as "rafting" in the charter of the boom company, specifying the fees and tolls allowed for rafting logs and timber. The act of sorting is a necessary part of the work of rafting. The very nature of the business, which is a proper element to be taken into consideration in giving construction of the language of the charter, indicates that logs of different owners arrive in the boom, and in rafting have to be separated or sorted out. Sorting and rafting may well be construed as imposing no greater duties than are implied in rafting in the charter. *Proprietors of Machias Boom v. Sullivan*, 27 Atl. 189, 191, 85 Me. 343.

Where a complaint charged negligence in rafting or rafting out logs, the words "raft-

ing and delivering," as used in a special finding in the action, limiting the damage to the failure to exercise reasonable diligence in rafting and delivering, means rafting or rafting out, nothing more, nothing less, and they are used in the conjunctive, and as having the same significance and meaning. *Pennobscot Lumbering Ass'n v. Russell*, 42 Atl. 408, 82 Me. 256.

## RAGE.

Anger distinguished, see "Anger."

## RAGS.

In an action on a policy of insurance against loss by fire on a junk dealer's stock of rags it is permissible to show that by a usage of the trade the term "rags" has acquired a broader signification than belongs to the word as commonly used, and to prove that in the junk trade the term "rags" includes all articles used in the manufacture of paper. *Mooney v. Howard Ins. Co.*, 138 Mass. 375, 52 Am. Rep. 277.

## RAIL.

See "All Rail."

## RAIL CAR.

Box car as, see "Box Car."

## RAILING.

A statute requiring towns to maintain a "fence or railing" on certain roads implies a barrier of sufficient strength to prevent travelers under ordinary circumstances from going off the bridge or embankment. *Munson v. Town of Derby*, 37 Conn. 298, 310, 9 Am. Rep. 332.

## RAILROAD—RAILWAY.

See "Belt Railroad"; "Bond of Railroad"; "Branch Railroad"; "City Railway"; "Connecting Roads"; "Horse Railroad"; "Lateral Railroad"; "Logging Railroad"; "New Road"; "Street Railroad"; "Switch Road."  
Any railroad, see "Any."

"Railroad" and "railway" are used interchangeably. They are as nearly exact synonyms as any two words in the English language. In common speech the word "railroad" is the more frequent designation. *State v. Brin*, 16 N. W. 406, 30 Minn. 522; *Hestonville, M. & F. Pass. R. Co. v. City of Philadelphia*, 89 Pa. 210, 219; *Millvale Borough v. Evergreen Ry. Co.*, 18 Atl. 993, 995, 131 Pa. 1.

The words "railroad" and "railway" are synonymous, and under all ordinary circumstances they are to be treated as without difference in meaning. *Massachusetts Loan & Trust Co. v. Hamilton*, 88 Fed. 588, 592, 32 C. C. A. 46; *Old Colony Trust Co. v. Allentown & B. Rapid Transit Co.*, 44 Atl. 319, 320, 192 Pa. 596.

Though in the popular understanding the expression "passenger railways" does not mean the great lines of road operated by steam power, yet it by no means follows that the term "railroad" does not include all passenger railways, for the purpose of taxation. A railway is essentially a railroad. They mean the same thing, and are used indiscriminately in reference to our great interstate lines. *Pennsylvania R. Co. v. City of Pittsburgh*, 104 Pa. 522, 538.

In Missouri legislation there is no distinction between a railroad and a railway. *St. Louis R. Co. v. Northwestern St. L. Ry. Co.*, 2 Mo. App. 69, 75.

"Railway" is synonymous with "railroad," so that where an action was begun against the Houston & Texas Central Railway Company a judgment against the Houston & Texas Central Railroad Company was not erroneous. *Houston & T. O. R. Co. v. Weaver* (Tex.) 41 S. W. 846, 848.

The words "railway" and "railroad" have identically the same meaning, and an indictment charging the breaking and entering of a depot belonging to a "railroad" company is sustained by proof of the entering of a depot belonging to a "railway" company. *Davis v. State*, 32 S. E. 158, 159, 105 Ga. 808.

The legal signification of the term "railroad" is not only a road or way on which iron rails are laid, but a road as incident to the possession or ownership of which important franchises and rights affecting the public are attached. *Gibbs v. Drew*, 16 Fla. 147, 149, 26 Am. Rep. 700.

A railroad is a road or way on which iron rails are laid for wheels to run on for the conveyance of heavy loads and vehicles. *Dinsmore v. Racine M. R. Co.*, 12 Wis. 649, 657 (citing *Webst. Dict.*).

A "railroad" should be confined to the highway on which the railway is laid, and the word "railway" to the rails of the road. *Johnston v. Morrow*, 60 Mo. 339, 341.

In Pennsylvania it is held that the words "railroad" and "railway" have been used indiscriminately by the legislature in that state, and have no technical meaning in a statute. *City of Philadelphia v. Philadelphia Traction Co.*, 55 Atl. 762, 763, 206 Pa. 35.

The term "railroad," as used in the chapter relating to railroads, shall be construed

to mean a railroad or railway operated by steam power. Civ. Code S. C. 1902, § 2024.

The term "railroad," as used in the chapter relating to railroads and street railways, means a railroad or railway of the class usually operated by steam power. Rev. Laws Mass. 1902, p. 978, c. 111, § 1.

#### **Bridges and ferries.**

A bridge owned by a railroad company on its line of road is properly returned for taxation as so much mileage of railroad, and cannot be again taxed as a bridge. *Schmidt v. Galveston, H. & S. A. R. Co.* (Tex.) 24 S. W. 547.

The term "railroad," as used in the act relating to the railroad and warehouse commission, shall include all bridges or ferries used or operated in connection with any railroad, and also all the road in use by any corporation operating the railroad, whether owned and operated under a contract, agreement, or lease. Gen. St. Minn. 1894, § 379b. So in that part of the chapter on railroad corporations relating to the regulation of common carriers, and defining the duties of the commissioner of railroads. Rev. Codes N. D. 1899, § 3012; *Cobbey's Ann. St. Neb.* 1903, § 10,047; U. S. Comp. St. 1901, pp. 3154, 3206; Code Iowa 1897, § 2122. See, also, *Interstate Commerce Commission v. Brimson*, 14 Sup. Ct. 1125, 154 U. S. 447, 38 L. Ed. 1047.

#### **As building.**

See "Building."

#### **Cable road.**

A short line of inclined cable railroad, located wholly within one county, and operated by means of a cable and stationary steam power, chartered under Acts Gen. Assem. 1887, c. 16, providing for the incorporation of cable or cog railroads for ascending mountain heights, does not come within the provisions of Acts 1897, c. 5, authorizing the assessment of railroad property by the state railroad commissioners. While the word "railroad" appears in the name of the corporation, and while in one sense it is a railroad, it is also apparent that it is a peculiar character of railroad. It is a character of railway specially designed for ascending mountain heights, and is a character of railroad that of course is not of common construction. *Lookout Incline & L. L. Ry. Co. v. King* (Tenn.) 59 S. W. 805, 808.

#### **Capital stock.**

"Road," as used in a contract providing that the road, rolling and live stock of a street car company should be exempt from taxation for a term of 50 years, cannot be construed to mean capital stock, because a part of the companies' capital stock, namely,

that which was invested in live stock and rolling stock, was expressly exempted, and, if the word "road" includes capital stock, no meaning whatever would be given to the words "rolling and live stock." They would constitute unnecessary tautology in the exempting clause. *Atlanta St. R. Co. v. City of Atlanta*, 66 Ga. 104, 109.

#### **Completed road.**

The word "railroad," as found in Act Assem. April 23, 1861 (Laws 1861, p. 410), providing that any railroad may purchase and hold the stock and bonds, or either, of any other railroad, and that any railroad can enter into a contract for the use or lease of any other railroad, means a finished railroad, and does not embrace the transfer of a franchise. *Wood v. Bedford & B. R. Co.* (Pa.) 8 Phila. 94, 95.

A railroad, within the meaning of its charter requiring its completion to a certain point by a certain date, and exempting it from taxation, is to be construed as including the entire road, consisting of several tracks, although but one track was constructed to the designated terminus within the time fixed in the charter. *State v. Baltimore & O. R. Co.*, 48 Md. 49, 74.

"Railroad," as used in a statute authorizing a contract for the use of a railroad, means one capable of being used, not a road-bed capable of receiving rails. *Troy & B. R. Co. v. Boston, H. T. & W. Ry. Co.*, 86 N. Y. 107, 121.

"Road," as used in Act May 12, 1846, authorizing the Hudson River Railroad Company to issue so many additional shares, not exceeding 10 per cent. of its original capital, as might be necessary to enable the company to provide for and pay interest on the installments paid in for the construction of the road until it should be completed and put in operation, meant the road as an entirety on its completion. *Manice v. Hudson River R. Co.*, 10 N. Y. Super. Ct. (3 Duer) 426, 441.

"Road," as used in a mortgage by a railroad company on the road and its franchise, means the road in its completed condition, proper and ready for use in running over it in the ordinary manner of that kind of business. It was not a road—that is, a railroad—but only a roadway, when it was only located between two termini and in the process of construction, but in no part completed ready for use. *Miller v. Rutland & W. R. Co.*, 36 Vt. 452, 493.

"Road," as used in Laws 1890, c. 565, § 78, providing that any railroad corporation leasing any of its road for a longer period than one year, unless such lease is approved by two-thirds of the stockholders, will be held to mean a lease of the entire road or an entire portion of a road, and will not cov-

er a mere contract for passage of cars over a road of which otherwise the owner remains in possession and control. *Chapman v. Syracuse Rapid-Transit Ry. Co.*, 56 N. Y. Supp. 250, 253, 25 Misc. Rep. 623.

#### Depots and other buildings.

"Railroad," as used in Gen. St. § 3476, providing that when it shall be necessary for the construction of a railroad to intersect or cross any water course or any public highway it may be constructed across or upon the same, etc., embraces main tracks, side tracks, turnouts, and depots; in fact all the land and buildings owned by the corporation, and necessary or convenient for the transaction of its business. *State v. Railroad Com'rs*, 15 Atl. 756, 757, 56 Conn. 308.

"Railroad," as used in Laws Kan. 1872, p. 110, c. 68, authorizing counties, incorporated cities, and municipal townships to issue bonds for the purpose of aiding in the construction of railroads, should be construed to include the depots and side tracks of an existing railroad. Such constructions are constituents—essential parts—of any railroad, without which it would be incomplete, and incapable of serving the uses for which it is intended. *Rock Creek Tp. v. Strong*, 96 U. S. 271, 276, 24 L. Ed. 815.

"Railroad," in its ordinary acceptation, fairly includes all the structures which are necessary and essential to its operation, and as used in a congressional grant in aid of a construction of a railroad has a more extended signification than "track" or "roadway," and includes station houses, etc. *United States Trust Co. v. Atlantic & P. R. Co.*, 47 Pac. 725, 729, 8 N. M. 673.

In common parlance a railway consists of the road and the rolling stock. The former includes everything that is immovable or affixed to the soil, such as station houses, round houses, platforms, water tanks, and machine shops. The road cannot be operated without these, or considered constructed until they are built. A license to take material for the construction of a railroad should not be confined to material necessary for the construction of the mere track. *United States v. Chaplin* (U. S.) 31 Fed. 890, 895.

In its ordinary acceptation, the term "railroad" fairly includes all structures which are necessary and essential to its operation. As used in the special act of June 8, 1872, granting to the Denver & Rio Grande Railway Company the right to take the material necessary for the construction of said railroad, the term is not limited merely to the roadbed or roadway, but includes also structures essential to the operation of the road. Thus a grant of timber for construction of a railroad would be a grant of timber for construction of depots and necessary station

buildings. *United States v. Denver & R. G. R. Co.*, 14 Sup. Ct. 11, 15, 150 U. S. 1, 87 L. Ed. 975.

An exemption from taxation of the capital stock of a railroad company and the "road" with fixtures and appurtenances, including workshops, warehouses, and vehicles of transportation, does not include a hotel building erected within the space which the company is entitled to hold for a right of way, though it is built under a lease from the company, and is a convenience to passengers, and a means of profit to the road. The ticket offices, however, which are kept within such building, are exempt. *Day v. Joiner*, 65 Tenn. (6 Baxt.) 441, 442.

"Road," as used in St. §§ 4044, 4045, providing that if a railroad fails to fence its road it shall be liable for the injuries resulting from such failure, does not include depot grounds. *Moses v. Southern Pac. R. Co.*, 23 Pac. 498, 500, 18 Or. 385, 8 L. R. A. 135.

The word "railroad" shall be held to include, in addition to the track of said railroad, including the rails, couplings, spikes, ties, bridges, culverts, tunnels, cuts, fills, embankments, and the land owned by the right of way of such railroad, all the structures, fixtures, improvements, and buildings of said railroad owned thereon or used in connection therewith. *Comp. Laws Nev.* 1900, § 1237.

A power granted to a corporation to construct a railroad and establish transportation lines upon it necessarily includes the essential appendages required to complete and maintain such a work and carry on such a business, as the power to erect and maintain suitable depots, carhouses, water tanks, shops for repairing engines, houses for bridge and switch tenders, coal and wood yards for fuel and for the use of their locomotives, etc.; but there is a limit to this incidental power of the company, which must be fixed where the necessity ends and the mere convenience begins. The necessary appendages of a railroad and transportation company are one thing and those appendages which may be convenient means for increasing the advantages and profits of the company are another thing. It might be advantageous for the company to purchase lands and erect houses in the right location and of the right kind for all their constant employes, to establish factories for making their own rails, engines, and cars, and even to purchase coal mines and supply themselves with fuel; but these are not among the necessary powers of such a company. *Camden & A. R. & Transp. Co. v. Mansfield Tp. Com'rs*, 23 N. J. Law (3 Zab.) 510, 514, 57 Am. Dec. 409.

"Road," as used in the charter of a railroad company declaring that the company should pay an annual tax of one-half of 1

per cent. "upon the cost of said road," means the actual roadbed and its rails with its appendages, including bridges, viaducts, wharves, piers, depots, and depot grounds, machine shops, and other similar erections which are essential either to its completion or its advantageous and convenient operation. *State Treasurer v. Somerville & E. R. Co.*, 28 N. J. Law (4 Dutch.) 21, 27.

#### **Elevated railway.**

"Railway," as used in Code 1873, § 464, requiring compensation to owners of lots abutting on a street in which there is a railway, should be construed to include an elevated railroad located in a street for the transportation of passengers only, so as to require compensation to the owners of abutting lots for damages for the erection of such railway; since it could not be held that elevated railroads were within the contemplation of the Legislature as a street railroad when the act was passed. *Freiday v. Sioux City Rapid Transit Co.*, 60 N. W. 656, 658, 92 Iowa, 191, 28 L. R. A. 246.

#### **Ferry distinguished.**

See "Ferry."

#### **Gauge.**

When the word "railroad" or "railroads" is used in any general or special law of this state, the same shall be deemed to apply alike to all railroads, without reference to the gauge thereof. *Gen. St. Minn. 1894*, § 256.

#### **As necessary land.**

The term "railroad" in a mortgage of a railroad company includes not only the whole road, but also the lands belonging to it and essential to the enjoyment of its franchise. *Chapman v. Pittsburg & S. R. Co.*, 26 W. Va. 299, 308.

The term "railroad" in a mortgage of a railroad does not include after-acquired lands, unless they are used in connection with the actual operation of the road as a part thereof. *Callhoun v. Memphis & P. R. Co.* (U. S.) 4 Fed. Cas. 1045, 1047.

#### **As a nuisance.**

See "Nuisance."

#### **Operation of train required.**

A railroad track is of no use to its owner or the public unless cars are run upon it. It is the movement of the trains upon the track which constitutes it a "railroad." That is the consummation of the whole business. *Missouri, K. & T. Ry. Co. v. Elliott* (U. S.) 102 Fed. 96, 106, 42 C. C. A. 188.

#### **Railways in pneumatic tubes.**

When the Constitution and general laws of New York speak of "railways," they al-

ways mean railways either for the general carriage of property or of passengers or of both, and a railway which may be operated in small pneumatic tubes by atmospheric pressure for the transmission of small packages is not within such meaning. Such a tube may contain vehicles placed on wheels, and the wheels may run upon rails or in grooves, and yet the structure could not, according to the popular sense, or in a legal sense, be what is generally known as a railway. The tubes may be so constructed that in a technical or scientific sense the structure might be called a railway, and so, too, any structure upon which vehicles may be moved upon rails, however peculiar or small, may in some limited sense be called a railway, and yet not be a railway within the meaning of the Constitution and the general laws of the state. *Astor v. New York Arcade Ry. Co.*, 113 N. Y. 93, 105, 20 N. E. 594, 596, 2 L. R. A. 789.

#### **All property of company included.**

In commonly accepted usage the meaning of the term "railway" has been extended to include not only the permanent way, but everything necessary to its operation, as the rolling stock, the buildings, including stations, warehouses, roundhouses, locomotive shops, car shops, repair shops, and all other property of the operating company, as stocks, bonds, and other securities. *Atchison, T. & S. F. Co. v. Kansas City, M. & O. Ry. Co.*, 70 Pac. 939, 943, 67 Kan. 569.

A railroad is a unit every part contributing to its purposes as a whole. This unit is made up of lands, personal property, choses in action, easements, all dependent upon and inseparable from each other, deriving their value from this inseparability—from the fact that they contribute to this unit. They differ from every other species of property. *Chamberlain v. Walter* (U. S.) 60 Fed. 788, 793.

The general term "railroad," as ordinarily used, includes many kinds of property, both real and personal, and cannot, with any degree of propriety, be confined to the track, or the land simply necessary to lay the track upon. The word, with no further specifications and modifications, may well be taken as covering the entire property of the company connected with the use and purposes of the road. *Knevals v. Florida Cent. & P. R. Co.* (U. S.) 66 Fed. 224, 231, 13 C. C. A. 410.

#### **As highway, road or street.**

See "Highway"; "Road"; "Street."

#### **As public improvement, purpose or use.**

See "Public Improvements"; "Public Purpose"; "Public Use"; "Public Work."



**As railroad company.**

The term "railroad" is frequently used to mean "railroad company." *Calhoun v. Memphis & P. R. Co.* (U. S.) 4 Fed. Cas. 1045, 1047.

"Railroads," as used in Const. art. 17, § 12, providing that all railroads which may be built and operated in the state shall be responsible for all damages to persons and property under regulations prescribed by the General Assembly, does not mean railroad corporations or companies, but the railroad owned and operated by them. *Little Rock & Ft. S. Ry. Co. v. Daniels*, 56 S. W. 874, 875, 68 Ark. 171.

The term "railroad" includes and applies to every person, firm, association of persons, and company, whether incorporated or not, who or which shall own or operate a railroad as a common carrier. Code Miss. 1892, § 4336.

**Railroad company distinguished.**

The word "railroad" is defined to be the roadbed, right of way, track, rolling stock, and appurtenances actually constructed and in operation as a public highway. The words "railroad company" do not mean the same thing as the word "railroad." The former may exist without the latter, and the latter without the former. The one applies to the agency which may construct or own, the other to the thing constructed or owned. *International & G. N. Ry. Co. v. Anderson Co.*, 59 Tex. 654, 663.

**As real estate.**

A railroad is real estate. *Newark & H. Traction Co. v. Borough of North Arlington*, 46 Atl. 568, 65 N. J. Law, 150 (citing *People v. Cassity*, 46 N. Y. 46; *People v. Commissioner of Taxes & Assessments of City of New York*, 82 N. Y. 459; *People v. Commissioners of Taxes & Assessments of City of New York*, 101 N. Y. 322, 4 N. E. 127).

**As right of way.**

The word "railroad" may sometimes mean the track or ground upon which the rails constituting the track are laid, or it may mean the right of way, including the track and the land on either side of the track, according to the connection in which the word is used. As used in Rev. St. c. 134, § 2, authorizing a telegraph company to construct lines along and upon a railroad means the right of way of the railroad company. *St. Louis & C. R. Co. v. Postal Tel. Co.*, 51 N. E. 382, 386, 173 Ill. 508.

"Railroad," as used in Gen. St. c. 63, § 50, providing that the mayor and aldermen of cities and selectmen of towns cannot lawfully lay out and establish a townway across a railroad without first obtaining authority

therefor from the county commissioners, should be construed to mean all the land, not exceeding five rods in width, taken by a railroad corporation for their road, which is included within the location thereof, filed according to law with the commissioners of the county within which the land is situated. The track or iron rails on which cars and carriages are to pass and travel may be laid down on any part of the surface of the land within the limits of the location, and they may be changed and shifted from place to place thereon as may be required for the convenience or reasonable accommodation of the company, which may also erect on the land such structures and buildings as are reasonably incident to the support of the road. *Commonwealth v. Inhabitants of Haverhill*, 89 Mass. (7 Allen) 523, 524 (citing *Inhabitants of Worcester v. Western R. Corp.*, 45 Mass. [4 Metc.] 564).

A relinquishment of a right of way of a certain width for a railroad to be located on the section line dividing two sections does not mean that the track of such railroad should be on the section line and nowhere else. It means that the strip of land given for the right of way should be located on the section line, which line and the track were both to be included in the strip. The word "railroad," says a leading lexicographer, should be confined to the highway in which the railroad is laid, the word "railway" to the rails when laid. In common parlance these words are used interchangeably. *Munkers v. Kansas City, St. J. & C. B. R. Co.*, 60 Mo. 334, 337.

The word "road," when applied to a railroad, is often used in a sense which comprehends not only the ground on which the ties and rails are laid, but the strip of ground on either side thereof, extending to the limits of its authorized right of way; and was so used in the conveyance of a city lot to a railroad conditioned that the grantee should construct and maintain its road through the tract. *Union Pac. Ry. Co. v. Cook* (U. S.) 98 Fed. 281, 283, 39 C. C. A. 86.

The word "road," as used in the statute regulating the manner of operating trains when any person, animal, or other obstruction appears on the road of the railroad, does not mean what is strictly called the roadbed or track of the railroad, but includes the whole road. *Nashville & C. R. Co. v. Anthony*, 69 Tenn. (1 Lea) 516, 519.

**Rolling stock.**

"Railroad," as used in a mortgage of the railroad, real estate, chattels real, and franchises of the company, means the roadbed and track with its superstructure; all that enters into and forms a part of a completed road. The rolling stock is no part of the railroad, though it is essential to

the successful operation of the railroad. It is an accessory to the trade and business of the road, and not to the road itself. The road is completed when the bed is graded, the superstructure laid, the rails put down, and everything ready for the reception of the locomotive and cars. *Beardsley v. Ontario Bank* (N. Y.) 31 Barb. 619, 624.

Act Cong. May 5, 1864 (13 Stat. 64), granting land in the usual form to the state of Minnesota to aid in the construction of a railroad, and providing that the said railroad shall be and remain a public highway for the use of the government of the United States, free from all toll or any charge for the transportation of any property or troops of the United States, refers only to the permanent structure of the road, and does not include the rolling stock or other personal property of the railway company. *Lake Superior & M. R. Co. v. United States*, 93 U. S. 442, 455, 23 L. Ed. 965.

#### Side tracks and branch lines.

The term "railroad" includes all the side tracks and turnouts necessary or convenient for the transaction of the company's business. *State v. Railroad Com'rs*, 15 Atl. 756, 757, 56 Conn. 308; *Rock Creek Tp. v. Strong*, 96 U. S. 271, 276, 24 L. Ed. 815.

"Railroad," as used in Act April 4, 1833, authorizing a defendant to build a railroad *ex vi termini*, includes sidings and branch lines to the company's wharves. *Black v. Philadelphia & R. R. Co.*, 58 Pa. (8 P. F. Smith) 249, 253.

Under a code provision authorizing a railroad company to construct its railroad across, along, or upon any street, the railroad is authorized to build a side track on the street, since a side track is an essential part of the railroad. *Town of Mason v. Ohio River R. Co.*, 41 S. E. 418, 420, 51 W. Va. 183.

In an action against a railroad company for damages for obstructing an alley with a side track extending between the engine house and main track of the railroad, in answer to the objection that the company had no authority to construct such side track the court said: "A railroad without switches, sidings, telegraph offices, and buildings for fuel, water, engines, stations, etc., would be useless in a great measure. They are essential to the operations of the railroad and to the transportation of freight and passengers with security and dispatch. The argument that the track and the engine house is the private way of the railroad company not used by the public, and therefore no part of the public highway, is ingenious, but unsound. Admitting that it is not a part of the public highway in the sense that it is not used immediately by the public, but by the company only, it does not follow that

the ground is not taken for public use. Under the power of eminent domain it is not the use made of it which characterizes it, but its convenient necessity to that part which is for the public use." *Philadelphia, W. & B. R. Co. v. Williams*, 54 Pa. (4 P. F. Smith) 103, 107.

Under Rev. St. 1889, § 7725, which provides that the board of equalization shall apportion the aggregate value of all property belonging to a railroad within the state to each county according to the ratio which the number of miles of road completed in such county shall bear to the whole length of the road of the state, in determining the length of the road for the purpose of apportionment only the length of its main track is to be considered. *State ex rel. Murphy v. Stone*, 25 S. W. 211, 213, 119 Mo. 668.

#### Street railroad.

Gen. St. 1887, c. 8, provides that every railroad corporation owning and operating a railroad in this state shall be liable for damages under certain circumstances. The question arises whether a "railroad," as used in such statute, includes a street railroad. Railroads in a rude form were in use as early as 1676, but it was not until 1829, when successful experiments in the use of locomotives were made, that they first began to be extensively constructed; and it is only within recent years that another class of railroads, namely, those laid down in the streets of towns and cities, have become very numerous. Judge Robertson, in *Louisville & P. R. Co. v. Louisville City Ry. Co.*, 63 Ky. (2 Duv.) 175, says: "A railroad is for the use of the universal public in the transportation of all persons, baggage, and other freight. A street railway is dedicated to the more limited use of the local public, for the more transient transportation of persons, only and within the limits of the city." In a technical sense, therefore, a street railway is not a railroad. A railroad and a street railroad or way are in both their technical and popular import as distinct and different things as a road and a street, or a bridge and a railroad bridge; and it has been authoritatively adjudged that the simple term "bridge" means a viaduct in a road dedicated to common use, and that the qualified phrase "railroad bridge" means a viaduct constructed for the exclusive use of railroad transportation. Perhaps it may be conceded that, technically speaking, the term "railroad" would include a street railway, so far as its roadbed is made of iron or steel rails for wheels of cars to run upon; but where there is doubt about the true meaning of the word or term used in the law the legislative intent is not to be determined from that particular expression, but from the general legislation upon the same subject-matter. It is claimed by counsel that on February 24, 1887, when the general law of that year was passed, there were

no cable or electric street railways in existence in this state. If so, what was the legislative intent in using the word "railroad" in the law of 1887, to be deduced from the whole and every part of the statute taken together, upon the subject of railroads? What was the mischief felt which resulted in the passage of this law? Was it a danger known, or one unknown? Was it a danger then felt and realized, or one that might possibly arise in the future? We must assume that it was dealing with and acting upon existing facts within its knowledge. If we were to hold that the term "railroad" in the law of 1887 applied to street railways because the word is broad enough to cover all roads constructed of iron or steel rails for wheels of cars to run upon, we see no reason why it should not be so construed whenever found in the other legislation of this state. This would require street railways to build depots and waiting rooms for passengers, for there is just as much reason to make the word "railroad" applicable in this respect as to personal injury cases. This is but one of the very many instances where by the use of the word "railroad" the company is required to perform certain duties to which it cannot reasonably be said that the meaning of such word includes street railways. *Funk v. St. Paul City Ry. Co.*, 63 N. W. 1099, 1100, 61 Minn. 435, 29 L. R. A. 208, 52 Am. St. Rep. 608 (cited and approved in *State v. Duluth Gas & Water Co.*, 76 Minn. 96, 57 L. R. A. 63, 78 N. W. 1032, 1034).

As used in Laws 1893, c. 4115, §§ 48, 49, relating to the taxation of "railroads," that term should be construed to include a street railroad, such being the practical construction given to the act by the executive department of the government for a considerable period of time. The word "railroad" in its broadest signification includes a street railroad, all railroads being more or less alike in their physical construction. When the word is used in a statute there is no definite rule of construction as to whether it so includes street railroads or not. It may or it may not include them. The meaning of the word must depend upon the context and the general intent of the statute in which it is used. As generally used, it applies to commercial railways engaged in the transportation of freight and passengers for long distances, and, as a general rule, steam engines for motive power, and making stops at regular stations for the receipt and discharge of freight and passengers. The term "street railroad" applies only to such road the rails of which are laid to conform to the grade and surface of the street, and which is otherwise constructed so that the public are not excluded from the street as a public highway; which runs at a moderate rate of speed compared with commercial railroads; which

carries no freight, but only passengers from one part of a thickly populated district to another in a town or city and its suburbs, and for that purpose runs its cars at short intervals, stopping at street crossings or other places irregularly, as the convenience of its patrons may require, for the receipt and discharge of its passengers. The cars upon such roads may be propelled by animal or mechanical power. *Bloxham v. Consumers' Electric Light & Street R. Co.*, 18 South. 444, 446, 36 Fla. 519, 29 L. R. A. 507, 51 Am. St. Rep. 44.

When used by the Legislature, unqualified by any other word, "railroad" is construed as referring exclusively to ordinary commercial railroads; while, on the other hand, when it is intended to refer to street railroads, they have qualified the word by the prefix "street." *State v. Duluth Gas & Water Co.*, 78 N. W. 1032, 1034, 76 Minn. 96, 57 L. R. A. 63.

City passenger railroads are included in the term "railroads" in Act May 6, 1861, relating to railroads. *Hestonville, M. & F. Pass. R. Co. v. City of Philadelphia*, 89 Pa. 210, 219.

The term "railroad" is not understood to mean a street railway engaged in the business of carrying passengers the entire distance or any part of the distance over which the road lies for one and the same fare. *Board of Railroad Com'rs v. Market St. Ry. Co.*, 64 Pac. 1065, 1067, 132 Cal. 677 (citing *Gyger v. Philadelphia City P. Ry. Co.*, 136 Pa. 96, 20 Atl. 399; *Louisville & P. R. Co. v. Louisville City Ry. Co.*, 63 Ky. [2 Duv.] 175; *Front St. Cable Ry. Co. v. Johnson*, 2 Wash. St. 112, 25 Pac. 1084, 11 L. R. A. 693; 1 Foote & E. Incorp. Co. p. 668, note 5).

"Railroad," as used in Code, § 1298, providing that "every railroad shall keep" some person upon the locomotives always upon the lookout ahead, includes a railroad operating within a city a train pulled by a small engine called a "dummy," and exclusively engaged in carrying passengers. *Katzenberger v. Lawo*, 16 S. W. 611, 612, 90 Tenn. 235, 13 L. R. A. 185, 25 Am. St. Rep. 681.

"Railroad," as used in Act March 10, 1854, providing for the redress of injuries arising from the neglect or misconduct of "railroad companies," applies to the proprietor of any kind of railroad, whether impelled by horse or steam power, or whether constructed with iron or other kind of rails. *Johnson's Adm'r v. Louisville City Ry. Co.*, 73 Ky. (10 Bush) 231, 232.

"Railway," as used in McClain's Code, § 2008, making a judgment against any railway corporation for injury to person or property a lien superior to that of mortgages on its property, does not apply to street rail-

**ways.** *Manhattan Trust Co. v. Sioux City Cable Ry. Co.* (U. S.) 68 Fed. 82, 84.

"Railroad corporations," as used in Act Feb. 12, 1855 (Sp. Laws, p. 304), entitled "An act to enable railroad corporations to enter into operative contracts and to borrow money," is sufficiently comprehensive to embrace horse railways as well as railroads whose cars are propelled by steam or other power; as well roads authorized to transport passengers only as roads authorized to transport passengers and freight by other power. *City of Chicago v. Evans*, 24 Ill. (14 Peck) 52, 55.

Act May 4, 1893, defining who are fellow servants, does not, in referring to "any railway corporation," include street railway companies; so that a street railway company is not liable for injuries to one of its servants which were caused by the negligence of a fellow servant. *Riley v. Galveston City Ry. Co.*, 35 S. W. 826, 13 Tex. Civ. App. 247.

"Railway corporations," as used in the tax law (Act 1878, § 1, Supp. Rev. p. 170), which provides for the taxation of certain real and personal property, and that the said section shall not apply to railway and certain other corporations, means those steam railroads which constitute a class well defined, and which are treated as a class in the New Jersey legislative scheme of taxation. The term does not apply to street railway companies. *City of Newark v. Merchants' Ins. Co.*, 26 Atl. 137, 55 N. J. Law (26 Vroom) 145.

As used in the laws of Iowa relating to railroad companies, the word "railroad" does not include street railroads. *Fidelity Loan & Trust Co. v. Douglas*, 73 N. W. 1039, 1040, 104 Iowa, 532; *Freiday v. Sioux City Rapid Transit Co.*, 60 N. W. 656, 657, 92 Iowa, 191, 26 L. R. A. 246 (citing *Sears v. Marshalltown St. Ry. Co.*, 65 Iowa, 744, 23 N. W. 150).

"Railroad," as used in the statute relating to railroads, does not include street railroads, the statutes of the state relating to railroads and to street railroads being separate and distinct. *Massillon Bridge Co. v. Cambria Iron Co.*, 52 N. E. 192, 193, 59 Ohio St. 179.

The word "railroad" has no such fixed definition as to enable a court to determine whether, by its mere use in a statute, it applies to street railways or not. It may be used in its broad sense to include a street railroad and any other kind of railroad on which rails of iron are laid for the wheels of cars to run upon, whether propelled by steam, electricity, horse power, or other power; or it may be used in its technical sense, which does not apply to street railroads. *Massachusetts Loan & Trust Co. v. Hamilton*, 88 Fed. 588, 590, 32 C. C. A. 46.

"Railroad," as used in Code, § 4438, providing a penalty for obstructing a railroad, includes a street railroad operated by horse power as well as a railroad on which the cars are drawn by a steam locomotive. *Price v. State*, 74 Ga. 378.

"Railroad," as used in the Ohio statute of March 20, 1889 (86 Ohio Laws, p. 120), giving a lien to mechanics, laborers, etc., for work done upon any railroad, turnpike, plank road, canal, or any public structure, includes street railways. *New England Engineering Co. v. Oakwood St. R. Co.* (U. S.) 75 Fed. 162, 165.

It is undoubtedly true that the words "railroad" and "railway" are synonymous, and in all ordinary circumstances they are to be treated as without distinction in meaning; but it is evident from the way in which these terms are used in Const. art. 17, that "railroad" is applied to steam railroads and "railway" to street railways, and therefore section 4, which forbids the consolidation by purchase or lease of any railroad companies owning or having under their control parallel or competing lines does not apply to street railway companies, and the latter, though parallel, will not be enjoined from consolidating. *Appeal of Montgomery*, 20 Atl. 399, 136 Pa. 96, 9 L. R. A. 369; *Shipley v. Continental R. Co.* (Pa.) 13 Phila. 128, 130.

Ordinarily, when we speak of a "railroad," we mean a railroad over which freight and passengers are transported from one town or city to another. When we speak of these roads on which passengers are transported over the street of a town or city, we call them "street railways." Const. art. 10, § 5, forbidding the acquisition of railroad properties by parallel or competing lines, applies to railroads proper, and not to street railways. *Scott v. Farmers' & Merchants' Nat. Bank* (Tex.) 75 S. W. 7, 16.

For some purposes the law recognizes several species of railroads and railroad companies, and recognizes a distinction between a railroad and a street railroad. Statutes using the term "railroad" may or may not apply to a street railroad. Therefore when the word "railroad" is used in a statute, if we want to know if it is intended to embrace in its meaning a street railroad, we must look at the connection in which it is used; and in Rev. St. 1899, § 2873, providing that every railroad corporation shall be liable to damages sustained by any servant by reason of the negligence of another agent or servant thereof, does not apply to street railroads. *Funk v. St. Paul City Ry. Co.*, 61 Minn. 435, 63 N. W. 1099, 29 L. R. A. 208, 52 Am. St. Rep. 608; *Manhattan Trust Co. v. Sioux City Cable Ry.* (U. S.) 68 Fed. 82. The very fact of the frequent use of the term "railroad" in the statutes in such connection

as to indicate that it would be taken as a matter of course to mean a steam railroad shows that the usual use of the word is with that meaning. *Sams v. St. Louis & M. R. Co.*, 73 S. W. 686, 690, 174 Mo. 53, 61 L. R. A. 475.

In the construction of the act relating to the railroad commissioner the phrase "railroad" shall be construed to include all railroads and railways operated by steam except cable street railroads in cities or towns, whether the same shall be operated by the corporation owning any such railroad, or by any other corporation or corporations, or otherwise. *Mills' Ann. St. Colo.* 1891, § 3740.

A horse railroad is not a railroad within the meaning of a statute providing that every engine or train shall be brought to a full stop before crossing a railroad. *Byrne v. Kansas City, Ft. S. & M. R. Co. (U. S.)* 61 Fed. 605, 9 O. C. A. 666, 24 L. R. A. 693. And a statute referring to any railroad corporation whose line is wholly or partly within Montana or reaches the boundary thereof, and giving a judgment for injury to the person a lien superior to a mortgage, does not include street railroads. In Kentucky a street railroad is said to be in a technical and popular sense as different from an ordinary railroad as a road and a street, or as a bridge and a railroad bridge. *Louisville & P. R. Co. v. Louisville City R. Co.*, 63 Ky. (2 Duv.) 175. In *Funk v. St. Paul Ry.*, 61 Minn. 435, 63 N. W. 1099, 29 L. R. A. 208, 52 Am. St. Rep. 608, it is said that a statute making every railroad company liable for injuries inflicted by reason of the negligence of a fellow servant did not include street railroads operated by cable. This reasoning is not applicable in Georgia, where the contrary is true, and where the word "railroad" includes a street railroad, unless the context shows that a particular kind of railroad is meant. In the Constitution, statutes, and decisions of Georgia the word "railroad" is recognized as generic, and includes street railroads, narrow-gauge roads, horse car companies, dummy lines, and street railroads operated by electricity; and a chartered street railroad is a railroad company within Civ. Code 1895, §§ 2297, 2323, making railroads liable to one servant for injuries inflicted by a fellow servant. *Savannah, T. & I. of H. R. v. Williams*, 43 S. E. 751, 752, 753, 117 Ga. 414, 61 L. R. A. 249.

"Railroad," as used in Comp. St. 1897, c. 72, § 3, providing that every railroad company shall be liable for damages for injuries caused by negligence, does not include street railroads. *Lincoln St. Ry. Co. v. McClellan*, 74 N. W. 1074, 1075, 54 Neb. 672, 69 Am. St. Rep. 736.

"Railroad," as used in the law, is broad enough to include street railways, but as used

in the Constitution of Kansas will not be held to include such street railways. *Ferguson v. Sherman*, 47 Pac. 1023, 1025, 116 Cal. 169, 37 L. R. A. 622.

A railroad is for the use of the universal public in the transportation of persons, baggage, and other freight. A street railway is dedicated to a more limited use of the local public, for the mere transient transportation of persons only, and within the limits of the city. In the technical sense, therefore, a street railway is not a railroad, and the court held that it was not included within the provisions of the statute authorizing the condemnation of lands for railroad purposes. *Thompson-Houston Electric Co. v. Simon*, 25 Pac. 147, 149, 20 Or. 60, 10 L. R. A. 251, 23 Am. St. Rep. 86.

Iron tracks or rails securely fastened to the soil, whether of a street or a prairie, constitute a railroad, irrespective of the propelling power by which vehicles are transported thereon; and the use of such a railroad may be contracted for under Act April 13, 1837, entitled "An act authorizing railroad companies to contract with each other," without any reference to the question whether such use is to be effected by horses or steam, or any other known or unknown motor power, and equally without regard to the nature of the locality through which such road may extend. *Central Crosstown R. Co. v. Twenty-Third St. R. Co. (N. Y.)* 54 How. Prac. 168, 185.

#### As limited to street railroads.

Though the term "railroad" is broad enough to cover steam railroads, yet as used in St. 1893, p. 288, providing that franchises to operate railroads can be granted only to the highest bidder, it will be limited to street railroads. *People v. Craycroft*, 44 Pac. 463, 111 Cal. 544; *Z. Russ & Sons Co. v. Crighton*, 49 Pac. 1043, 1045, 117 Cal. 695.

The act incorporating a certain passenger railway company authorizes construction of a railroad from a point within the city to a point outside, with the right to use steam as a motor power, and to transport freight as well as passengers, the words not implying that a street railway only was intended, but the words "railway" and "railroad" are popularly used as synonymous, and Webster defines both alike. *Millvale Borough v. Evergreen Ry. Co.*, 18 Atl. 993, 995, 131 Pa. 1, 7 L. R. A. 369.

#### As structure.

See "Structure."

#### Telegraph line.

An authority to construct a railroad is sufficient authority to also construct a telegraph line to be used in connection with the

railroad. *Snell v. Leonard*, 8 N. W. 425, 426, 55 Iowa, 553.

#### As track.

A railroad is a road especially laid out and graded, having parallel rails of iron or steel for the wheels of carriages or cars drawn by steam or other motive power to run upon. As used in a deed describing land as lying, adjoining, and parallel with the land of a certain "railroad," the nearest part being 20 feet distant from the center line of said railroad, the word "railroad" should be construed to mean the railroad track, or the road between the rails or under the rails, and does not refer to railroad right of way. *Peoria & P. U. Ry. Co. v. Tamplin*, 40 N. E. 960, 962, 156 Ill. 285.

"Railroad," as used in a city ordinance providing that the line of a railroad erected in a street should not approach nearer than fifteen feet of the curbstone, means the rails; they being the only portion of the track necessarily or properly rising above the surface of the grade. In a broader sense a railroad includes all the land, works, buildings, and machinery required for the support and use of the road and way, with its rails. *Chicago, St. L. & P. R. v. Elsert*, 26 N. E. 759, 761, 127 Ind. 156.

#### Tramways in mines and marine railways.

The term "railroads and railways," as used in the chapter relating to railroads and street railways, means all railroads and railways except tramways in mines and marine railways. *Rev. Laws Mass. 1902*, p. 978, c. 111, § 1.

As used in the chapter relating to railroads and railways, the term "railroads and railways" includes all railroads and railways operated by steam, except marine railways, doing business as common carriers in this state, and whether operated by the corporations owning them or by other corporations or otherwise. *Civ. Code S. C. 1902*, § 2024.

#### Unused land.

A lease of a railroad purporting to lease the "railroad of the party of the first part" means and includes "the railroad belonging to the lessor which has been used or which it was necessary to use in operating the road, and not land which has never been used in connection with it." *New York Cent. R. Co. v. Buffalo & N. Y. & E. R. Co. (N. Y.)* 49 Barb. 501, 504.

#### RAILROAD AFFAIRS.

Affairs of railroad, see "Affairs."

#### RAILROAD APPENDAGE.

See "Appendage."

#### RAILROAD BRIDGE.

As bridge, see "Bridge."

A viaduct constructed for the exclusive use of railroad transportation is a railroad bridge. *Louisville & P. R. Co. v. Louisville City Ry. Co.*, 63 Ky. (2 Duv.) 175, 178.

#### RAILROAD CAR.

See "Car."

As carriage, see "Carriage."

The word "railroad car," in 2 Hill's Code, p. 662, § 46, which defines "burglary" as an unlawful entry, with intent to commit a felony, of an office, shop, store, warehouse, malthouse, stillhouse, mill, factory, bank, church, schoolhouse, railroad car, barn, stable, ship, steamboat and water craft, or any building in which goods, merchandise, or valuable things are kept for use, sale, or deposit, means any railroad car, without regard to whether any valuable things are kept therein or not, as the latter clause of the statute only refers to buildings not specifically designated. *State v. Sufferin*, 32 Pac. 1021, 6 Wash. 107.

#### RAILROAD COMMISSION.

A railroad commission is a state instrumentality having the power, and obliged as a body, to regulate the rates on railroads of the state. It may do so on one and all, according to the condition and circumstances of each. Surely so if the roads be under separate ownership and management, and may be so when united in ownership or management. *Southern Pac. Co. v. Board of Railroad Com'rs (U. S.)* 78 Fed. 236, 252.

#### RAILROAD COMPANY.

See "Commercial Railroad Company."

As common carrier, see "Common Carrier."

As moneyed corporation, see "Moneyed Corporation."

As public corporation, see "Public Corporation."

Railroad distinguished, see "Railroad—Railway."

The term "railroad company," as used in the chapter relating to the listing of personal property for taxation, includes any person or persons, joint-stock association, or corporation, wherever organized or incorporated, when engaged in the business of operating a railroad either wholly or partially within this state, whether on rights of way acquired and held exclusively by such company, or otherwise. *Bates' Ann. St. Ohio 1904*, § 2780—17.

In the construction of the act relating to the railroad commissioner, the phrases

"railroad corporation" and "railroad company" shall be construed to mean the corporation, company, or individual, whether owner, trustee, receiver, or otherwise, that maintains or operates a railroad operated by steam power. *Mills' Ann. St. Colo. 1891, § 3740.*

In construing the act relating to railroads, unless such meaning be repugnant to the context or the manifest intention of the Legislature, the term "railroad company" shall include and be construed to mean any incorporated railroad company, or any express or transportation company or other common carrier, or any railroad bridge company, or any person or persons, lessee, assignee, trustee, receiver, partnership, joint-stock company, or corporation, engaged wholly, partially, jointly, or severally in laying out, constructing, owning, operating, using, or maintaining any railroad operated by steam, or any portion or part of such railroad line. *Gen. St. Kan. 1901, § 5997.*

In the construction of statutes the phrase "railroad company" shall be construed to mean and include all corporations, trustees, receivers, or other persons that lay out, construct, maintain, or operate a railroad operated by steam power, unless such meaning would be repugnant to the context or to the manifest intention of the Assembly. *Gen. St. Conn. 1902, § 1.*

A railroad company is a carrier of goods for the public, and as such is bound to carry safely whatever goods are intrusted to it for transportation within the course of its business to the end of its route, and there deposit them in a suitable place for their owners or consignees. If the road of the company connects with other roads, and goods are received for transportation beyond the termination of its own line, there is superadded to its duty as a common carrier that of a forwarder of the connecting line; that is, to deliver safely the goods to such line—the next carrier on the route beyond. *Michigan Cent. R. Co. v. Myrick, 107 U. S. 102, 110, 1 Sup. Ct. 425, 429, 27 L. Ed. 325, 326.*

A railway company, although it is designed to enhance the general prosperity, is a private corporation. *Directors for Leveeing Wabash River v. Houston, 71 Ill. 318, 322.*

A company to which a charter was granted for the purpose of "carrying on the general business of sawing all kinds of lumber by machinery run by steam or such power as may be best adapted to the business, to place that lumber on market," etc., is not a railroad company, though it had authority by its charter to buy, lease, sell, use, and operate locomotives and railroad engines on tramroads and railroads, and to build, construct, and project railroads and tramroads

contiguous to and in connection with and for the purpose of facilitating and easily carrying on its business of sawing, manufacturing, etc., and though it did on some occasions transport passengers and freight for hire. *Ellington v. Beaver Dam Lumber Co., 19 S. E. 21, 93 Ga. 53.*

The expression "railroad company," used in an indictment for willfully obstructing the engines of a railroad corporation, does not necessarily import "corporation," but might mean either a corporation or a voluntary association. *State v. Mead, 27 Vt. 722, 724.*

"Railroad company," as used in *Sayles' Civ. St. art. 4258b, § 7*, prescribing a penalty for unjust discrimination in freight rates by railroad companies, does not include receivers operating such road. *Bonner v. Franklin Co. Ass'n, 23 S. W. 317, 4 Tex. Civ. App. 166.*

A "railroad company" means a corporation which lays out, constructs, maintains, or operates a railroad operated by steam power, according to the express provisions of Pub. St. c. 112. *Holland v. Lynn & B. R. Co., 11 N. E. 674, 676, 144 Mass. 425.*

A corporation which is given authority to construct, complete, and operate a railroad between certain designated points, and to extend its road by lateral branches to connect with other branches, with the power of eminent domain, and to take and transport upon its road all persons and property, and fix such established rates of toll for such transportation, is a "railroad company" within the meaning of the Illinois statutes authorizing cities and counties to subscribe for stock in railroad companies. Such corporation is none the less a railroad company because it is also a coal or mining or a furnace or a manufacturing company. *Randolph County v. Post, 93 U. S. 502, 511, 23 L. Ed. 957.*

A railroad company is a quasi public corporation, and owes certain duties to the public, among which are the duties to afford reasonable facilities for the transportation of persons and property, and to charge only reasonable rates for such service. *Chicago, M. & St. P. R. Co. v. Wabash, St. L. & P. R. Co. (U. S.) 61 Fed. 993, 997, 9 C. C. A. 659.*

## RAILROAD CORPORATION.

Railroad receivers are liable under Pub. St. c. 112, § 214, making every railroad corporation liable for property destroyed by fire communicated by its engines, though they are not named therein, and other sections of chapter 112 had mentioned them, in view of section 1, providing that a "railroad corporation" means a corporation operating a railroad by steam power, "unless such meaning would be repugnant to the context or to the manifest intention of the general court." *Wall v. Platt, 48 N. E. 270, 272, 169 Mass. 398.*

Railroad corporations are quasi public corporations, and enjoy privileges and franchises granted by the state in consideration of the general benefits which the public may be expected to derive from the operation of the road. *Farwell Farmers' Warehouse Ass'n v. Minneapolis, St. P. & S. S. M. Ry. Co.*, 55 Minn. 8, 12, 56 N. W. 248.

A horse railroad company is a "railroad corporation" within the meaning of Gen. St. c. 118, § 113, authorizing domestic corporations to institute insolvency proceedings, except railroad and banking corporations. *Central Nat. Bank of Worcester v. Worcester Horse R. Co.*, 95 Mass. (13 Allen) 105, 106.

A railway corporation is an artificial being, created by the state for the public good. To this end the artificial creation is clothed with great privileges and powers. It may, and generally does, exercise the right of eminent domain. The railway corporation must not recklessly and willfully use its powers to the injury of the citizens, and it must use its privileges in such manner as may be necessary to meet the objects of its creation with reasonable skill and care. *Sinal v. Louisville, N. O. & T. Ry. Co.*, 71 Miss. 547, 553, 14 South. 87.

A corporation which has the possession, control, and management, and is engaged in the business of running and operating a railroad, is a "railway corporation" within chapter 94, Laws 1874, making railway corporations liable for the killing of stock because of the absence of a fence, notwithstanding that the road was so engaged in the execution and discharge of a trust for the benefit of the bondholders of the corporation which built and owned the railway, and was not itself the absolute owner thereof. *Union Trust Co. v. Kendall*, 20 Kan. 515, 517.

"Railroad corporation," as used in Laws 1872, c. 26, providing for the assessment and taxation of the property of railroad companies, is not used to distinguish the character of the owner of the property taxed, but to distinguish the property, and the provisions of the charter would apply as well to an individual or a partnership operating a railroad as to an incorporated company. *City of Dubuque v. Chicago, D. & M. R. Co.*, 47 Iowa, 196.

A "railroad corporation" means a corporation which lays out, constructs, maintains, or operates a railroad, operated by steam power, by the express provisions of Pub. St. c. 112. *Holland v. Lynn & B. R. Co.*, 11 N. E. 674, 676, 144 Mass. 425.

A railroad corporation is a carrier of passengers by virtue of the franchise granted to it by its charter—a franchise intended to be used for the public good. By asking for and receiving the franchise, the corporation

comes under the obligation to answer in damages to every one who may be injured by any negligence in the use of the privilege it has received. And public policy will not permit the corporation to relieve itself from this obligation by any contract with others. *Murray v. Lehigh Val. R. Co.*, 34 Atl. 506, 507, 66 Conn. 512, 32 L. R. A. 539.

A "railway corporation," within Laws 1874, c. 94, creating a cause of action for the recovery of damages against any railway company killing stock, is a corporation which has the possession, control, and management, or is engaged in the business of renting and operating a railroad within the state, though it is so engaged in the execution and discharge of a trust for the benefit of bond and stock holders of a corporation which built and owned the road, and is not itself the absolute owner thereof. *Union Trust Co. v. Kendall*, 20 Kan. 515, 517.

"Railroad corporation," as used in Gen. St. p. 812, § 2798, providing that every railroad corporation shall be liable for all damages for fire that is set out or caused by operating any line of road, should be construed to mean any body, company, or association of persons, whether technically incorporated or not, engaged in the operation of railroads. *Union Pac. Ry. v. De Busk*, 20 Pac. 752, 757, 12 Colo. 294, 3 L. R. A. 350, 13 Am. St. Rep. 221.

A railway construction company organized for the purpose of furnishing materials for building and equipping railroads is a "railway corporation" within the meaning of the statute exempting stockholders from liability beyond the amount of their stock. The court said: "That there can be a railroad company which does nothing but construct the road, and a railroad company which does nothing but operate the constructed road, cannot be doubted. It is not essential to the idea of a railroad company that it should both construct and operate a railway. The words 'constructing and operating,' 'constructing or operating,' and 'constructing' simply, are applied to railway corporations in the statute." *First Nat. Bank v. Davies*, 43 Iowa, 424, 433.

The term "railroad corporations" in Gen. St. c. 118, § 113, authorizing any corporation created by authority of the state to institute insolvency proceedings, except railroad and banking corporations, includes a horse railroad corporation or a street railway corporation. The chief characteristics of a railroad company, under the laws of the state, are that it is created mainly for the public benefit, and only incidentally for its own profit; intrusted with its right of eminent domain for the purpose of taking land, at least outside of common highways, and, by laying iron rails and preparing the soil to support



them, authorized and directed to carry passengers for fare in its own cars, over its own rails; punishable for transgression of the rules prescribed for the public safety and convenience, and protected from interference with its rights by indictment in behalf of the public; obliged to transport the cars and passengers of other smaller corporations on terms fixed by commissioners appointed by this court; having a franchise which cannot be alienated, absolutely or in mortgage, without permission of the Legislature; required to make annual returns showing its pecuniary condition, and the mode in which it has discharged its public duties; and bound to render its charter and duties to the public on being paid a sum sufficient to reimburse its expenditures and a reasonable interest or profit. *Central Nat. Bank of Worcester v. Worcester Horse R. Co.*, 95 Mass. (13 Allen) 105, 106.

A railroad corporation is an artificial person, created by positive law, and invested with franchises involving specific powers and privileges, conferring some of the attributes of sovereignty, to be exercised primarily for the benefit and advantage of the public. Such corporate franchises can never arise and be invested by any kind of implication. *Bradley v. Ohio R. & C. R. Co.* (U. S.) 78 Fed. 387, 389.

#### Statutory definitions.

The term "railroad corporation," as used in that part of the chapter on railroad corporations, providing for the regulation of common carriers, and defining the duties of the commissioner of railroads, means all corporations, companies, or individuals now owning or operating or using, or which may hereafter own, operate or use, as a common carrier, any railroad operated by steam, in whole or in part, in this state, or leasing cars, by whatever name known, for the purpose of transportation. *Rev. Codes N. D. 1899*, § 3012.

The term "railroad corporation," or "railroad company," as used in the chapter relating to railroads, shall be deemed and taken to mean all corporations, companies, or individuals now owning or operating, or which may hereafter own or operate, any railroad, in whole or in part, in this state. *Civ. Code S. C. 1902*, § 2024.

The terms "railroad corporation" and "railroad company," as used in the chapters relating to railroads and street railways, mean the corporation which lays out, constructs, maintains, and operates a railroad of the class usually operated by steam power. *Rev. Laws Mass. 1902*, p. 978, c. 111, § 1.

In the construction of the act relating to railroad commissioner, the phrases "railroad corporation" and "railroad company"

shall be construed to mean the corporation, company, or individual, whether owner, trustee, receiver, or otherwise, that maintains or operates a railroad operated by steam power. *Mills' Ann. St. Colo. 1891*, § 3740.

The term "railroad corporation," as used in the act regulating railroads and fixing freight rates, means all corporations, companies, or individuals now owning or operating, or which may hereafter own or operate, any railroad, in whole or in part, in the state. *Cobbey's Ann. St. Neb. 1903*, §§ 10,047-10,063.

By the term "railroad corporation or other corporation," as used in a provision prohibiting the consolidation of railroads, is meant any corporation, company, person, or association of persons who own or control, manage or operate, any line of railroad in this state. *Rev. St. Tex. 1895*, art. 4530.

"Railroad corporation or other corporation," as used in the act relating to miscellaneous offenses, is declared to mean any corporation, company, person, or association of persons who own or control, manage or operate, any line of railroad in this state. *Pen. Code Tex. 1895*, art. 421.

The term "railway corporations," as used in the chapter relating to the regulation of carriers, shall mean all corporations, companies, or individuals owning, or operating any railroad, in whole or in part, in the state. *Code Iowa 1897*, § 2122.

#### RAILROAD CROSSING.

A railway crossing is an intersection of railway tracks. The word "tracks," as applied to a railroad, is defined in the *Century Dictionary* to be "the two continuous lines of rails on which the railway cars run." *Atchison, T. & S. F. Ry. Co. v. Kansas City, M. & O. Ry. Co.*, 70 Pac. 939, 940, 67 Kan. 569.

#### RAILROAD DEPOT.

See "Depot."

#### RAILROAD EMPLOYEE.

"Railroad employé," as contained in an accident insurance policy providing that the insurance does not cover injuries resulting wholly or partly "from walking or being on any railroad bridge or roadbed (railway employes excepted)," means one whose employment requires him to work on or about a railroad, and whose employer is one who operates a railroad, either as owner or otherwise, and a traveling salesman for a coal company will not be deemed a railway employé because the duties of his occupation render it necessary that he should go upon the roadbeds of railroads, and he cannot re-

cover for injuries received while between the tracks of a railway company on its roadbed. *Yancy v. Aetna Life Ins. Co.*, 33 S. E. 979, 980, 108 Ga. 349.

### RAILROAD EQUIPMENT.

As fixtures, see "Fixture."

### RAILROAD FACILITIES.

See "Facilities."

### RAILROAD FERRY.

A railroad ferry is a means of connecting railroad tracks or two railroads, the same as a railroad bridge is the continuation of railroad tracks across a stream of water. It is a substitute for a railroad bridge, and is a part of a railroad route for the transportation of cars which are used upon a railroad track and the burden which they bear, and is not for the accommodation of any persons except those who happen to be for the time being railroad passengers. It differs widely, except in name, from a general and unlimited ferry. *City of New York v. New England Transfer Co.* (U. S.) 18 Fed. Cas. 137, 141.

### RAILROAD LINE.

See "Line of Railroad."

### RAILROAD OFFICERS.

Railroad officers are not governmental agents whose laches creates no bar to the defense of the statute of limitations to actions for encroachment upon streets and roads. *Pittsburgh, C., C. & St. L. Ry. Co. v. Stickley*, 58 N. E. 192, 193, 155 Ind. 312.

### RAILROAD PROPERTY.

"Railroad property" is not an equivalent term with "the property of a railroad company." The term "railroad property" is commonly understood to mean the property essential to a railroad company to enable it to discharge its functions and duties as a common carrier by rail. It includes the roadbed, right of way, tracks, bridges, stations, rolling stock, and such like property. On the other hand, lands owned and held for sale or other disposition for profit, and in no way connected with the use or operation of the railroad, are not "railroad property" in the sense mentioned, but are the property of the railroad company independently of its functions and duties as a common carrier. *Northern Pac. R. Co. v. Walker* (U. S.) 47 Fed. 681, 685.

"Railroad property," as used in *Laws Dak.* 1883, c. 99, providing for the taxation

of railroad property, means the property necessary for use in the usual daily conduct of the business of the company as a common carrier by rail, and lands outside of that use, although owned by a railroad company, cannot be classified and taxed under the head of "railroad property." *McHenry v. Alford*, 18 Sup. Ct. 242, 248, 168 U. S. 651, 42 L. Ed. 614.

"Railroad property," as used in *Pub. Laws* 1888, p. 269, authorizing the taxation of railroad property, means property in the possession of a railroad company as of right, if suitable and proper to the purposes of its franchise, and used by it for such purpose, irrespective of its ownership by the railroad company. The right or interest of the railroad that is deemed to be property, within the meaning of this act, may be an absolute fee, or any less interest, down to simple possession as of right. *In re Erie R. Co.*, 48 Atl. 601, 602, 65 N. J. Law, 608.

"Railroad property," within the meaning of the statute exempting the property of a railroad from taxation, cannot be construed to include a steamboat, though used in connection with the railroad. *Illinois Cent. R. Co. v. Irvin*, 72 Ill. 452, 455.

"Railroad property," within the meaning of the statute exempting railroad property from taxation, does not include warehouses erected by private individuals upon lands leased by the railroad company along and on the company's right of way and intended for the private benefit of the lessees who have a right to renew the same before the termination of their lease. *Gilkerson v. Brown*, 61 Ill. 486, 488.

The railroad track and the rolling stock, taken together, include the entire railroad property. A statute providing for the taxation of railroad track and rolling stock includes all property owned or used by the railroad company, in the operation of its road, which may come within the term "railroad property." *Pittsburgh, C., C. & St. L. R. Co. v. Backus*, 14 Sup. Ct. 1114, 1118, 154 U. S. 421, 38 L. Ed. 1031.

### RAILROAD PURPOSES.

Where a railroad company uses a freight yard for the purpose of carrying on a private coal business upon its own account with coal from its own mines, transported in its own cars to such yard, and then from such yard by the railroad company through its own agents, sold to others in its own name and upon its own account, such yard so used is not property retained or used for "railroad purposes" within *Gen. St.* p. 3332, § 212, providing that all property of a railroad not used for railroad purposes shall be assessed and taxed by the same assessors and in the

same manner and at the same time as the taxable property of other owners in the same assessing district. *Delaware, L. & W. R. Co. v. City of Newark*, 37 Atl. 629, 630, 60 N. J. Law, 60.

"Railroad purposes," as used in the statute exempting lands used for railroad purposes from taxation, should be construed to include the use of the land for the erection of a grain elevator thereon. *Pennsylvania R. Co. v. Jersey City*, 9 Atl. 782, 784, 49 N. J. Law (20 Vroom) 540, 60 Am. Rep. 648.

### RAILROAD SHOP.

Commonly, the word "shop" means a building inside of which a mechanic carries on his work. It is obvious, however, that the term "railroad shop" includes much more than would be included in the terms "shoe shop" and "tailor shop." *Chicago, R. I. & P. Ry. Co. v. Denver & R. G. R. Co.* (U. S.) 45 Fed. 304, 314.

### RAILROAD STATION.

A railroad station is a place where passengers are received upon and discharged from railroad trains, and, under an Arkansas statute providing that local freights shall carry passengers from and to their stations, a railroad company running a local freight must at any event carry the passenger to the yard of the station at his destination at a place not unreasonably distant from the station platform. *St. Louis & S. F. Ry. Co. v. Neal*, 51 S. W. 1060, 66 Ark. 543.

### RAILROAD SWITCH.

See "Switch."

### RAILROAD TICKET.

A railroad ticket is a receipt or voucher. It has more the character of personal property than that of a negotiable instrument. *Lawson*, in his work on *Contracts of Carriers*, p. 116, § 106, says that: "A railroad or steamboat ticket is nothing more than a mere voucher that the party to whom it is given, and in whose possession it is, has paid his fare and is entitled to be carried a certain distance." Where possession of railroad tickets was obtained by fraud, the purchaser from the person so obtaining them obtains no title thereto. *Frank v. Ingalls*, 41 Ohio St. 560, 563.

While a railroad ticket is in one sense property, yet it is not merchandise or a chattel, but it is merely the evidence of the contract of the carrier to transport the holder between the points, and on the conditions therein named. Treating the ticket as the contract itself, it is in the nature of a chose in action. No one with whom a carrier

makes such a contract has any inherent constitutional right to insist that it should be assignable. *State v. Corbett*, 59 N. W. 317, 318, 57 Minn. 345, 24 L. R. A. 498.

A railroad ticket purchased at the usual full fare, and for a special occasion, is not a contract in itself, but the mere token or the evidence of the contract which the law creates, and which lies behind the ticket. In such case the law makes the contract and regulates the reciprocal rights and duties of both carriers and passengers, and the ticket is a mere token that such contract exists, and that under it the passenger is entitled to be carried to and from the points named, without regard to a time limit printed upon it. The ticket itself is not, however, to be presumed to set out the terms of the contract, and the passenger is not required or expected to look to it for any stipulations or conditions different from what the law imposes. *Watson v. Louisville & N. R. Co.*, 56 S. W. 1024, 1026, 104 Tenn. 194, 49 L. R. A. 454.

A passenger's ticket is both a receipt and a contract. It is an acknowledgment of receipt of the fare, and the obligation to carry him for the purposes and on the terms specified; and, where a railroad company has sold a passenger a ticket to a certain station, it is liable for refusal to stop there. *Richmond, F. & P. R. Co. v. Ashby*, 79 Va. 130, 133, 52 Am. Rep. 620.

A railroad ticket is a mere token or voucher showing that the holder has paid his fare and is entitled to passage as thereon indicated. *Elmore v. Sands*, 54 N. Y. 512, 515.

### RAILROAD TRACK.

Under the revenue laws, lands occupied by a railroad company with its main track, side tracks, depot, roundhouse, coalsheds, and water tanks are to be valued and assessed by the State Board of Equalization as "railroad track," and cannot be assessed by the local authorities. *Pfaff v. Terre Haute & I. R. Co.*, 9 N. E. 93, 94, 108 Ind. 144.

The term "railroad track" embraces all fixed railroad property of a railroad corporation. *Little Rock & Ft. S. Ry. v. Worthen*, 7 Sup. Ct. 469, 120 U. S. 97, 30 L. Ed. 588.

For the purpose of the title relating to the revenue, "railroad track" shall be deemed to include the right of way, station, superstructures upon such right of way, station and other grounds, and all other immovable property used, operated, or occupied by any person, company, or corporation owning, operating, or constructing lines of railroad wholly or partly within the state, and reasonably necessary to the maintenance and operation of such road. *Pol. Code Idaho 1901*, § 1357.

Lands occupied by a railroad company with its main track, side tracks, depot, roundhouse, coal sheds, and water tanks are to be valued and assessed by the State Board of Equalization as "railroad track." *Pfaff v. Terre Haute & I. R. Co.*, 9 N. E. 93, 94, 108 Ind. 144. It includes lands occupied by a railroad company with its main tracks, side tracks, depots, roundhouses, coal sheds, and water tanks. *Oregon Short Line Ry. Co. v. Yeates*, 17 Pac. 457, 460, 2 Idaho (Hasb.) 397.

Main track, side tracks, right of way, and improvements thereon are all "railroad track," and taxable as such, under Rev. St. c. 120, § 42. *Cairo, V. & C. Ry. Co. v. Mathews*, 38 N. E. 623, 625, 152 Ill. 153; *Quincy, O. & K. C. Ry. Co. v. People*, 41 N. E. 162, 164, 156 Ill. 437.

The term "railroad track," as used in a statute classifying the property of the railroad for taxation purposes into capital stock, railroad track, etc., "embraces property held for right of way, including superstructures thereon." *Ohio & M. R. Co. v. Weber*, 96 Ill. 443, 448.

"Railroad track," as used in a deed bounding the land by the line of a railroad track, should be construed to mean the line of the rails, if the grantor could convey so far, and not simply to the right of way. *Reid v. Klein*, 37 N. E. 967, 970, 138 Ind. 484.

#### Bridge.

The railway bridge of the Chicago, Burlington & Quincy Railroad Company across the Mississippi, from Henderson county to Burlington, built by it, and used solely as a part of its track, is, so far as it is within the jurisdiction of Illinois, assessable as "railroad track" by the State Board of Equalization, and is not assessable by the township or county assessors. 2 *Starr & C. Ann. St. c. 120, para. 42, 110*. This is not changed by the act of 1873 (Id. par. 299 et seq.) as to bridges on the border of the state, providing that they be assessed as real estate. That act applies to bridges owned by bridge companies. *Anderson v. Chicago, B. & Q. R. Co.*, 7 N. E. 129, 131, 117 Ill. 26.

Railroad property, to be assessable by the State Board of Equalization as "railroad track," must not only be so used, but it must be the property of a railroad company, and hence does not include a bridge, belonging to a bridge company, leased to a railroad company. *Chicago & A. R. Co. v. People*, 38 N. E. 1075, 1076, 153 Ill. 409, 29 L. R. A. 69.

#### Embankment.

"Railroad track," as used in Code, § 464, providing that no railroad company shall occupy a street with its railway track until the resulting injury to property abutting thereon has been ascertained and compensated, includes an embankment forming the

roadbed and embankments forming approaches to highways or street crossings, rendered necessary by the construction of the railroad. *Nicks v. Chicago, St. P. & K. C. R. Co.*, 50 N. W. 222, 223, 84 Iowa, 27.

The "track" of a railroad is not merely the rails and ties upon which cars run, but it is the "road, course, way" (Webster), and includes all that enters into and composes the road, the course, and way. The embankment upon which the rails and ties are laid is a part of the whole that makes the railroad track. *Gates v. Chicago, St. P. & K. C. R. Co.*, 48 N. W. 1040, 1041, 82 Iowa, 518.

#### Realty held for future use.

Under Rev. St. c. 120, § 42, which defines the "railroad track" which must be assessed by the State Board of Equalization as the "right of way, including the superstructure, of main, side, and second track and turn-outs, and the station and improvements of the railroad company on such right of way," city lots which have been bought by a railroad company with the intention of using them as a site for its station, when it should acquire title to other adjoining lots, but which it has held for four or five years without attempting to acquire title to such other lots, form no part of its railroad track. *Chicago, B. & Q. R. Co. v. People*, 27 N. E. 200, 201, 136 Ill. 660.

Under sections 40-42 of the Illinois revenue act, property held by a railway, "located" and in process of construction for right of way, is to be listed in its schedule of "railway track." The fact that lots held for the right of way have buildings on them which are occupied, and that the company permits such occupancy to continue during the construction of the track, does not change the character of such property. *People v. Chicago & W. I. R. Co.*, 4 N. E. 480, 481, 116 Ill. 181; *Chicago & W. I. R. Co. v. People (Ill.)*, 4 N. E. 480, 481.

#### Right of way.

"Railroad track," in Revenue Act 1872, § 42, requiring certain property of a railroad company to be listed and valued for taxes as "railroad track," includes town or city lots used by the company as right of way. *Chicago & N. W. Ry. Co. v. Miller*, 72 Ill. 144, 146.

#### Roadbed.

"Track," as used in Rev. St. 1898, § 1816, subd. 1, providing for recovery by a railway employé who, without contributory negligence, is injured by a defect in the track, clearly includes the roadbed upon which the track rests. *Crouse v. Chicago & N. W. Ry. Co.*, 78 N. W. 446, 450, 102 Wis. 196.

"Track," as used in an instrument relating to special assessments against the

track right of way of a railroad, does not mean the right of way, but is merely a part of the right of way; that is, that part on which the rails and ties are laid. *Drainage Com'rs of Dist. No. 3 v. Illinois Cent. R. Co.*, 41 N. E. 1073, 1076, 158 Ill. 353.

#### Side track.

"Track," as used in Laws 1853, c. 62, authorizing villages to lay out streets and highways across the track of any railroad, signifies the entire roadbed, and not merely the iron or railway, but roadbed, including turn-outs and switches, or other contrivances for passing engines or cars from one line of rails to another, or for public traffic purposes (citing *Delaware & H. Canal Co. v. Village of Whitehall*, 90 N. Y. 21), so that a street may be laid out over the side tracks running with the main track and within the yard limits. *In re Folts St. in Village of Herkimer*, 46 N. Y. Supp. 43, 46, 18 App. Div. 568.

The phrase "railroad track" is defined to be a right of way, including superstructures on main, side, or second tracks, and turn-outs, and the stations and improvements of the railroad company on such right of way. *Huck v. Chicago & A. R. Co.*, 86 Ill. 352, 358.

A railroad company owned a tract of land of about 30 acres adjoining its right of way, on which were buildings and conveniences for yarding and feeding sheep, and for loading and unloading sheep to and from cars on the main and side tracks. The track was entirely surrounded by a fence, and the only railroad track thereon was a stub about 500 feet long, used for conveying feed to the buildings, and shut off from the right of way by a grade when not so in use. The revenue law (Hurd's Rev. St. 1899, p. 1401, § 42) provides that a railroad "right of way including the superstructures of main, side or second track and turn-outs and the station and improvements of the railroad company on such right of way shall be held to be real estate for the purpose of taxation and denominated 'railroad track.'" Held, that such 30-acre tract was no "railroad track" within the meaning of such section. *Chicago & N. W. Ry. Co. v. People*, 62 N. E. 869, 871, 195 Ill. 184.

Under the revenue act of 1872, a strip of land, with tracks and shops, etc., thereon, occupied by a railroad company and adjoining the main track, should be assessed as "railroad track," and not as "other real estate," the same being a part of the right of way. *Chicago, R. I. & P. R. Co. v. People*, 4 Ill. App. (4 Bradw.) 468, 470.

The word "track," as used in Laws 1853, c. 62, authorizing highways to be carried across railroad tracks, does not include grounds upon which tracks are laid for stor-

ing cars or exclusively for making up trains. The word may include one or more single tracks, but should be limited to the track used for public traffic, whether composed of one or more, including turn-outs and switches, or, in other words, what may fairly be regarded as the roadway. *People v. New York Cent. & H. R. R. Co.*, 51 N. E. 312, 314, 156 N. Y. 570; *Boston & Albany R. R. Co. v. Village of Greenbush*, 52 N. Y. 510, 511.

#### Spur track.

Under Rev. St. c. 120, § 109, which provides that all "railroad track" shall be assessed by the State Board of Equalization, a track to a quarry, constructed for the sole purpose of providing material to keep the roadbed in proper repair, is "railroad track," and cannot be assessed by the local assessor, and a tax levied upon an assessment by him is void. *Chicago & A. R. Co. v. People*, 22 N. E. 864, 865, 129 Ill. 571.

#### Street railroad track.

"Railway track," as used in Code 1873, § 464, relating to compensation to owners of land abutting on streets in which a railway track is proposed to be located and laid down, does not apply to a horse railway track. *Sears v. Marshalltown St. Ry. Co.*, 23 N. W. 150, 151, 65 Iowa, 742.

A "railway track," as generally understood, means only a track on which steam is used as motive power, and it will be presumed that the Legislature used such words in that sense in providing for compensation to abutting owners where a railway track is laid in the street. *Freiday v. Sioux City Rapid Transit Co.*, 60 N. W. 656, 657, 92 Iowa, 191, 26 L. R. A. 246.

#### As a structure.

See "Structure."

#### Tracks in yard.

The word "track," as used meaning the track of a railroad company, applies as well to tracks or lands devoted to the purpose of the railroad yards. *Chicago & A. R. Co. v. City of Pontiac*, 48 N. E. 485, 486, 169 Ill. 155.

"Tracks," as used in Act 1872, art. 5, § 1, par. 89, providing that city councils shall have power, by condemnation or otherwise, to extend any street, alley, or highway over or across any railroad track, right of way, or land of any railroad company within the corporate limits, should not be limited to such right of way, tracks, and land as are appropriated to the active operation of a company's railway, but to include tracks or land devoted to the purposes of a railroad yard. *Chicago & N. W. Ry. Co. v. City of Chicago*, 37 N. E. 842, 845, 151 Ill. 348.

Under Rev. St. 1874, c. 24, art. 5, § 1, par. 89, declaring that a city council shall have power by condemnation to extend any street over or across any "railroad track," right of way, or land of any railroad company, it is held that a city is authorized to extend the street across a railroad yard consisting merely of a collection of tracks. *Illinois Cent. R. Co. v. City of Chicago*, 30 N. E. 1044, 141 Ill. 586, 17 L. R. A. 530.

### RAILROAD YARD.

See, also, "Switch Yard."

The words "railroad yard," as employed in connection with and descriptive of railway service, consists of side tracks upon either side of the main track, and adjacent to some principal station or depot grounds where cars are placed for deposit, and where arriving trains are separated and departing trains made up. It is the place where such switching is done as is essential to the proper placing of cars either for deposit or for departure. *Baltimore & O. S. W. Ry. Co. v. Little*, 48 N. E. 862, 863, 149 Ind. 167; *Chicago & N. W. Ry. Co. v. City of Chicago*, 87 N. E. 842, 844, 151 Ill. 348.

The "yard" of a railroad company is a place for the deposit of cars and the making up of its freight trains. *Philadelphia, W. & B. R. Co. v. Burkhardt*, 34 Atl. 1010, 1011, 83 Md. 516.

The word "yard," as employed in connection with and as descriptive of railway service, consists of side tracks upon either side of the main track, and adjacent to some principal station or depot grounds where cars are placed for deposit, and where arriving trains are separated and departing trains made up. It is the place where such switching is done as is essential to the proper placing of cars either for deposit or for departure. *Baltimore & O. S. W. Ry. Co. v. Little*, 48 N. E. 862, 863, 149 Ind. 167; *Harley v. Louisville & N. R. Co.* (U. S.) 57 Fed. 144, 145.

### RAILWAY ACCIDENT.

"Railway accident," as used in a policy of insurance against death or injury in a railway accident, means an accident occurring in the course of traveling, and arising out of the fact of the journey. It does not necessarily depend on any accident to the railway or machinery connected with it. *Theobald v. Railway Passengers' Assur. Co.*, 28 Eng. Law & Eq. 432, 441.

### RAILWAY CUT.

A "railway cut" includes the sloping sides as well as the deepest part of the excavation, or, in other words, the bottom

thereof; so that a deed conveying the land "south of a railway cut" conveys only the land to the upper and outer edge of the cut. *Newton v. Louisville & N. R. Co.*, 19 South. 19, 20, 110 Ala. 474.

### RAINY DAYS.

A charter party provided that the charterer should have 30 days, not counting "rainy days," in which to load. It was claimed, in an action for demurrage, that any day on which any rain fell was a "rainy day," but it was held to mean a day on which at least a moderate rainfall occurred during a greater portion of the time, and that this was the meaning that should be attached to the phrase in the contract, the intention being to except only those days on which the rainfall was sufficient to prevent the vessel from loading with safety and convenience. *Balfour v. Wilkins* (U. S.) 2 Fed. Cas. 539, 540.

### RAISE.

A statute authorizing a millowner to "raise the dam and waterworks" to the height of the natural surface of the water at the line of his lands will be construed to authorize the raising of the water in the dam to that height, and not to authorize the raising of the structure of the dam so that the water would be made to flow back on the land of the adjoining proprietor. *Colwell v. May's Landing Water Co.*, 19 N. J. Eq. (4 C. E. Green) 245, 248.

The expression "raise the dam," in a lease and contract giving the right to raise the dam, "implies that there is a dam in existence which may be raised, and applies to the whole dam, to one part of it as well as to another." *Smith v. Moodus Water Power Co.*, 35 Conn. 392, 399.

Under a will providing that the testator's widow should receive the benefits and proceeds of his real estate to help her "raise" and school his children, and that after they had been "raised" his widow and children should continue to receive the benefits of his real estate during the widow's lifetime, it is held that the children are "raised" when they arrive at the age of 21 years. *Shoemaker v. Stabaugh*, 59 Ind. 598, 600.

To "raise" money, in its ordinary import, is simply to procure it. When applied to an individual or a business corporation, it means the procuring of money in any of the usual methods—by note, mortgage, or obligation. As applied to municipal corporations, its ordinary import is the procuring of money by taxation or by the obligations of the corporation; and, where a statute authorizes the borrowing of money, the words "to raise money" are equally apt to signify raising by

taxation or by municipal obligations. Black's Law Dictionary defines "raising money" as follows: "To raise money is to realize money by subscription, loan, or otherwise." *New York & R. Cement Co. v. Davis*, 66 N. E. 9, 10, 173 N. Y. 235.

The term "to raise money," in its ordinary import, is simply to procure it. When applied to an individual or business corporation, it means the procuring of money in any of the usual methods—by notes, mortgages, or other obligations. As applied to municipal corporations, its ordinary import is the procuring of money by taxation or by the obligations of the corporation. Where a statute authorizes the borrowing of money, the words "to raise money" are equally apt to signify raising by taxation or by municipal obligation. That this is the commonly accepted significance of the words seems to be beyond controversy, and this, too, is their legal significance, except where used in a statute in which it appears that they were intended to be used in a more restricted sense. The authority given by Village Law, § 128, authorizing a village board of trustees to raise money for a certain purpose, was construed to authorize the issuance of bonds, as well as the securing of funds by taxation. *New York & R. Cement Co. v. Keator*, 71 N. Y. Supp. 185, 186, 62 App. Div. 577.

The use of the word "raised," in a subscription paper in which a certain subscription is conditioned on an additional sum being raised, whether it means "subscribed" or "paid," at least requires one or the other, and, unless the amount in question is in good faith subscribed, the conditional subscriber is released. The condition is not performed by subscriptions of responsible residents, if it was understood by the payee and any of the subscribers that they should pay nothing and that understanding has been carried out. *New London Literary & Scientific Inst. v. Prescott*, 40 N. H. 330, 333.

"Raised," as used in a chattel mortgage describing the property as all the crops raised by the mortgagor in any part of a county for the term of three years, does not of itself convey the idea of past time. It does not convey the thought that the crops have been raised before the mortgage was executed. *Muir v. Blake* (Iowa) 9 N. W. 345, 346.

#### As borrow.

"Raised," as used in a municipal ordinance providing that a certain amount of money shall be raised by the pledge or hypothecation of the stock held by the city, means "borrowed." *City of Baltimore v. Gill*, 31 Md. 375, 388.

#### As collect.

As used in a letter to the president of a college, stating that if he could "raise" a cer-

tain sum to aid the college he might rely upon the writer for a certain sum. "raise" means "collect." *Bates College v. Bates*, 135 Mass. 487, 488.

To "raise" money, as the word is ordinarily understood, is to collect or procure a supply of money for use, as in the case of a municipal corporation by taxation or a proposed loan. Money cannot be actually given or appropriated before it is raised. The promise to give or appropriate money may be made before the money is actually procured. But in such case the promise binds the promisor to have the money on hand when it becomes due, and, so in a sense, the money is "raised" by the promise. As authority to grant money includes authority to promise a grant of it, so an exception in respect to raising money includes an exception of a promise by which money must be raised. *Childs v. Hillsboro Electric Light & Power Co.*, 47 Atl. 271, 272, 70 N. H. 318.

The term "raise," in How. Ann. St. § 483, subds. 1, 2, 6, empowering boards of supervisors to purchase real estate and erect various county buildings, and authorizing them to borrow or raise, by tax, money necessary for any of the purposes of the act, is held to mean "obtain." *Dickinson County v. Warren*, 98 Mich. 144, 146, 56 N. W. 1111.

#### Increase not implied.

"Raising revenue," as used in Const. 1868, art. 4, § 15, declaring that all bills for raising revenue shall originate in the House of Representatives, does not imply increase of revenue. The transitive verb "to raise," in this connection, means to bring together, to collect, to levy, to get together for use or service. The precise meaning in this clause is to levy a tax as a means of collecting revenue. *Perry County v. Selma, M. & M. R. Co.*, 58 Ala. 546, 559.

#### Power of sale implied.

A proviso in a will that if testator's personal estate, and his house and lands at a certain place, should not pay his debts, his executors were "to raise" the sum out of his copyhold premises, gave the executors power to sell the copyhold lands to satisfy the testator's intention. *Bateman v. Bateman*, 1 Atk. 421.

Where money is directed to be "raised by rents and profits," unless there are other words to restrain the meaning and to confine them to the receipts of the rents and profits as they accrue, the court, in order to obtain the end which the party intended by raising the money, has, by liberal construction of these words, taken them to amount to a direction to sell, and, as a devise of the rents and profits will at law pass the land, the raising by rents and profits is the same as

raising by sale. *Green v. Belchier*, 1 Atk. 505, 506.

#### As produce or realize.

"Raised," as used in a statute requiring the managers of a lottery to pay into the treasury of the state the whole proceeds, after deducting the amount allowed them for their services and expenses, "not exceeding 25% on the sum 'raised' by such lottery," means actually produced and realized in cash ready to be paid into the treasury of the state, and not a sum of money ineffectually attempted to be raised, and bad debts made by trusting out tickets are not to be considered as money "raised." As used in the act granting a lottery to "raise a sum," etc., it means to create or produce a fund. *State of Maine*, 7 Me. (7 Greenl.) 502, 504.

#### As raise by taxation.

"Raised," as used in 2 Rev. St. c. 11, tit. 2, art. 1, which provides that the electors of a town at the annual meeting shall have power to direct the institution or defense of suits at law or in equity, etc., and to direct such sums to be "raised" in such towns for prosecuting or defending such suits as they may deem necessary, means raised by taxation, and does not mean borrowed. *Wells v. Town of Salina*, 23 N. E. 870, 871, 119 N. Y. 280, 7 L. R. A. 759.

Under the provision of a municipal charter that the amount that may be voted or "raised" within a year shall not exceed a certain per cent. of the valuation, the word "raised" means raised by taxation. *Schneewind v. City of Niles*, 61 N. W. 498, 499, 103 Mich. 301.

#### RAISE AND REBUILD.

A reservation of the right of raising and rebuilding a certain milldam, in case it was washed away, amounted to a reservation of the right to raise as well as rebuild the dam. *State v. Suttle*, 20 S. E. 725, 726, 115 N. C. 784.

"Raised," as used in Const. § 184, providing that no sum shall be raised or collected for education, other than in common schools, until the question of taxation is submitted to the legal voters, and the majority of the votes cast at said election shall be in favor of such taxation, construed in its common meaning, means "borrowed." *Brown v. City of Newport*, 57 S. W. 612, 613, 108 Ky. 783.

#### RAISED BOTTOMS.

Round copper plates turned up at the edges are not "raised bottoms," within the acts of Congress imposing a duty on raised bottoms. *United States v. Potts*, 9 U. S. (5 Cranch) 284, 287, 3 L. Ed. 102.

#### RAM.

A ram is an uncastrated male sheep. *State v. Royster*, 65 N. C. 539.

#### RANCHMAN.

See, also, "Stock Rancher."

A person who leaves his farm, and goes to work for wages in herding, or feeding, or keeping cattle, is not a "ranchman" within the meaning of Gen. St. § 1705, providing that any ranchman to whom cattle shall be intrusted for the purpose of feeding, herding, etc., shall have a lien thereon for his services; the word "ranchman," as used in the statute, being construed to mean a ranchman who takes the stock to his farm and keeps it there. This conclusion was based on the ground that if any other meaning were given to the word "ranchman," as used in the statute, the use of the specific designation would be rendered superfluous, since all that would have been necessary, if it had been intended to give a lien to any one except to the owner and operator of the ranch, would have been to say that any "person intrusted with the feeding, herding," etc., of cattle should have a lien. *Hooker v. McAllister*, 40 Pac. 617, 618, 12 Wash. 46.

#### RANDOM.

The word "random," in its popular sense, means done at hazard, or without any settled aim, purpose, or direction; left to chance, or casual or haphazard; and, when the phrase "at random" is used, it is applied to anything done at haphazard or chance, and one who intentionally shot a dog is not guilty of shooting "at random" on the public highway, the person having a fixed purpose to shoot the dog. *Commonwealth v. Bynum* (Ky.) 50 S. W. 843.

#### RANGE.

See "Cattle Range."

The expression "range" or "accustomed range," as used in the statute making it a criminal offense to willfully drive stock of another from its accustomed range, is a matter of local description, and, unlike a generic term requiring the species to be stated, it admits of proof under the general allegation, without defining by averments the limits of the range. *Foster v. State*, 21 Tex. App. 80, 87, 17 S. W. 548, 549 (citing *State v. Thompson*, 40 Tex. 515).

#### RANK.

In a case involving the question concerning the duty of a husband to support his wife,



and a deprivation of such support by the sale of liquor to the husband, the court say that the social position of the wife in society is a synonym of "rank" or "station." *Thill v. Pohlman*, 41 N. W. 385, 386, 76 Iowa, 638.

#### Army officer.

"Rank," as used in Act Cong. July 28, 1866 (14 Stat. 337, c. 299) § 2, providing that officers of the regular army entitled to be retired on account of disability occasioned by wounds received in battle may be retired upon the full "rank" of the command held by them, whether in the regular or volunteer service, at the time such wounds were received, is not identical with "office." "Rank" is often used to express something different from "office." It then becomes a designation or title of honor, dignity, or distinction conferred upon an officer in order to fix his relative position with reference to other officers in matters of privilege, precedence, and sometimes of command, or by which to determine his pay and emoluments. A person, being a colonel in the line of the army, who is retired with the rank of major general under an act authorizing it, did not have conferred on him a new office, and therefore did not become a major general. He remained a colonel of cavalry, to which office he had been duly appointed, and he acquired only a new and higher rank by the act of Congress authorizing his retirement. An order of the War Department styling a person "brigadier general, formerly major general," refers by those designations only to his rank, and not to his office. *Wood v. United States (U. S.)* 15 Ct. Cl. 151, 158.

#### Claims against estate.

"Rank," as used in Code Civ. Proc. § 1483, requiring claims against decedent's estate to be filed in court and "rank" among the acknowledged debts of the estate to be paid in due course of administration, did not include claims not properly legal debts. The first two examples given by Mr. Webster of authorized uses of the verb "to rank" are as follows: "Poets were 'ranked' in the class of philosophers. Heresy is 'ranked' with idolatry and witchcraft." The first does not necessarily mean nor imply that poets are philosophers, nor the second that heresy is idolatry or witchcraft. Nor does the requirement that an allowed claim shall be "ranked" among debts exclude from the ranks all claims which may not properly be termed "legal debts." *Verdier v. Roach*, 31 Pac. 554, 557, 96 Cal. 467.

#### RANSOM.

The word "ransom" in St. 5 Rich. II, forbidding forcible entry on lands under pain of imprisonment and "ransom," meant not only

a fine, but a severe one. *United States v. Griffin*, 6 D. C. 53, 57.

#### RAPE.

See "Assault with Intent to Commit Rape."

Rape is the carnal knowledge of a female forcibly and against her will. *Maxey v. State*, 52 S. W. 2, 3, 66 Ark. 523; *Charles v. State*, 11 Ark. 389, 409; *Harvey v. State*, 14 S. W. 645, 646, 53 Ark. 425, 22 Am. St. Rep. 229; *Croghan v. State*, 22 Wis. 444, 445 (citing 2 Bouv. Law Dict.); *Sowers v. Territory*, 50 Pac. 257, 260, 6 Okl. 436; *Walton v. State*, 15 S. W. 646, 647, 29 Tex. App. 163; *State v. Montgomery*, 63 Mo. 296, 298; *Richards v. State*, 53 N. W. 1027, 1029, 36 Neb. 17; *Stephen v. State*, 11 Ga. 225, 238 (citing 1 Hale, P. C. 628); *Lowry v. Commonwealth*, 23 Ky. Law Rep. 1553, 1554, 65 S. W. 434, 435; *People v. Crego*, 38 N. W. 281, 282, 70 Mich. 319.

Rape is the carnal knowledge of a woman without her consent, obtained by force, threats, or fraud. *Jones v. State*, 18 Tex. App. 485, 488.

The word "rape" has no technical value which renders its use in an indictment imperatively necessary, and if words be employed which describe such offense they will be taken according to their legal import. If they charge the crime in the language employed by the statute to define rape, they will be taken to charge the crime of rape; and if they charge an "assault with intent to" do the act denominated rape, the construction will be the same. *People v. McDonald*, 9 Mich. 150, 152.

Rape is the carnal knowledge of a woman without her consent. It must not only be obtained by force and threats, but without the consent and against the will. It must be forcible and against the will of the prosecutrix. *Felton v. State*, 139 Ind. 531, 541, 39 N. E. 228, 231.

#### Statutory definitions.

Rape is defined by Rev. St. 1858, c. 164, § 40, as the unlawfully knowing and abusing a female child under the age of 10 years. A female child under 10 years is incapable of consenting to the act of carnal connection, consequently any carnal connection with a child under that age is necessarily against her consent. In order to constitute rape, under section 39, the carnal connection must have been done with force and against the will of a female over the age of 10 years. *State v. Erickson*, 45 Wis. 86, 89.

Rev. St. § 4381, provides that any person who shall "ravish and carnally know any female of the age of 12 years or more by force and against her will" shall be impris-

oned in the state prison. *State v. Mueller*, 55 N. W. 165, 166, 85 Wis. 203.

Rape is the carnal knowledge of a female forcibly and against her will. Every male person of the age of 16 years and upwards, who shall have carnal knowledge of any female person under the age of 14 years, either with or without her consent, shall be adjudged guilty of the crime of rape. *Addison v. People*, 193 Ill. 405, 417, 62 N. E. 235, 238 (citing Cr. Code, div. 2, § 237).

Rape is the carnal knowledge of a female under the age of 16 years, other than the wife of the person, with or without her consent, and with or without the use of force, threats, or fraud. *Rice v. State*, 37 Tex. Cr. R. 36, 37, 38 S. W. 801 (citing Code Cr. Proc. 1895, art. 633).

By Rev. St. Pen. Code, art. 523, rape is defined to be the carnal knowledge of a woman without her consent, obtained by force, threats, or fraud, or the carnal knowledge of a female under the age of 10 years, with or without consent, and with or without the use of fraud, force, or threats. *Mayo v. State*, 7 Tex. App. 342, 347; *Reagan v. State*, 12 S. W. 601, 602, 28 Tex. App. 227; *White v. State*, 1 Tex. App. 211, 214; *Williams v. State*, 1 Tex. App. 90, 91, 28 Am. Rep. 399; *Burk v. State*, 8 Tex. App. 336, 342; *Hardin v. State*, 46 S. W. 803, 806, 39 Tex. Cr. R. 426.

Laws of 1868-69, c. 167, par. 2, provides that every person who is convicted of ravishing any female over 10 years of age by force and against her will, or of knowing and abusing any female child under the age of 10 years, shall suffer death; and paragraph 3 provides that every person convicted of an assault with intent to commit a "rape" shall be imprisoned, etc. Held, that under these statutes rape is the carnal knowledge of any woman above the age of 10 years against her will, and of a woman child under the age of 10 years with or against her will. *State v. Johnston*, 76 N. C. 209, 211.

Sess. Laws 1895, p. 67, provides that "if any person over the age of 16 years shall carnally know any female child under the age of 16 years" he shall be deemed guilty of rape. *State v. Knighten*, 64 Pac. 866, 39 Or. 63, 87 Am. St. Rep. 647.

"Rape" is defined by Sess. Laws 1895, p. 104, as "an act of sexual intercourse accomplished with a female, not the wife of the perpetrator, under either of the following circumstances: First, when the female is under the age of 16 years, of previous chaste and virtuous character; second, where she is incapable, through lunacy or any other unsoundness of mind, whether temporary or permanent, of giving legal consent; third, when she resists, but her resistance is overcome by force or violence; fourth, where she is pre-

vented from resisting by threats of immediate and great bodily harm, accompanied by apparent power of execution; fifth, where she is prevented from resisting by any intoxicating narcotic or anæsthetic administered by or with the privy of the accused; sixth, where she is at the time unconscious of the nature of the act, and this is known to the accused; seventh, where she submits under a belief that the person committing the act is her husband, and this belief is induced by artifice, pretense, or concealment practiced by the accused with intent to induce such belief. *Parker v. Territory*, 59 Pac. 9, 10, 9 Okl. 109; *Asher v. Territory*, 54 Pac. 445, 446, 7 Okl. 188.

"Rape" is defined by Pen. Code, § 450, as sexual intercourse either with a female under 16, or with one whose resistance is overcome by force or violence. *State v. Mahoney*, 61 Pac. 647, 24 Mont. 281.

Under Burns' Rev. St. 1894, § 1990, whoever unlawfully has carnal knowledge with a woman forcibly against her will, or of a female child under 14 years of age, is guilty of rape. When perpetrated against a female child under 14 years of age, consent or non-consent forms no element of the crime. *Hanes v. State*, 57 N. E. 704, 706, 155 Ind. 112.

Under Sess. Laws 1887, c. 150, § 1, carnal knowledge of a female under the age of 18 years is in itself, ipso facto, rape; that is, force, threats, or fraud and want of consent need not be averred or established. *State v. Crawford*, 18 Pac. 184, 185, 39 Kan. 257.

Rape is an act of sexual intercourse accomplished with a female not the wife of the perpetrator, under either of the following circumstances: With a child of tender years, with a lunatic or insane woman, by intimidation, the administration of intoxicating or narcotic substances, etc. Pen. Code, § 221; *People v. Snyder*, 17 Pac. 208, 209, 75 Cal. 323.

If any person shall carnally know any female child under the age of 14 years, or shall forcibly ravish any woman of the age of 14 years or upward, such person shall be deemed guilty of rape, etc. Pen. Code, § 1733; *State v. Jarvis*, 23 Pac. 251, 18 Or. 360.

The statute provides that whoever ravishes and carnally knows a female of the age of 10 years or more, by force and against her will, or unlawfully or carnally knows and abuses a female child under the age of 10 years, shall be punished by death or by imprisonment in the state prison for life. *Barker v. State*, 40 Fla. 178, 188, 24 South. 69, 70.

Rev. St. 1879, § 3480, defines "rape" as follows: "Every person who shall be convicted of rape, either by carnally and unlawfully knowing any female child under the

age of 14 years, or by forcibly ravishing any woman of the age of 14 years or upwards, shall suffer death," etc. *State v. Wray*, 109 Mo. 594, 599, 19 S. W. 86, 87; *State v. Meinhardt*, 73 Mo. 562, 568.

#### **Adultery distinguished.**

See "Adultery."

#### **Age of prosecutrix.**

Rape may be committed on a female under the age of puberty, as well as on one above it, and even on one so young as not to be capable of giving consent or of exercising any judgment in the matter at all. *Dawson v. State*, 29 Ark. 116, 120.

#### **Assault and battery included.**

The word "rape" imports not only force and violence on the part of the man, but resistance on the part of the woman. Every charge of rape necessarily includes a charge of an assault and battery. *Mills v. State*, 52 Ind. 187, 193 (citing 2 Bish. Cr. Proc. § 955).

Rape necessarily includes an assault and battery. To sustain an indictment for assault with intent to commit a rape, it is not necessary to allege or prove a battery. But a battery may be one of the facts by which the offense is made out. It then constitutes a part, though not an essential part, of the offense. If not alleged, there is no variance; if alleged, there is no duplicity. *Commonwealth v. Thompson*, 116 Mass. 346, 348.

The common-law definition of rape is "the carnal knowledge of a woman forcibly and against her will." The same definition is adopted by our statute. Under this definition an assault is a necessary ingredient of every rape or attempted rape. But it is not a necessary ingredient of the crime of carnally knowing a child under the age of 12 years, with or without her consent, defined in the statute, and also called "rape." Here are two crimes differing essentially in their nature, though called by the same name. To one force and resistance are essential ingredients, while to the other they are not essential. They may be present or absent, without affecting the criminality of the fact of carnal knowledge. So, under an indictment charging rape upon a female under the age of 12 years, where the offense was not fully committed, the defendant may be convicted of an attempt to commit rape, though the child consented to all he did, but in such case he cannot be convicted of "assault with intent to commit rape." There can be no assault upon a consenting female, although there may be what the statute designates rape. *State v. Pickett*, 11 Nev. 255, 257, 258, 259, 21 Am. Rep. 754.

#### **Chastity of prosecutrix.**

It is as much rape to force an unchaste woman to have sexual intercourse as it is to

force a virtuous woman. *People v. Crego*, 38 N. W. 281, 282, 70 Mich. 319.

#### **Consent.**

Rape is the carnal knowledge of a woman without her consent, obtained by force, threats, or fraud, or carnal knowledge of a female under the age of 12 years with or without the use of force, threats, or fraud, and in such a case it is immaterial whether the female did consent. *Gonzales v. State* (Tex.) 31 S. W. 371.

Under Rev. St. § 3840, providing that "every person who shall be convicted of rape, either by carnally and unlawfully knowing any female child under the age of 14 years, or by forcibly ravishing any woman of the age of 14 years or upwards, shall," etc., sexual intercourse with a female under the age of 14 years constitutes rape, whether she consents or not. *State v. Lacey*, 20 S. W. 238, 111 Mo. 513.

A rape may be committed on an infant, and a child under 10 years of age cannot consent to carnal intercourse, so as to rebut the presumption of force. *Stephen v. State*, 11 Ga. 225, 238.

Rape is defined as an act against the will of the prosecuting witness. The word "will," as employed in defining the crime of rape, is not construed as implying the faculty of mind by which an intelligent choice is made between objects, but rather as synonymous with inclination or desire, and in that sense it is used with propriety with reference to persons of unsound mind. But where a man has criminal connection with a woman of mature years, but who is shown by the testimony to be in a state of dementia, not idiotic, but approaching it, and no fraud or force is used, the act did not constitute rape. *Crosswell v. People*, 13 Mich. 427, 432, 87 Am. Dec. 774.

#### **As a legal conclusion.**

Rape is the carnal knowledge of a woman without her consent, obtained by force, threats, or fraud, and in an indictment for attempt to commit rape the intended means to effect the rape must be charged. Rape being the conclusion of law from the allegation of all the constituent acts, to allege an assault with intent to rape, or that defendant did rape, without setting forth all of the elements of the offense, would be simply to charge that defendant committed a certain offense. *Hewitt v. State*, 15 Tex. App. 80, 81.

#### **Emission.**

At common law and in Ohio emission is a necessary element in the crime of rape. *Blackburn v. State*, 22 Ohio St. 102, 111.

To constitute carnal knowledge, there must be both penetration and emission. *Williams v. State*, 14 Ohio, 222, 224, 45 Am. Dec. 536.

Rape is defined to be the unlawful carnal knowledge of a woman forcibly and against her will. Pen. Code, § 91. It was at one time held that to constitute and complete the offense it was necessary to prove emission in the body of the female; but such is not the law now, either in England or here, and penetration alone is sufficient, even though the fact of emission is negated by the evidence. *Commonwealth v. Childs* (Pa.) 2 Pittsb. R. 391, 394, 395.

#### Fear.

On a prosecution for rape defendant could be found guilty, though the force or threats by which the act was accomplished did not create a reasonable apprehension of death in the mind of prosecutrix. *Waller v. State*, 40 Ala. 325, 331.

Rape is the carnal knowledge of a woman forcibly and against her will, or the unlawful carnal knowledge of a woman forcibly when she does not consent. The offense is complete when the woman is made to yield through fear or the use of drugs. *Hooper v. State*, 17 South. 679, 680, 106 Ala. 41.

#### As felony.

See "Felony."

#### Force.

Force is an essential ingredient in the crime of rape. *People v. Bartow* (N. Y.) 1 Wheeler, Cr. Cas. 378, 380.

The word "rape" imports not only force and violence on the part of the man, but resistance on the part of the woman. *Mills v. State*, 52 Ind. 187, 193.

Where sexual intercourse is obtained by representations that it is necessary in order that prosecutrix may recover from disease, the act will not constitute rape unless there was an intent to use force in case the fraud failed. The force used in ordinary sexual intercourse will not of itself be sufficient to support a conviction. *Walter v. People* (N. Y.) 50 Barb. 144, 146.

Rape is the carnal knowledge of a woman without her consent, obtained by force. The force must be such as might reasonably be supposed to overcome resistance, taking into consideration the relative strength of the parties and other circumstances of the case. *Shields v. State*, 23 S. W. 893, 895, 32 Tex. Cr. R. 498.

Force is a necessary element in the crime of rape. The employment of arts and devices, without violence, by which the moral nature of a female is corrupted, so that she is no longer able to resist the temptation to yield to sexual desires, is not sufficient. *People v. Royal*, 53 Cal. 62, 64.

All the elements of the crime of ravishing—the assault with physical force, result-

ing in copulation against the will or consent of the victim—are signified by the word "rape." Violence and force—that is, the use of physical force for the purpose of compelling submission—is one of the circumstances essential to make the successful attempt a rape. *Rookey v. State*, 38 Atl. 911, 913, 70 Conn. 104.

Rape is defined as the having unlawful carnal knowledge of a woman by force and against her will. 1 Bish. Cr. Law; Code, § 3861. In order to sustain a conviction for assault with intent to commit a rape, the evidence must show that the accused had a purpose, not only to have sexual intercourse with the prosecutrix, but must have intended also to use whatever degree of force might be necessary to overcome her resistance and to accomplish his object. *State v. Canada*, 27 N. W. 288, 289, 68 Iowa. 397.

Carnal connection with a female under 10 years of age is rape, no matter what the circumstances; and the question of consent of the female, or whether there was force, threats, or fraud employed in obtaining the connection or not, is wholly immaterial. Pen. Code, art. 523. It is provided by the Code that the definition of force, as applicable to assaults and batteries, applies also to the crime of rape; and, further, "it must have been such as might reasonably be supposed sufficient to overcome resistance, taking into consideration the relative strength of the parties and other circumstances of the case." Pen. Code, art. 542; *Anschicks v. State*, 6 Tex. App. 524, 534.

Force is an essential element in the crime of rape. The term is general, and in its application the quantum of force is not to be taken into consideration, provided the act be consummated against the will of the female. *Bradley v. State*, 32 Ark. 704, 710.

Whoever unlawfully has carnal knowledge of a woman forcibly, against her will, is guilty of rape, and upon conviction thereof, etc. Rev. St. 1881, § 1917. Under this statute, where there is a carnal connection and no consent in fact, there is in the wrongful act itself all the force which the law demands as an element of the crime. *Pomeroy v. State*, 94 Ind. 96, 100, 48 Am. Rep. 146.

By the statute rape is defined to be an act of sexual intercourse accomplished with a female not the wife of the perpetrator, where she resists, but her resistance is overcome by force or violence, or where she is prevented from resisting by threats of great bodily harm accompanied by apparent power of execution, and unless at the time the female is of sound mind, and not under the influence of drugs or anaesthetics. Held, that without force, actual or constructive, there can be no rape. To authorize a conviction the testimony must show that prosecutrix resisted to the extent of her ability, but, if

she submits from terror or dread of greater violence caused by threats, the intimidation becomes equivalent to force. *Sowers v. Territory*, 50 Pac. 257, 260, 6 Okl. 436.

Under the laws of this state "rape" means "the carnal knowledge of a woman with or without her consent, obtained by force, and such force as might reasonably be supposed sufficient to overcome resistance, taking into consideration the relative strength of the parties and other circumstances of the case." *Price v. State*, 36 Tex. Cr. R. 143, 146, 35 S. W. 988, 989.

#### **Fraud.**

Rape is the unlawful carnal knowledge of a woman forcibly and against her will. Act 1839, c. 23, § 13. The offense of rape can only be perpetrated by the use of force in overcoming the female. If the carnal knowledge of a woman be the result of a fraudulent stratagem, whereby the female is induced to yield her consent, the act is not rape. *Wyatt v. State*, 32 Tenn. (2 Swan) 394, 397.

Rape is the carnal knowledge of any female of 10 years or more by force and against her will, and fraud in this connection is not equivalent to force, except in that class of cases in which the prisoner has been in some way instrumental in disabling the prosecutrix to make resistance. Hence, where one attempts to have illicit connection with a woman by impersonating her husband, he is not guilty of assault with intent to commit rape. *State v. Brooks*, 76 N. C. 1, 3.

#### **Incest distinguished.**

Under Hill's Ann. Code, § 1873, the crime of rape by forcible ravishment and incest cannot be committed by the same act. Rape is accomplished by the impelling force of one person, and incest by the concurring assent of two. *State v. Jarvis*, 26 Pac. 302, 303, 20 Or. 437, 23 Am. St. Rep. 141.

Assent by both parties is a necessary ingredient of the crime of incest. If the carnal intercourse is obtained by force the crime is rape, and not incest. This decision seems to rest to some extent upon the peculiar wording of the Iowa statute under which the case arose, the court remarking in the course of the argument that the theory of the state was that if a man has carnal knowledge with a woman related to him within the prohibited degrees he is necessarily guilty of incest, and if he has carnal knowledge of her by force he is also guilty of rape; so that the crime of rape committed by one person on another related within the prohibited degrees necessarily includes incest, and that the guilty person may be charged with both in the same indictment, and convicted of the latter, if not of the former. In answer to this contention the court says that consent, of course, excludes rape, and that whether force and want of consent in-

clude incest must be determined by the construction which should be put upon the section of the Code punishing the crime of incest. The Code declares (section 4030) that if any persons within the prohibited degrees carnally know each other they shall be deemed guilty of incest. In construing this section it is to be observed that to constitute the crime of incest the parties must have carnal knowledge of each other. It is not sufficient that the man should have carnal knowledge of the woman, unless it follows that in such case she would necessarily have carnal knowledge of him. We come, then, to the question whether it can be said that a woman who is ravished has carnal knowledge of the man, within the meaning of the statute. In our opinion, it cannot. The very use of the word "knowledge" indicates that the connection is to be deemed one of the mind as well as of the body. It is further to be observed that a person is not to be deemed singly guilty of incest, for the language is, "they shall be deemed guilty of incest." Again, it is easy to see that incest and rape have each a distinct element of criminality. The use of force is criminal, but the criminality is essentially different from the corruption of the mind of the other party where force is wanting. *State v. Thomas*, 4 N. W. 908, 909, 53 Iowa, 214.

#### **Legal status of prosecutrix.**

Rape is an act of sexual intercourse accomplished with a female not the wife of the perpetrator, under either of the following circumstances: Where the female is under the age of 15 years, etc. Comp. Laws, p. 509, § 46. Under this section it is not necessary to allege that the female was not defendant's wife. *State v. Williams*, 23 Pac. 335, 336, 9 Mont. 179.

"Rape" is defined by the Revised Statutes in the following language: "Any person who shall ravish and carnally know any female of the age of 10 years or more by force and against her will shall be punished in the state's prison not more than 30 years nor less than 10." Held, that the fact that the female is a married woman is immaterial, and hence words in an indictment alleging her to be a married woman are mere surplusage. *State v. Hooks*, 33 N. W. 57, 58, 69 Wis. 182, 2 Am. St. Rep. 728.

#### **Unwarranted liberty with person.**

Evidence of an unwarranted liberty with the person of a female, however gross, not showing an attempt to commit a rape by force, threats, or fraud, will not sustain a conviction. *Thompson v. State*, 43 Tex. 583, 584.

#### **Mental capacity of prosecutrix.**

By Pen. Code, § 261, subd. 2, rape "is an act of sexual intercourse accomplished with a female not the wife of the perpetra-

tor, under either of the following circumstances: \* \* \* (2) Where she is incapable, through lunacy or unsoundness of mind, of giving legal consent." Held, that the fact that defendant did not know that the woman was too feeble minded to give consent was no defense to a charge of rape. *People v. Griffin*, 49 Pac. 711, 712, 117 Cal. 583, 59 Am. St. Rep. 216.

Rape is defined by the Penal Code as "the carnal knowledge of a woman without her consent, obtained by force, threats, or fraud, or the carnal knowledge of a female under the age of 10 years, with or without her consent, and with or without force, threats, or fraud." Neither in this nor in any other provision does the Code recognize mental incapacity of the female as a consideration affecting the offense of rape; and therefore whatever may have been the mental condition of the female, if she was over the age of 10 years at the time of the alleged rape, it is incumbent on the state to allege and prove that the carnal knowledge was obtained without her consent, and by means of force, threats, or fraud. *Baldwin v. State*, 15 Tex. App. 275, 280.

"Rape" is defined to be the having carnal knowledge of a female forcibly and against her will. There is here no limit to the use of the word "female." There is nothing said as to the soundness or unsoundness of the mind, as to the idiocy or insanity, and the offense embraces the case of one having intercourse forcibly and against the will or resistance of an insane female. *State v. Crow* (Ohio) 10 West. Law J. 501, 502.

To constitute rape the act must be intended to be done with force, and without the woman's consent, and, if done with these intentional elements, it can make no difference that the woman was insane, and that the accused did not know she was incapable of giving her consent; but if the man does not know that the woman is non compos, and from her conduct is led to believe he has her consent, the act cannot be rape. *State v. Cunningham*, 12 S. W. 376, 379, 100 Mo. 382.

#### Penetration.

In rape the least penetration is sufficient. *State v. Le Blanc* (S. C.) 3 Brev. 339, 341.

On a prosecution for rape proof of penetration alone is sufficient to sustain the indictment. *Waller v. State*, 40 Ala. 325, 332.

On a prosecution for rape the fact of penetration must be proved beyond a reasonable doubt. *Davis v. State*, 43 Tex. 189, 191.

Under Act Feb. 22, 1861 (Acts 1860-61) the least penetration of the person of a female against her will constitutes the crime of rape, and it is not necessary that the

hymen should be ruptured. *State v. Hargrave*, 65 N. C. 466.

Rape is defined to be the having unlawful and carnal knowledge of a woman by force and against her will. To constitute this carnal knowledge there must be both penetration and emission. The law presumes that an infant under the age of 14 years is incapable of committing or attempting to commit the crime of rape, but this presumption may be rebutted by proof that such person has arrived at the age of puberty. *Williams v. State*, 14 Ohio, 222, 224, 45 Am. Dec. 536.

Rape is the carnal knowledge of a female forcibly and against her will. A female under 12 years of age is incapable of consenting to carnal knowledge of her person. Therefore carnal knowledge of her, even with her nominal consent, is in legal contemplation forcible and against her so as to constitute rape. Whether or not the female is sufficiently developed to admit of it, penetration, however slight, is necessary to constitute carnal knowledge. *White v. Commonwealth*, 28 S. W. 340, 341, 96 Ky. 180.

#### Resistance.

In order to constitute the crime of rape of a female over 10 years of age, when it appears that at the time of the alleged offense she was conscious, had the possession of her natural mental and physical powers, was not overcome by numbers, or terrified by threats, or in such place and position that resistance would have been useless, it must also be made to appear that she did resist to the extent of her ability at the time and under the circumstances. *People v. Dohring*, 59 N. Y. 374, 382, 17 Am. Rep. 349.

To constitute rape, the act of the defendant must have been without any consent on the woman's part; he must have used sufficient force to accomplish his purpose; and the degree of resistance is frequently essential in determining whether the want of consent was real, though there is no rule of law requiring the jury to be satisfied that the woman, according to their measure of her strength, used all the physical force in opposition of which she was capable. *Commonwealth v. McDonald*, 110 Mass. 405, 406.

The crime of rape can only be committed where there is on the part of her on whom the attempt is made the utmost reluctance and the utmost resistance. A passive course of conduct or slight resistance is not sufficient; there must be no consent, however reluctant. *State v. Burgdorg*, 53 Mo. 65, 67.

By Sess. Laws 1895, c. 20, art. 2, p. 104, rape is an act of sexual intercourse accomplished with a female not the wife of the perpetrator under either of the following circumstances: "(3) Where she resists, but her resistance is overcome by force or violence."

Held, that an allegation in an indictment for rape which charged that defendant feloniously made an assault, and attempted by force, threats, and violence to have carnal knowledge of a female without her consent, was equivalent to a statement that she resisted, and under such an allegation evidence that she resisted or was prevented from resisting was admissible. *Harmon v. Territory*, 49 Pac. 55, 56, 5 Okl. 368.

"Rape" is defined to be the unlawful carnal knowledge by a man of a woman or female child, forcibly and against her will. The jury must find on the part of the woman not merely a passive or equivocal submission to the defendant. Such resistance will not do. Voluntary submission on her part, while she has the power to resist, no matter how reluctantly yielded, removes from the act the essential element of the crime of rape. *Richards v. State*, 36 Neb. 17, 23, 53 N. W. 1027, 1029.

It is essential to constitute rape that the attempt and its consummation throughout be against the will of the female, and that she resisted the attempt to ravish her to the extent of her ability at the time and under the circumstances. The utmost resistance which otherwise is required may not be requisite to the offense if the female was not in the possession of her mental and physical powers, or is terrified by threats serious in character, or in such a place and position as to render resistance useless. *Dean v. Raplee*, 27 N. Y. Supp. 438, 441, 75 Hun, 389.

#### **Seduction distinguished.**

In rape, force, actual or constructive, is necessary, and the character of the female for virtue and chastity, except as it bears on the question of consent, is utterly immaterial, as is also whether she be a married or an unmarried woman. In seduction, on the other hand, the female must be an unmarried woman, and her consent to the act of sexual intercourse and the surrender of her chastity must have been obtained by means of temptation, deception, arts, flattery, or a promise of marriage; hence it is that an acquittal of a charge of rape will not support a plea of autrefois acquit in a trial for seduction based upon the same act. *Hall v. State*, 32 South. 750, 753, 134 Ala. 90.

#### **Surprise.**

To constitute the crime of rape it has always been held that there must be force, and an act accomplished by surprise will not amount to rape. *McNair v. State*, 53 Ala. 453, 455.

#### **Virginity of prosecutrix.**

The fact that the complainant was not a virgin does not lessen the crime of rape in the slightest degree. *Higgins v. People* (N. Y.) 1 Hun, 307.

## **RASCAL**

A statement that a physician is a "damned rascal" conveys the idea of moral turpitude. *Brown v. Mims* (S. C.) 2 Mill, Const. 235, 236.

## **RATE**

See "Joint Through Rates"; "Regular Rate"; "Tariff Rate"; "Unreasonable Rate"; "Usual Rates"; "Water Rate."

"Rate" is defined by Webster to be the price or amount stated or fixed for anything. *Raun v. Reynolds*, 11 Cal. 14, 19.

A railroad organized under a state charter fixing two rates for the transportation of property, and one for the transportation of passengers, leased its road to another company, "subject to the rates above mentioned." It was held that the word "rates" clearly related to the charges fixed for the transportation of property and the conveyance of persons, for there was only one rate as to passengers. *Georgia R. & Banking Co. v. Maddox*, 42 S. E. 315, 318, 116 Ga. 64.

Const. art. 9, § 1, directs that the Legislative Assembly shall provide by law for a uniform and equal rate of assessment and taxation. It was held that the word "rate" was used in different senses, in relation to assessment and taxation. "An equal and uniform rate of assessment" means proportional valuation; relative, not absolute, equality. And "equal and uniform rate of taxation" means that the percentage of taxation shall be the same, or absolutely equal. *Crawford v. Linn County*, 5 Pac. 738, 739, 11 Or. 482.

#### **Amount distinguished.**

See "Amount."

#### **As price.**

"Rate" means price; value. "Going rate," as to freight, like "market price" for produce, means a fixed and established price for the time. *Barrett v. The Wacousta* (U. S.) 2 Fed. Cas. 923, 925.

"Rate," as used in Pub. St. 1880, c. 149, prescribing a certain sum per week as the rate of board charged by the trustees of state lunatic hospitals for the support of paupers, means nothing more than the word "price." *Gould v. City of Lawrence*, 35 N. E. 462, 463, 160 Mass. 232.

Within the meaning of Starr & C. Ann. St. 1896, c. 24, conferring on cities and villages power to provide for water supply for use and protection from fire, and paragraph 445, authorizing the city council to tax, assess, and collect from the inhabitants such tax, rates, or rents for the use and benefit of water used or supplied to the inhabitants by such waterworks, the words "tax,"

"rents," and "rates" refer to the mere operation of the plant and the collection of its revenues, and not to any mode of taxation, strictly speaking. The revenues and rates that are spoken of are the earnings of the plant from the use of the water by those persons who take the same, and hence the city is not authorized to levy a tax not for the use of the water, but in addition thereto. *Village of Lemont v. Jenks*, 64 N. E. 362, 364, 197 Ill. 363, 90 Am. St. Rep. 172.

#### As proportion.

Under a statute prohibiting the charge of a greater rate of fare than two cents, the word "rate" may be construed as meaning proportion or standard; the clause reading that "a road charging a greater proportion or standard of the price or sum paid for carrying a passenger than that allowed by law shall forfeit," etc. *Chase v. New York Cent. R. Co.*, 26 N. Y. 523, 526.

The word "rate," in statutes relating to taxation, in connection with the provision of the statute prescribing a land tax in any rate not exceeding \$4 to the quarter section, denotes that, 160 acres being taken as a unit of quantity, whatever may be the ratio between it and the tax, the same relative proportion must be observed as to any other given quantity of land, more or less, that falls within the apportionment. *Burlington & M. R. R. Co. v. Lancaster County*, 4 Neb. 293, 304.

In a statute providing for the taxation of shares in a corporation, "but not at a greater rate than is assessed upon other moneyed capital in the hands of individuals in the state," the term "rate" or "ratio" means the percentage, merely; the proportion; the degree. *Webster and Worcester*. If the state imposed a tax of five mills on the dollar on all the real and personal property, then said five mills is the rate agreed on; the proportion; the percentage of taxation. This is distinct from the question of exemption. The exemption of certain property may compel the payment of a larger amount by the remaining taxpayers in an indirect manner, for the reason that so large a sum does not come into the treasury of the state as if there were no exemptions. If so, it is not because the rate is altered, but because there is less material upon which the tax may attach itself. *People v. Dolan*, 36 N. Y. 59, 67.

"Rate," as used in Const. art. 9, § 1, declaring that the Legislative Assembly shall provide by law for a uniform and equal rate of taxation and assessment, applies to the percentage of taxation, as used in connection with "taxation," and to the valuation of the property, as used in connection with "assessment." *Crawford v. Linn County*, 5 Pac. 738, 739, 11 Or. 482.

The word "rate" is used with reference both to a percentage or proportion of taxes,

and to a valuation of property. *Coventry County v. Assessors of Taxes of Coventry*, 14 Atl. 877, 16 R. I. 240.

An ordinance giving exclusive privileges to a gas company, but requiring it to furnish gas at rates as favorable as furnished by a certain gas company in another city, should be construed to mean prices as low, irrespective of any circumstances or conditions. *Decatur Gaslight Co. v. City of Decatur*, 11 N. E. 406, 408, 120 Ill. 67.

#### As public rate.

The word "rates," in Laws 1897, c. 137, § 16, as amended by Laws 1877, c. 31, providing that cemetery lands and property of any association formed pursuant to the act, and any property held in trust for the purposes mentioned in section 9 thereof, shall be exempt from all public taxes, rates, and assessments, is to be construed to mean public rates. *Batterman v. City of New York*, 73 N. Y. Supp. 44, 45, 65 App. Div. 576.

#### As valuation.

"Rate," as used in Act March 9, 1849 (*Nix*, Dig. 945, pl. 57), providing that, where any person or corporation shall be assessed at too low a rate, the commissioners of appeal shall make such addition to the assessment as shall be agreeable to the principles of justice, must be construed as applying either to the percentage of taxation or to the valuation of property. "Rate," in *Cunningham's Law Dictionary*, is said to be a "valuation of every man's estate"; and hence the commissioners of appeal had jurisdiction to add the accumulated surplus of a life insurance company to its assessment. *Mutual Life Ins. Co. v. Utter*, 34 N. J. Law (5 Vroom) 489, 494.

"Rate," as used in Revenue Law, § 33, providing that the taxation of national bank stock shall not be at a greater rate than is assessed upon other moneyed capital, etc., applies as well to the valuation of the shares of the stockholder as to the ratio of tax to be levied thereon. *Bressler v. Wayne County*, 49 N. W. 787, 789, 32 Neb. 834, 13 L. R. A. 614. See *Coventry County v. Assessor of Taxes*, 14 Atl. 877, 16 R. I. 240; *Crawford v. Linn County*, 5 Pac. 738, 739, 11 Or. 482.

#### RATE OF EXCHANGE.

See "Current Rate of Exchange."

#### RATE OF INTEREST.

See "Equitable Rate of Interest."

In common acceptance, the expression "rate of interest" refers to the percentage or amount of interest, and not to the manner of computing; and the phrase "rate of interest," in a statute providing that parties might agree on any rate of interest, meant the



amount of interest, and did not refer to the means of computation. *Raun v. Reynolds*, 11 Cal. 14, 19.

### RATABLE.

The word "ratable," found in the statute providing for the distribution of the effects of an insolvent national bank, and requiring the distribution to be ratable, means on one rule of proportion, applicable to all alike. *Merrill v. National Bank*, 19 Sup. Ct. 360, 371, 173 U. S. 131, 43 L. Ed. 640.

#### As taxable.

A ratable estate, within the meaning of the tax law, is a taxable estate. *State v. Camp Sing*, 18 Mont. 128, 145, 44 Pac. 516, 519, 32 L. R. A. 635, 56 Am. St. Rep. 551.

"Ratable estate," as used in Gen. St. c. 19, providing that every person whose ratable estate shall be set in the list of the town in which he resides at the sum of \$3 or upwards for five years in succession shall thereby gain a settlement in such town, means taxable estate—the real and personal property that the Legislature designates as taxable. *Town of Marshfield v. Town of Middlesex*, 55 Vt. 545, 546.

The word "ratable," as used in Gen. Laws, c. 46, § 7, requiring a person returning an account to make oath before an assessor that it contains, to the best of his knowledge and belief, a true and full account and valuation of all his ratable estate, is not equivalent to the word "taxable." In *re Newport Reading Room*, 44 Atl. 511, 512, 21 R. I. 440.

"Ratable," as used in Pub. St. c. 43, § 6, providing that before assessing a tax the assessors shall give a notice requiring every person to bring into the assessor a true and exact account of all his ratable estate, means all property that is in its nature capable of being appraised, and not simply that which is taxable. The words "ratable estate" often denote that estate which is to bear its proportion or rate in taxation. As used in the statute, it does not relate to the property actually taxed, but to that which is in its nature taxable, and which the assessors rate or value in discharging their duty. *Coventry County v. Assessors of Taxes of Coventry*, 14 Atl. 877, 16 R. I. 240.

### RATABLE POLLS.

The polls of male aliens above the age of 16 years are "ratable polls," within the meaning of the Constitution. *Opinion of Justices*, 7 Mass. 523, 529.

Within the meaning of the Constitution, providing that "all public taxes shall be assessed on the polls and ratable estates in

manner following, namely, each male poll from eighteen to seventy years of age will be valued at \$1.10," aliens are ratable polls, and liable to be taxed as such. It is reasonable that it should be so. They reside within the government, and enjoy all the benefits of its protection, and this without being subject to some of the burdens imposed upon the citizens; and it is but just that, for the protection thus afforded, they should pay, as an equivalent, similar taxes to those assessed upon the citizens. *Opinion of Justices*, 8 N. H. 573, 574.

### RATABLY.

"Ratably," as used in a will making provision for testator's children, and providing that, in case any child should die without issue, then his or her share should be paid ratably to testator's surviving children, is equivalent to the words "pro rata." *Brombacher v. Berking*, 39 Atl. 134, 135, 56 N. J. Eq. 251.

### RATES, TAXES, AND DUTIES.

"Rates, taxes, and duties," in a lease of city property, obligating the lessee to pay the rates, taxes, and duties, include an assessment under the betterment acts, though it is local and special. *Curtis v. Pierce*, 115 Mass. 186, 187.

### RATING.

The expression "rate" or "rating," of vessels, as used in policies of assurance, means relative state in regard to insurable qualities; and where a policy required that a vessel should not be below a certain rate, as "not below A2," this rate is not, in the absence of agreement to that effect, to be established by the rating register alone of the office making the insurance, but may be established by any kind of evidence which shows what the vessel's condition really was. *Insurance Cos. v. Wright*, 68 U. S. (1 Wall.) 456, 472, 17 L. Ed. 505.

### RATIFY.

To ratify is to give validity to the act of another, and implies that the person or body ratifying has at the time power to do the act ratified. A ratification is, in its effect upon the act of an agent, equivalent to the possession by him of a previous authority. It operates on the act ratified in the same manner as though the authority of the agent to do the act existed originally. It follows that a ratification can only be made when the party ratifying possesses the power to perform the act ratified. *Norton v. Shelby County*, 6 Sup. Ct. 1121, 1130, 118 U. S. 425, 30 L. Ed. 178.

To ratify is to give sanction and validity to something done without authority by one individual on behalf of another. Ratification may be expressed or implied. When there is no express ratification, the facts and circumstances from which a ratification may be inferred must be such as are inconsistent with a different intention. *Heyn v. O'Hagen*, 26 N. W. 861, 863, 60 Mich. 150.

The word "ratify" means to make valid; to confirm; to sanction. In legal phrase, it usually means to approve or confirm by a principal what has been done by an agent or one assuming to act for another. Laws 1879, p. 47, authorizes the municipal authorities of any city to contract with water companies for a supply of water, and provides that such contract shall have no binding force until submitted to a vote of the qualified electors, and ratified by a two-thirds majority. Held, that the requirement as to ratification does not require that the contract be submitted after it has been accepted by the water company, but it may be ratified by the people before such acceptance. *City of Lexington ex rel. Price v. Lafayette County Bank*, 85 S. W. 943, 945, 165 Mo. 671.

The terms "adopt" and "ratify" are properly applicable only to contracts by a party acting or assuming to act for another. The latter may then adopt or ratify the act of the former, however unauthorized. To adoption or ratification there must be some relation, actual or assumed, of principal and agent. Hence it is held that the board of trustees of a civil town, having no authority to levy a tax for a special school fund, but which has in fact levied such a tax, cannot have such unauthorized levy adopted or ratified by the board of trustees of the school town. *Shepardson v. Gillett*, 31 N. E. 788, 789, 133 Ind. 125.

The words "ratify" and "approve" are not, in their abstract meaning, the equivalents of such terms as "to adopt" or "to incorporate into," and, where a statute is ratified and approved by a constitutional amendment, it is not necessarily embodied into the Constitution, but may have been thereby simply validated and made constitutional; remaining still nothing more than mere valid legislation. *State ex rel. Saunders v. Kohnke*, 33 South. 793, 801, 109 La. 838.

"Ratified, confirmed, and made valid," as used in St. 1863, c. 338, declaring that "the acts and doings of cities and towns in paying and agreeing to pay bounties and recruiting expenses for soldiers already furnished by them are hereby ratified, confirmed, and made valid," only applies to past acts or doings of cities and towns in paying or agreeing to pay bounties or recruiting expenses, and does not apply to future acts of the same character. *Barker v. Inhabitants of Chesterfield*, 102 Mass. 127, 128.

## RATIFICATION.

See "Implied Ratification"; "Subsequent Ratification."

Webster defines "ratification" to be the act of giving sanction and validity to something done by another, as the ratification of a treaty. *Carter v. Pomeroy*, 30 Ind. 438, 441.

A ratification is the adoption of a previously formed contract. Ordinarily ratification, like a contract, includes within it an intention. *Gallup v. Fox*, 30 Atl. 756, 757, 64 Conn. 491.

Ratification is the adoption of a contract made on behalf of some one whom we did not authorize, which relates back to the execution of the contract, and renders it obligatory from the outset. *Reid v. Field*, 1 S. E. 395, 399, 83 Va. 26.

A ratification, when fairly made, will have the same effect as an original authority has, to bind the principal, not only in regard to the agent himself, but in regard to third persons; and the ratification relates back to the inception of the transaction, and has a complete retroactive efficacy. *Ruffner v. Hewitt*, 7 W. Va. 585, 604, 605.

Ratification is equivalent to antecedent authority. *Lorab v. Nissley*, 27 Atl. 242, 156 Pa. 329; *Bell v. Borough of Waynesboro*, 45 Atl. 930, 931, 195 Pa. 299; *Municipal Security Co. v. Baker County*, 54 Pac. 174, 178, 33 Or. 338; *Story v. Maclay*, 13 Pac. 198, 201, 6 Mont. 492.

Ratification bears upon the act ratified in the same manner as though the authority of the agent to do the act existed originally. It follows that the ratification can only be made when the party ratifying possesses power to perform the act ratified. *Bell v. Borough of Waynesboro*, 45 Atl. 930, 931, 195 Pa. 299.

Ratification is where a person adopts a contract made on his behalf by another without his authority, and requires that the agent must have contracted as agent, and not on his own account. *Backhaus v. Buells*, 73 Pac. 342, 344, 43 Or. 558.

Burrill, in his Law Dictionary, says that ratification is the confirmation of a previous act done either by the party himself or by another; that it is the confirmation of a justifiable act. *First Nat. Bank v. Drake*, 29 Kan. 311, 324, 44 Am. Rep. 646 (quoting *Bouv. Law Dict.*; *Burr. Law Dict.*).

"Ratification" means the adoption by a person, as binding upon himself, of an act done in such relations that he may claim it as done for his benefit, although done under such circumstances as would not bind him except for his subsequent assent. *Town of*

*Ansonia v. Cooper*, 33 Atl. 905, 907, 66 Conn. 184.

"Ratification" is the approval, by act, word, or conduct, of that which was attempted (of accomplishment), but which was improperly or unauthorizedly performed in the first instance. *Hartman v. Hornsby*, 142 Mo. 368, 44 S. W. 242, 244.

The doctrine of ratification proceeds on the theory that there was no previous authority, and that the relation of principal and agent did not in fact exist, but implies it from the acts and conduct of the parties, and, when so implied, is equivalent to previous authority, and results as effectively to establish the relation of principal and agent as if the agency had been authorized in the beginning. *Ballard v. Nye*, 72 Pac. 156, 159, 138 Cal. 588.

Ratification, when fairly made, will have the same effect as an original authority has to bind a principal not only in regard to the agent himself, but in regard to third persons. In short, the act is treated throughout as if it were originally authorized by the principal, for the ratification relates back to the time of the inception of the transaction, and has a complete retroactive efficacy. *Shuenfeldt v. Junkermann* (U. S.) 20 Fed. 357, 359.

Ratification is an agreement to adopt an act performed by another for one's use, and is either express or implied. *Bouv. Law Dict.* Ratification can only be express, or by acts and conduct inconsistent with any other hypothesis than that he approved and intended to adopt what had been done in his name. *Hatton v. Stewart*, 70 Tenn. (2 Lea) 233, 235 (citing 1 Daniel, Neg. Inst. § 317).

It is beyond controversy that the ratification by the alleged principal of a contract made by another, who assumed in that regard to act as the former's agent, is an adoption of the contract by such principal, and subjects him to liability thereunder, the same as if the contract had been sanctioned by him at its inception. *Henry Hess & Co. v. Baar*, 35 N. Y. Supp. 687, 688, 14 Misc. Rep. 286.

The use of the term "ratification" in an instruction on the question of the ratification by a bank of the illegal act of its cashier, so as to bind the bank, and render it liable for the cashier's act, without expressly defining the term "ratification," was not objectionable, since the word was not a word of rare use, nor was it also a technical term applicable to any branch of learning or science, but was a word in common use and commonly understood, and was applicable to the case, and, as used in the instruction, it was used in its usual and ordinary acceptation to mean "acceptance," etc. *Iowa State Sav. Bank v. Block*, 59 N. W. 283, 284, 91 Iowa, 490.

"Ratification" means the adoption by a person, as binding on himself, of an act

done in such relations that he may claim it as done for his benefit, although done under such circumstances as would not bind him, except for his subsequent assent, as where an act was done by a stranger having at the time no authority to act as his agent, or by an agent not having adequate authority. The acceptance of the results of the act with an intent to ratify, and with full knowledge of all the material circumstances, is a ratification. Ratification makes the contract in all respects what it would have been if the requisite power had existed when it was entered into. It relates back to the execution of the contract, and renders it obligatory from the outset. The party ratifying becomes a party to the contract, and is, on the one hand, entitled to all its benefits, and, on the other, is bound by all its terms. *Town of Ansonia v. Cooper*, 30 Atl. 760, 762, 64 Conn. 536; *Goodwin v. Town of East Hartford*, 38 Atl. 876, 884, 70 Conn. 18.

The requisites and form of ratification are prescribed by the Civil Code as follows: Section 2309 declares that an oral authorization is sufficient for any purpose, except that an authority to enter into a contract required by law to be in writing can only be given by an instrument in writing. Section 2310 provides that a ratification can only be made in the manner that would have been necessary to confer original authority for the act ratified, or where an oral authorization would suffice by accepting or retaining the benefit of the act with notice thereof. *Blood v. La Serena Land & Water Co.*, 45 Pac. 252, 253, 113 Cal. 221.

Generally the word "ratification" expresses the idea of the adoption of the act of one who has assumed to be an agent without the grant of an antecedent authority. In its application to different conditions, legal accuracy requires the observance of very wide differences in the significance of the term. There is a marked difference between the ratification of the acts of an agent possessing a general authority to represent his principal, who steps outside the usual limits of his business, or the adoption of what has been done by one having a special authority, which he has exceeded in the terms of the engagement into which he had entered, which might otherwise have been deemed authorized, or the liability incurred by the principal, who has permitted another to be misled by the conduct of his agent, and who has received the benefits of the transaction, or suffered injury to come to the other, whereby he is estopped, and the case of a ratification of a completed act, performed by one without authority, where the failure to repudiate worked no injury, and the principal has not accepted or received any benefit from the transaction. Where one assuming to act as agent without authority signs another's name as surety on a bond, mere

silence on the part of the person whose name is so signed, after receiving information of the act, is not of itself a ratification, since his failure to repudiate works no injury. *Smyth v. Lynch*, 43 Pac. 670, 675, 7 Colo. App. 383.

**Adoption distinguished.**

In reference to the adoption and ratification of a contract, there is, in their primary significance, a manifest distinction between the two. The one signifies to take and receive as one's own that with reference to which there existed no prior relation, either colorable or otherwise; while the other is a confirmation, approval, or sanctioning of a previous act or an act done in the name or on behalf of the person ratifying, without sufficient or legal authority; that is to say, the confirmation of a voidable act. But as relating to contracts, some lexicographers treat them as synonymous. Thus, when a person affirms a voidable contract, or ratifies a contract made by his agent beyond his authority, he is said to adopt it. And a corporation will be bound by contracts made on its behalf by promoters before organization, if, after it is organized, with full knowledge of all the facts, it assumes the contract, and agrees to pay the consideration or acceptance, and retains the benefit, whether such act is called "adoption" or "ratification." *Schreyer v. Turner Flouring Mills Co.*, 43 Pac. 719, 720, 29 Or. 1.

**Confirmation distinguished.**

See "Confirm—Confirmation."

**As consent.**

See "Consent."

**Consideration.**

A ratification is not a contract, but is merely an adoption of one previously made in the name of the ratifying party, and requires no consideration. *Wilson v. Hayes*, 42 N. W. 467, 471, 40 Minn. 531, 4 L. R. A. 196, 12 Am. St. Rep. 754.

**Contract in ratifier's behalf.**

"Ratification" means adoption of that which was done for and in the name of another. Hence the contract, at its inception, must purport to be the contract of the principal. It is not sufficient to constitute ratification that the contract may have inured to the benefit of a person sought to be charged as principal. *Minnich v. Darling*, 36 N. E. 173, 175, 8 Ind. App. 539.

Ratification is only effected when the act is done by a person professedly acting as the agent of the party sought to be charged. *Mitchell v. Minnesota Fire Ass'n*, 51 N. W. 608, 609, 48 Minn. 278.

Where a corporation adopts as its own contracts made on its behalf by its promoter,

such act does not constitute a ratification which relates back to the date of the making of the contract by the promoter, but is the legal effect of the adoption. There cannot be a ratification of a contract which could not have been made binding on the ratifier at the time it was made. *McArthur v. Times Printing Co.*, 51 N. W. 216, 48 Minn. 319, 31 Am. St. Rep. 653.

**Correction of defects.**

Ratification is, in general, the adoption of a previously formed contract. A mere ratification cannot, of course, correct any defects in the terms of the contract. *Negley v. Lindsay*, 67 Pa. (17 P. F. Smith) 217, 228, 5 Am. Rep. 427.

**Extent.**

Where a ratification is established as to a part of a transaction, it operates as a ratification of the whole of that particular transaction. *Ruffner v. Hewitt*, 7 W. Va. 585, 604, 605.

**Formality.**

"Ratification" is equivalent to original authority, and, where a statute requires the original authority to be in writing, on principle the ratification must also be. *Long v. Poth*, 37 N. Y. Supp. 670, 672, 16 Misc. Rep. 85.

**Knowledge.**

Ratification is an act with knowledge, and must be unequivocal in its character. *Harris v. Tumbridge* (N. Y.) 8 Abb. N. C. 291, 299 (citing *Hays v. Stone* [N. Y.] 7 Hill, 132).

Ratification refers to a past act or transaction. It would strain the doctrine of ratification to hold that a person had ratified or adopted the unauthorized act of another, of which he had no information. *First Nat. Bank v. Allen*, 14 South. 335, 337, 100 Ala. 476, 27 L. R. A. 426, 46 Am. St. Rep. 80.

Ratification is in the nature of a contract. It is the adoption of, and assent to be bound by, the act of another. There can be no ratification unless there is previous knowledge of all the facts and circumstances attending the act to be ratified. *Herring v. Skaggs*, 73 Ala. 446, 454, 455.

Ratification presumes the existence of knowledge of all the facts, and one not informed of the whole transaction is not in a position to ratify the same. *Hommel v. Meserole*, 45 N. Y. Supp. 407, 409, 18 App. Div. 106; *King v. Mackellar*, 16 N. E. 201, 203, 109 N. Y. 215; *Beck v. Donohue*, 57 N. Y. Supp. 741, 742, 27 Misc. Rep. 230.

Knowledge of all material facts and circumstances is an essential element to an effective ratification. Without such knowledge, the adoption of the acts of an unau-

thorized agent, or one who has exceeded his authority, will not bind the principal; but, on the contrary, if he has given his assent while in ignorance of the facts of the case, he may, on being informed, disapprove the unauthorized transaction. 1 Am. & Eng. Enc. Law (2d Ed.) 1189; *Shull v. New Bird-sall Co.*, 86 N. W. 654, 656, 15 S. D. 8.

Ratification presupposes a knowledge of the thing ratified. A corporation may ratify an unauthorized transaction of its agent, either by the unanimous acquiescence of the shareholders, or by a vote of the majority, if the transaction is of such a character that the majority might have authorized it at the outset. *San Diego, O. T. & P. B. R. Co. v. Pacific Beach Co.*, 44 Pac. 333, 336, 112 Cal. 53, 33 L. R. A. 788 (citing *Mor. Priv. Corp.* [2d Ed.] § 525).

A ratification is the affirmation and approval of an act; giving sanction and validity to something done by another. Whether there is a ratification is a question of fact. Before a person can be said to have ratified an act, it is absolutely necessary that he should know the character of such act, before ratification could be made. *Hull v. Young*, 30 S. C. 121, 123, 8 S. E. 695, 3 L. R. A. 521.

#### Presumption.

Long acquiescence, with a full knowledge of the situation, amounts to a ratification, and bars the right to recover. *Egan v. Grece*, 45 N. W. 74, 77, 79 Mich. 629.

Ratification of a past and completed transaction, into which an agent has entered without authority, is a purely voluntary act on the part of the principal. *Combs v. Scott*, 94 Mass. (12 Allen) 403; *Greenfield Bank v. Crafts*, 84 Mass. (2 Allen) 269. If, however, one is acting in the execution of a general power, but in a mode not sanctioned by its terms, and if any benefit comes to the principal from the act, ratification may be presumed pretty quickly from lapse of time with the knowledge of the circumstances. *Brown v. Henry*, 52 N. E. 1073, 1074, 172 Mass. 559.

Ratification is when a person assumes in good faith to act as agent for another in a given transaction, but acts without authority. Whether the relation of principal and agent does or does not exist between them, the person in whose behalf the act was done, upon being fully informed thereof, must within a reasonable time disaffirm the act, at least in cases where his silence might operate to the prejudice of innocent parties, or he will be held to have ratified such unauthorized act. *Heyn v. O'Hagen*, 26 N. W. 861, 864, 60 Mich. 150 (citing rule in *Save-land v. Green*, 40 Wis. 431, 438).

"Ratification," strictly speaking, means adoption, but it is sometimes said to result

from acts or conduct which constitute an estoppel. Where a landowner instructed her agent to sell certain lands, and the agent employed a broker to sell the lands, without being authorized to do so, who effected a sale, and the landowner signed the contract for such sale without knowing the broker's connection therewith, but was afterwards informed that the broker claimed compensation, and the purchaser offered to release the owner if she was dissatisfied with the terms of the sale, her voluntary execution of the deed to the purchaser, but without acknowledging her liability to the broker or promising to pay him, was not a ratification of the act of the agent, so as to make her liable for the compensation for the broker. *Williams v. Moore*, 58 S. W. 953, 956, 24 Tex. Civ. App. 402.

The act relied on as a ratification must amount to a promise or undertaking to pay the debt. Where an infant bought goods that were not necessities, and, three days before he became of age, the vendors, in an action against him for the price, attached the goods, which remained in the hands of the attaching officer at the time of the trial of the action, the fact that defendant gave no notice to plaintiffs, after he became of age, of his intention not to be bound by the contract of sale, did not amount to a ratification thereof. *Smith v. Kelley*, 54 Mass. (13 Metc.) 309.

To raise the presumption of ratification, slight circumstances and small matters will sometimes suffice. *Story, Ag.* § 253. Authority to do the act is presumed from subsequent acts of assent and acquiescence. One act from which the acquiescence of the principal may be presumed is from his action in treating the transaction as his own. There is no necessity for a positive or direct confirmation on his part of the acts of the agent. The ratification may arise by implication from the acts or proceedings of the principal in pais. *Byrne v. Doughty*, 13 Ga. 46, 53.

#### Unauthorized act presupposed.

The word "ratification" involves the idea of a previous assumption by the doer of the character of agent for the ratifier. It presupposes the act to be done for another, but without competent authority from him; and where a suit was brought by a husband and wife for personal injury to the wife, and the wife died, and the husband prosecuted the suit, his action was not susceptible of ratification by her administrator. *Saltmarsh v. Town of Candia*, 51 N. H. 71, 76.

#### Silence.

Mere silence in relation to a libel published over one's signature, and a failure to disavow it to the injured party within a reasonable time after knowledge of the publication, does not amount to a ratification,

as a matter of law. *Dawson v. Holt*, 79 Tenn. (11 Lea) 583, 587, 47 Am. Rep. 312.

Long acquiescence, without objection and even silence of the principal, will in many cases amount to a conclusive presumption of the ratification of an unauthorized act, especially where such acquiescence is otherwise not to be accounted for. *Ruffner v. Hewitt*, 7 W. Va. 585, 604, 605.

## RATIHABITIO.

"Ratihabitio" is defined as the act of assenting to what has been done by another in one's name. *Saltmarsh v. Town of Candia*, 51 N. H. 71, 76 (citing *Broom*, Leg. Max. 833).

"Ratihabitio priori mandato æquiparatur" is translated as follows: "A subsequent ratification of an act is equivalent to a prior authority to perform such act." It is a maxim borrowed from the Roman law, and now an element in the jurisprudence of every civilized nation. *Palmer v. Yates*, 5 N. Y. Super. Ct. (3 Sandf.) 137, 151.

## RATIO.

"Ratio" is variously defined to be the relation between two magnitudes of the same kind; the relation between two similar magnitudes in respect to quantity; the relation between two similar quantities in respect to how many times one makes so many times the other; especially the relation expressed by the division of one quantity by the other, or by the factor that, multiplied into one, will produce the other; relative amount; proportion. In *re Klock*, 30 App. Div. 24, 41, 51 N. Y. Supp. 897.

Where a payment is to be made according to a certain ratio, the word "ratio" imports a payment to such certain persons in certain proportions. *Shattuck v. Balcom*, 49 N. E. 87, 90, 170 Mass. 245.

## RATIO IMPERTINENS.

Ratio impertinens is an impertinent reason; that is, an argument not pertaining to the question. *Wilmington & W. R. Co. v. Board of Railroad Com'rs* (U. S.) 90 Fed. 33, 34.

## RATIO PERTINENS.

Ratio pertinens is a pertinent reason; that is, a reason pertaining to the question. *Wilmington & W. R. Co. v. Board of Railroad Com'rs* (U. S.) 90 Fed. 33, 34.

## RATIONAL.

Webster gives "rational" as a synonym for "sane." "Sanity" is a term more frequent-

ly found in the books than "rational," but it is more the result of habit and convenience than because of any inherent or substantial difference in their meaning. *State v. Leehman*, 49 N. W. 3, 5, 2 S. D. 171.

## RATIONAL DOUBT.

A "rational doubt" is equivalent, in an instruction, to "reasonable doubt." *Shipp v. Commonwealth*, 10 S. E. 1065, 1066, 86 Va. 746.

A rational doubt which should result in acquittal of an accused is a doubt as to all or any one of the constituent elements essential to legal responsibility or punishable guilt, and, unless they all concur, acquittal is the legal consequence. *Smith v. Commonwealth*, 62 Ky. (1 Duv.) 224, 228.

## RATIONAL INTENT.

A rational intent is one founded on reason, as a faculty of the mind, and opposed to an irrational purpose. Thus, under a policy declaring that the company should not be liable for the death if it should be by his own suicidal act, sane or insane, an instruction that, to render that company not liable, the insured must have formed a rational intent to take his own life, would destroy the defense, and was erroneous. *Supreme Lodge Order Mutual Protection v. Gelbke*, 64 N. E. 1058, 1060, 198 Ill. 365.

## RATIS.

The word "ratis," in the Roman law, answers properly to our word "raft." *Raft of Cypress Logs* (U. S.) 20 Fed. Cas. 169, 170.

## RATTOONS.

Rattoons are the shoots which spring up in the following years from the roots from which sugar cane has been cut and recut for sugar in the two years succeeding the first cutting, after which it is usual to plant the ground anew. *Viterbo v. Friedlander*, 7 Sup. Ct. 962, 976, 120 U. S. 707, 30 L. Ed. 776.

## RAVINE.

A ravine is a long, deep, and narrow hollow worn by a stream or torrent of water; a long, deep, and narrow hollow or pass through mountains; hence the presence of water, at least occasionally, is almost inseparable from the idea of a ravine, and authority to construct a bridge across it is given by an act authorizing the construction of bridges across streams. *Long v. Boone County*, 36 Iowa, 60, 65.

**RAVISH.**

See "Forcibly Ravishing."

"Ravish," from the Latin word "rapuit," imports the use of force, and an indictment for rape, charging that the defendant ravished a certain female against her consent, sufficiently alleges the crime, without an express allegation of the use of force. *Commonwealth v. Fogerty*, 74 Mass. (8 Gray) 489, 490, 69 Am. Dec. 264.

In an indictment, a charge that the defendant "did ravish" is equal to an allegation that rape was effected by force and against the consent of the female, the word "ravish" being equal to, and of the same import with, having carnal knowledge by force. *Elschlep v. State*, 11 Tex. App. 301, 302, 303; *Gibson v. State*, 17 Tex. App. 574, 577; *Williams v. State*, 1 Tex. App. 90, 92, 28 Am. Rep. 399.

All the authorities concur that the word "ravish" is indispensable in an indictment for rape. *State v. Marsh*, 43 S. E. 828, 829, 132 N. C. 1000.

The term "ravish" has always been held necessary in an indictment for rape, and no other word, nor any circumlocution, would answer the purpose. The words "feloniously did ravish, and carnally know," imply that the act was done forcibly and against the will of the woman. *People v. Quinn* (N. Y.) 1 Cow. Cr. R. 301, 303 (citing *Bouv. Law Dict.*).

An indictment charging rape, and alleging that defendant "feloniously did ravish and carnally know" the woman, is sufficient, without stating that the act was committed "forcibly and against her will." The word "ravish" implies force and violence in the man, and want of consent in the woman. *Harman v. Commonwealth* (Pa.) 12 Serg. & R. 69, 70; *Rookey v. State*, 38 Atl. 911, 913, 70 Conn. 104.

The term "ravish" imports both force and resistance, and includes the meaning of the phrase "carnally know by force and against her will," and therefore the omission of the latter phrase in an indictment for rape is harmless, if the former word is used, though the phrase is contained in the statutory form of indictment. *O'Connell v. State*, 6 Minn. 279, 285 (Gil. 190, 191).

The word "ravish" or "ravished" is the essential word in all indictments for rape, and imports not only force and violence on the part of the man, but resistance on the part of the woman. When, therefore, it is charged in an indictment that A. B. feloniously ravished C. D., it is but a repetition to add that he carnally knew her forcibly and against her will. *O'Connell v. State*, 6 Minn. 279, 285 (Gil. 190, 191).

**As carnally know.**

Under a statute which, in defining rape, uses the terms "carnal knowledge," and does not use the term "ravish," an indictment charging that defendant did "then and there ravish and have carnal of the said" female was not insufficient because of the omission of the word "knowledge" after the word "carnal," as the defect was supplied by the word "ravish." This word, at common law, included the idea that the party charged, forcibly and against the will of the woman, had carnal knowledge of the female, and is equivalent to the words "carnal knowledge." *Fields v. State*, 46 S. W. 814, 815, 39 Tex. Cr. R. 488.

An indictment for rape is not duplicitous in using the words "ravish" and "carnally know" in connection with the allegation of the age of the female as being under 15 years, as they charge two separate and distinct kinds of rape—that with force and that without force.—*Buchanan v. State*, 52 S. W. 769, 41 Tex. Cr. R. 127.

The word "ravish," as used in indictments for rape, presupposes force in carnal knowledge, but the term "carnally know" does not charge force; and, where an indictment alleges that the accused did "ravish and carnally know" a party under 15 years of age, the prosecution can be successfully maintained by proving force, or not, according to the proof of the case. *McAvoy v. State*, 51 S. W. 928, 929, 41 Tex. Cr. R. 56.

**Rape synonyms.**

In Rev. Code 1845, art. 2, § 26, defining rape to be, first, carnally to know any female child under 10 years of age; or, secondly, forcibly ravishing any woman of the age of 10 years or upwards, the words "rape" and "ravish" are used, as in common parlance, as synonymous terms, and the only difference in the statute between the two species of the offense is that the latter contemplated force, while the former may consist in the act of sexual intercourse alone, irrespective of actual violence or consent. *McComas v. State*, 11 Mo. 116, 117.

**RAW.**

Hay is a raw or unmanufactured article, within Rev. St. § 2516, providing that a duty of 10 per cent. ad valorem shall be paid on the importation of all raw or unmanufactured articles. *Frazee v. Moffitt* (U. S.) 18 Fed. 584.

The term "raw or unmanufactured article not enumerated or provided for," in the McKinley tariff act, fixing a duty on such articles at 10 per cent., was construed not to include natural gas, which was held to be a crude mineral, within the meaning of

the latter term in the free list. *United States v. Buffalo Natural Gas Fuel Co.* (U. S.) 78 Fed. 110, 112, 24 C. C. A. 4.

"Raw material," as used in Code, §§ 189, 193, providing that if any corporation carrying on any business in the county of A. shall for 30 days fail to pay the furnishers of any raw material used in the business, it shall be liable to a receivership, etc., is not limited to such raw materials as become incorporated in the course of manufacture with the product involved, but includes coal. *Hicks v. Consolidated Coal Co.*, 25 Atl. 979, 980, 77 Md. 86.

Straight whiskies are not raw materials, under the Dow law, so as to be exempt from taxation, though used in making compound whiskies and blends. *Block v. Lewis*, 5 Ohio S. & C. P. Dec. 370, 5 N. P. 392.

## RAZOR.

As a weapon, see "Weapon."

## REACHED.

See "Next Port Reached."

"Reached" means stretched out or forth; extended. It does not indicate direction. As used in Rev. St. § 3374, providing that railroad fare shall always be made "that multiple of five nearest reached by multiplying the rate by the distance," it indicates the object in closest proximity; closest to reach by the least extension or stretching forth without reference to direction. *Wells v. C., C. & St. L. Ry. Co.*, 9 O. C. D. 527, 530.

## READ.

"Read and write," as used in Code Cr. Proc. art. 636, providing that it shall be a cause of challenge if a juror cannot read and write, means read and write the language in which the business of the courts is conducted—the English language, and not any other language, such as the German. *Wright v. State*, 12 Tex. App. 163, 166.

### As explained.

A statement in a certificate of the acknowledgment of a deed stating that, "the deed being read to her," the wife had joined in the acknowledgment, was not equivalent to the statutory requirement that the deed should be fully explained to her. The words "the deed being read to her" might import a reading without an understanding. *Watson v. Michael*, 21 W. Va. 568, 573.

### As read at length.

"Read," as used in Const. art. 4, § 15, providing that no bill shall become a law

unless the same shall be read on three separate days in each house, means read at length, and is not satisfied by reading the title and a portion of a bill twice, and reading the whole once. The verb "to read," in all its modes and tenses, when applied to bills for acts pending before legislative bodies, has not acquired a purely technical signification which absolutely excludes its ordinary meaning. *Weill v. Kenfield*, 54 Cal. 111, 112.

A constitutional requirement which simply declares, in general terms, that a bill should be read twice or three times in each house before it can be enacted into a law, cannot be said to carry with it the necessity of reading over each section of the bill at each reading, though the word "bill," in its meaning, covers the proposed legislation in its entirety. *Saunders v. Board of Liquidation of City Debt*, 34 South. 457, 463, 110 La. 313.

## READ AS FOLLOWS.

Where a provision in an act is amended by the form "to read as follows," the intention is manifest to make the provision following a substitute for the old provision, and to operate exclusively in its place. It is intended to prescribe the only rule to govern. *Cortesy v. Territory*, 32 Pac. 504, 505, 7 N. M. 89; *City of Helena v. Rogan*, 69 Pac. 709, 710, 27 Mont. 135.

## READ LAW.

"Read law," as used in a will bequeathing a law library to testator's nephews who may read law, while not strictly a technical legal term, to which a certain meaning must attach, to the exclusion of all others, is yet an expression which should find its interpretation in the common understanding of lawyers. Among lawyers, "to read law" means to take up the study of the law with the purpose of being admitted to the bar and practicing the profession. Its meaning is not confined to a preparatory course. It may properly be said to include that reading of cases and text-books of which every lawyer does more or less after his admission. It certainly does not mean to read law-books casually for amusement or general instruction, nor in a desultory manner. As used by the testator it means "become lawyers." In *re Benson's Estate*, 32 Atl. 654, 169 Pa. 602.

## READILY.

The word "readily," according to the dictionaries that are acceptable authority, means quickly, speedily, easily (Cent. Dict.); at hand, immediately, available, convenient, handy (Stand. Dict.). The use of the term



in an instruction requiring a mine operator to use all appliances readily obtainable, known to science for the prevention of accidents arising from the accumulation of gas or other explosive substances, is not erroneous, as imposing an unreasonable burden. *Western Coal & Mining Co. v. Berberich* (U. S.) 94 Fed. 329, 334, 36 C. C. A. 364.

In an action for injuries alleged to have been caused by the absence of sufficient lights at or near a ditch of which defendants had control, the court instructed that, to render defendants free from fault, the lights must have been such that the ditch could have been readily seen. It was held that the term "readily seen," in the connection in which it was used in the charge, while perhaps not the best or clearest expression of the idea, was the equivalent of "patent" or "obvious." *Missouri, K. & T. Ry. Co. v. Johnson* (Tex.) 67 S. W. 769, 771.

## READJUSTED LUMBER.

In common parlance, "readjusted lumber" is simply veneering cut with a knife, instead of being cut with some one of the many kinds of saws used in sawmills. *Talbot v. Fear* (U. S.) 89 Fed. 197, 200, 32 C. C. A. 186.

## READY.

"Ready," as used in Equity Rule 83, providing that the master, as soon as his report is ready, shall return the same into the clerk's office, means when the report is written. *Hatch v. Indianapolis & S. R. Co.* (U. S.) 9 Fed. 856, 859.

An averment that a patent and specification are "ready in court to be produced" is equivalent to a profert in its most formal terms. *Wilder v. McCormick* (U. S.) 29 Fed. Cas. 1220, 1221.

The use of the word "ready" in a charge "that if the defendants committed the assault, and the other defendants were ready, if necessary, to aid, assist," etc., "such other defendants were also guilty," conveys the same meaning, in connection with the words "aid and assist," as the expression "for the purpose and with the intent to aid and assist, if necessary." Webster defines "ready" thus: (1) "Prepared at the moment; not behindhand or backward when called upon; causing no delay for lack of being fitted or furnished. (2) Prepared in mind and disposition; not reluctant; willing; free; inclined; disposed." Hence, according to this definition, if defendant was ready, if necessary, to assist, etc., he was prepared at the moment; was not reluctant; was willing, free, inclined, disposed, if necessary, to assist.

*State v. Gooch*, 16 S. W. 892, 893, 105 Mo. 392, 398.

### Ready for cargo.

A charter party providing that a ship shall be ready for cargo at a certain time refers to the condition of the ship, and not to the act of loading; and a ship is ready for cargo at the time she comes to anchor in the stipulated port, in actual readiness to receive cargo. *Gill & Fisher v. Browne* (U. S.) 53 Fed. 394, 397, 3 C. C. A. 573.

A shipmaster cannot report himself ready to receive cargo before he is permitted by the revenue laws of a port to receive it. The expression in the charter party is that "the lay days commence from the time the master reports himself ready to receive cargo." They do not commence, however, until he has a right to report himself ready, and he has no such right until the ship is actually ready, and she is not ready as long as she is prohibited by law from receiving cargo in consequence of the nonperformance of certain things to be done on her part, and there can be no delay on the part of the charterer until she has been so made ready. *Pierson v. Ogden* (U. S.) 19 Fed. Cas. 682.

### Ready for occupancy.

A contract whereby a party agreed, for a certain price, to move a house, do certain work upon it, and to finish said house "ready for occupancy," means that everything shall be done on the house which is reasonably necessary and proper to make it ready for occupation; taking into consideration, in determining what should be done, the character of the house to be finished. *Cunningham v. Washburn*, 119 Mass. 224, 226.

### Ready for sea.

A regulation in a policy of insurance by which the time of clearing was to be deemed the time of sailing, provided the ship was then "ready for sea," meant that the ship at the time of clearing ought to be ready for sea in every respect short of heaving the anchor. It was not enough that a crew was engaged, but the men must be on board. It could not have been intended that if the vessel cleared without being ready for sea, and became ready afterwards, it should operate as a compliance with the regulation. *Graham v. Barras*, 5 Barn. & Adol. 1011.

### Ready to discharge.

"Ready to discharge," within the meaning of the provision of a bill of lading that all goods are to be taken from alongside as soon as the vessel is ready to discharge, means ready to make a proper discharge, and excludes a discharge of fruit when the weather is so cold as to freeze it. *The Aline* (U. S.) 19 Fed. 875, 876.

The phrase "ready to unload," in a charter party providing that lay days for unloading should commence when the steamer was ready to unload, meant actually ready to discharge. *New Ruperra S. S. Co. v. 2,000 Tons of Coal (U. S.)* 124 Fed. 937, 938.

**Ready to pay or deliver.**

In actions for breach of covenant for the delivery of property, a plea of "ready to pay or deliver" is not a sufficient plea of tender, although the covenantee may not have appeared at the specified time and place to receive the property, since it does not appear from such plea in what manner the covenantor was ready, or if he had the property at the time and place specified as required in order to constitute a tender. *Mitchell v. Gregory*, 4 Ky. (1 Bibb) 449, 452, 4 Am. Dec. 655.

**READY AND WILLING.**

In common sense, the meaning of an averment of readiness and willingness in an action on a contract, in which the plaintiff alleged that delivery of the goods was prevented by the purchasers' refusal to accept, must be that the noncompletion of the contract was not the fault of the plaintiff, and that they were disposed and able to complete it, if it had not been renounced by the purchaser. *Cort v. Ambergate, N. & B. & E. Junction Ry. Co.*, 17 Q. B. 127, 144.

**READY-MADE.**

The words "ready-made clothing" will not include a garment which has been made for a customer at a stipulated price, as used in a note payable in ready-made clothing. *Vance v. Bloomer (N. Y.)* 20 Wend. 196, 200.

**READY MONEY.**

A deed of assignment, directing that the assigned property be disposed of for ready money, means for cash. *Cox v. Palmer*, 60 Miss. 793, 798.

In 1877 plaintiff's testatrix made her will, providing that "I further give and bequeath to my beloved husband all the ready money I may have either in bank or elsewhere at my decease." In 1879 she gave to defendant, her husband, authority to collect a legacy due to her, which he collected in 1880. From January 1, 1880, until her death, the testatrix was of unsound mind and incompetent to transact business. The money so collected was used by defendant, with his own money, in defraying household expenses, and in procuring nurses and medical attendance for his wife, and none of which remained at her death. Held, that such money should be included in the term "ready money," as used in the will, and that defendant was entitled to retain the same;

it remaining in his hands as ready money, liable to be paid on demand; he holding it simply as a depository, and using it subject to this liability. *Smith v. Burch*, 92 N. Y. 228, 231.

**Cash in bank.**

"Ready money," as used by a testator in bequeathing to his wife all his ready money, applies to cash balances in the hands of the testator's bankers and of his agent, and dividends of stock due on the testator's death; but the rent of a house and the interest of a sum due on a mortgage did not pass by the bequest. *Fryer v. Ranken*, 11 Sim. 55.

"Ready money," as used in a will bequeathing a testator's ready money, comprehended not only cash in the house, but money of the testator in the hands of his banker. *Parker v. Marchant*, 1 Younge & C. 290, 306.

**REAL.**

See "Chattels Real"; "Things Real."

In common law, the term "real" is used as relating to land, as distinguished from personal property. The word is applied to land, tenements, and hereditaments. In civil law the term refers to a thing, whether movable or immovable, as distinguished from a person. *Black, Law Dict.*

The word "real," in a deed which recites that the grantor granted, assigned, bargained, and sold all goods, chattels, and all other goods whatsoever, as well real as personal, to the grantee, etc., cannot operate to extend the grant to land, though it might embrace chattels real, such as leasehold estates, if in the possession of the grantor. *Ingell v. Nooney*, 19 Mass. (2 Pick.) 362, 366, 13 Am. Dec. 434.

**REAL ACTION.**

Ejectment as, see "Ejectment."

A real action is one in which the title to real estate is actually brought in question. *Crocker v. Black*, 16 Mass. 448.

"Real actions are those brought for the specific recovery of lands, tenements, and hereditaments. The essential and distinguishing fact that gives the action the character of a real action is that it seeks to recover specifically the land and its possession." *Hall v. Decker*, 48 Me. 255, 256.

"Real actions" are defined in 1 Chit. Pl. 97, as actions "for the specific recovery of real property only, and in which the plaintiff, then called the demandant, claims title to lands, tenements, or hereditaments." In such actions the judgment is, if in favor of the plaintiff, that he have and recover, or, if

against him, that he take nothing; and for defendant, that he have and recover his costs. A suit brought pursuant to Rev. St. § 2326 [U. S. Comp. St. 1901, p. 1430], which provides that one who has filed in a land office an adverse claim to an application for patent shall commence proceedings in a court of competent jurisdiction to determine the question of the right of possession, is a purely statutory proceeding, cognizable in equity, and is not a real action. *Doe v. Waterloo Min. Co.* (U. S.) 43 Fed. 219, 220.

Real actions are those brought for specific recovery of land, tenements, and hereditaments. Trespass quare clausum fregit is to be regarded as a personal action, and hence may be commenced by trustee process. *Linscott v. Fuller*, 57 Me. 406, 408.

Real actions are those which concern the realty only, by which the demandant claims title to have any lands or tenements, rents, or other hereditaments, in fee simple, fee tail, or for life. Dower is an estate for life created by law. An action for the recovery of dower is a real action. *Kidder v. Blaisdell*, 45 Me. 461, 466.

#### REAL ADVANCEMENT.

Real advancements differ from the general term "advancements" only in that they consist of portions of the parent's real estate. *Williams v. Stonestreet* (Va.) 3 Rand. 559, 561.

#### REAL COST.

"Real cost," as used in 1 Stat. 677, c. 22, § 68, providing that the valuation of imports made by the collector shall not, in case of a prosecution for forfeiture, exclude other proof of the real cost of the goods at the place of exportation, means "the true and real price paid for the goods upon a genuine, bona fide purchase." *United States v. Sixteen Packages* (U. S.) 27 Fed. Cas. 1111, 1113.

#### REAL COVENANT.

Covenants real are of two kinds: First, where a man binds himself to pass a real thing; and, second, where the covenant runs with the land. *Chapman v. Holmes' Ex'rs*, 10 N. J. Law (5 Halst.) 20, 28.

A covenant to pay off a certain mortgage on real estate is not a real covenant running with the land, but a mere personal covenant. *Skinner v. Mitchell*, 48 Pac. 450, 452, 5 Kan. App. 366.

#### REAL DANGER.

Real danger is a danger such as is manifest to the physical senses. *Allen v. State*, 6 S. W. 187, 189, 24 Tex. App. 216.

#### REAL ESTATE.

See "Productive Real Estate"; "Real Property."

Action for recovery of, see "Action for the Recovery of Real Estate."

All my real estate, see "All."

All real estate, see "All."

#### REAL ESTATE BROKER.

A real estate broker is a person who, for commission or other compensation, is engaged in the selling of, or negotiating sales of, real estate belonging to others. *Buckley v. Humason*, 52 N. W. 385, 386, 50 Minn. 195, 16 L. R. A. 423, 36 Am. St. Rep. 637; *Latta v. Kilbourn*, 14 Sup. Ct. 201, 208, 150 U. S. 524, 37 L. Ed. 1169.

Real estate brokers are brokers who negotiate the sale or purchase of real property. They are a numerous class, and, in addition to the above duty, sometimes procure loans on mortgaged security, collect rents, and attend to the letting and sale of houses and land. *City of Little Rock v. Barton*, 33 Ark. 436, 444.

Section 215 of an ordinance of Chicago passed June 11, 1897, defines a real estate broker as one who, for a commission or other compensation, is engaged in the selling of, or who negotiates sales of, real estate belonging to others, or obtains or places loans for others on real estate. *Banta v. City of Chicago*, 50 N. E. 233, 235, 172 Ill. 204, 40 L. R. A. 611.

Those who hold themselves out to the public as such, generally having offices or places of business, the character of which is indicated by clear and unmistakable evidence, are engaged in the business or occupation of real estate brokers, within the meaning of an act providing for the licensing of such brokers. *Chadwick v. Collins*, 26 Pa. (2 Casey) 138, 139.

One who, while engaged in other business, negotiates a sale of land for another, is entitled to compensation, even though he has no license, and though there is in the city where the transaction occurred an ordinance declaring it unlawful to exercise within the city the business of real estate broker without a license therefor, since effecting a single sale does not constitute the exercise of the business of real estate brokerage, or constitute the person effecting such sale a real estate broker, within the meaning of the ordinance declaring a real estate broker to be one who, for commission or other compensation, is engaged in selling or negotiating sales of real estate belonging to others. *O'Neill v. Sinclair*, 39 N. E. 124, 125, 153 Ill. 525.

It is held in New York that the tenth section of the statute of frauds in that state,

which provides that no broker or real estate agent selling lands on account of the owner shall be entitled to receive any commission for such sale unless the authority for selling is in writing, signed by the owner or his authorized agent, applies to any person who acts as broker or real estate agent in the very transaction out of which the claim for compensation arises, even though his customary business was the practice of law. *Stout v. Humphrey*, 55 Atl. 281, 282, 69 N. J. Law, 436.

A real estate broker is one employed to negotiate the sale of real property. His contract is complete when he has found a purchaser who is willing and able to buy on the terms specified, or will respond to damages, and has executed a valid written contract to that effect. *Brauckman v. Leighton*, 60 Mo. App. 38, 42.

A real estate broker is one who negotiates the sale of real property. His business generally is only to find a purchaser who is willing to buy the land on the terms fixed by the owner. He has no authority to bind the principal by signing a contract of sale. *McCullough v. Hitchcock*, 42 Atl. 81, 71 Conn. 401.

"A real estate agent is a person who, generally speaking, is engaged in the business of procuring purchasers or sales of lands for third persons upon a commission contingent upon success. He owes no affirmative duty to his client, is not liable to him for negligence or failure, and may recede from his employment at will without notice. On the other hand, courts almost unanimously unite in holding that, in case of an ordinary employment to sell, when he has procured a party able and willing to buy upon the terms demanded by his principal, and has notified him of the purchaser's readiness to buy, the agent's work is ended, and he is entitled to his commission. It is not his duty to procure a contract or to make one, and he is not in default if he fails to do either. Therefore ordinarily it is not within the contemplation of the owner and agent, where property of this character is placed in the hands of the latter for sale, that he shall, without consultation with his client, execute a contract." *Carstens v. McReavy*, 25 Pac. 471, 1 Wash. St. 359. A sale of real estate involves the adjustment of many matters besides the fixing of the price. The delivery of the possession has to be settled, generally the title has to be examined, and the conveyance, with its covenants, is to be agreed upon and executed by the owner. For obvious reasons, these duties are not within the authority of a real estate agent, and others which might be suggested make it a wise provision of the law which withholds from a real estate agent any implied authority to sign a contract of sale on behalf of the principal. *Donnan v.*

*Adams*, 71 S. W. 580, 582, 30 Tex. Civ. App. 615 (citing *McCullough v. Hitchcock*, 42 Atl. 81, 71 Conn. 401); *Halsey v. Monteiro*, 24 S. E. 258, 259, 92 Va. 581. This is true whether the authority of the broker is confirmed by writing or by parol. *Brandrup v. Britten*, 92 N. W. 453, 454, 11 N. D. 376.

#### REAL ESTATE BUSINESS.

See "Regular Real Estate Business."  
As trade, see "Trade."

#### REAL OBLIGATION.

When obligations are attached to immovable property, they are called "real obligations." Civ. Code La. 1900, art. 2010.

#### REAL PARTY IN INTEREST.

##### Assignee.

One to whom a bond was assigned by his debtor as collateral security is the "real party in interest," within the meaning of the New York Code of Procedure, § 111, providing that "every action must be prosecuted in the name of the real party in interest, except as otherwise provided," and the proper person to bring action on such bond. *Chew v. Brumagen*, 80 U. S. (13 Wall.) 497, 504, 20 L. Ed. 663.

Under the statute requiring suits to be brought in the name of the real party in interest, a judgment in favor of the assignor of a note, to the use of the assignee, should be arrested; the suit not having been brought by the real party in interest. *Hutchings v. Weems*, 35 Mo. 285, 286.

Gen. St. § 3026, reads, "Every action shall be prosecuted in the name of the real party in interest, except as otherwise provided for in this act." The only interpretation that can be placed upon this section of the statute is that whenever a thing in action, transferable by law, is absolutely assigned, so that the ownership passes to the assignee without conditions or reservations, and the legal title or equitable claim is fully vested in him, he is the real party in interest, and must sue in his own name. *Gruber v. Baker*, 23 Pac. 858, 861, 20 Nev. 453, 9 L. R. A. 302.

Under Acts 1848-49, providing that every civil action must be prosecuted in the name of the "real party in interest," the assignee to whom a promissory note has been assigned for collection is the real party in interest, and may sue thereon in his own name. *Webb v. Morgan*, 14 Mo. 429, 430.

Where a statute of a state, applicable by express adoption to the practice in the federal court sitting therein, requires that an action shall be brought by the real party in interest, an order on an insurance com-

pany given by the assured to a creditor after loss, directing the company to pay such creditor the amount due under the policy, makes the person receiving such an order an assignee of the cause of action, and entitles him, under such statute, to sue on the policy for the loss in his own name. *Spratley v. Hartford Ins. Co. (U. S.)* 22 Fed. Cas. 973.

**Plaintiff, as assignee of a note and account sued on,** is the real party in interest, within the meaning of the Code, though the consideration of the assignment may have been a payment to the assignor after recovery in the suit by the assignee. *Bassett v. Inman*, 3 Pac. 383, 385, 7 Colo. 270.

The phrase "real party in interest," as used in Code, § 29, providing that an action must be prosecuted in the name of the real party in interest, means the person entitled to the avails of the suit; and a mere assignee, having no interest in the result of the suit, and who obtains an assignment on a promise to pay the assignor the amount he may derive from the action, is not the real party in interest, and cannot maintain the action. *Hoagland v. Van Etten*, 35 N. W. 869, 870, 22 Neb. 681.

#### **Executor.**

Where a creditor of an insolvent estate purchased property at an executor's sale on credit, the executor, in bringing suit for the purchase price, was the real party in interest, inasmuch as the contract was made with him, and the promise to pay runs to him, and he was personally accountable for the price of the assets which he has sold. *Thompson v. Whitmarsh*, 2 N. E. 273, 274, 100 N. Y. 35.

#### **Lessee.**

In an action by the lessee of land against a trespasser for damages to growing crops, the lessee is the real party in interest, within the meaning of Code, § 177, providing that actions shall be brought in the name of the real party in interest. *Bridgers v. Dill*, 1 S. E. 767, 97 N. C. 222.

#### **Payee of draft.**

The payee of a draft is not the real party in interest, notwithstanding an agreement between him and the drawer that it is taken for collection. *Minnesota Thresher Mfg. Co. v. Heipeler*, 52 N. W. 33, 49 Minn. 395.

### **REAL PROPERTY.**

See "Incorporeal Real Property."

See, also, "Property."

The term "real property" at common law was deemed coextensive with "lands, tenements, and hereditaments." *Fretwell v. Mc-*

*Lemore*, 52 Ala. 124, 145; *Field v. Higgins*, 35 Me. 339.

"Real property" is coextensive with "lands, tenements, and hereditaments," and includes any interest in land. *Martinovich v. Mariscano*, 70 Pac. 459, 137 Cal. 354.

"Real estate includes every possible interest in land, except a mere chattel interest." *Jackson v. Parker (N. Y.)* 9 Cow. 73, 81.

The term "real property" includes real estate, lands, tenements, and hereditaments, corporeal and incorporeal. In re *Ehrsum*, 55 N. Y. Supp. 942, 944, 37 App. Div. 272.

Real estate is something which may be held by tenure or will pass to the heir of the possessor at his death, instead of his executor, and includes lands, tenements, and hereditaments, whether the latter be corporeal or incorporeal. *Gillett v. Gaffney*, 3 Colo. 351, 364.

In this country, both by statute and common law, the term "real estate" is generally used for the phrase "lands, tenements, and hereditaments." *Murphy v. Superior Court of Los Angeles County*, 70 Pac. 1070, 138 Cal. 69.

At common law real property consists of land and all rights and profits arising from and annexed to land that are of a permanent and immovable nature, and included under the words "lands, tenements, and hereditaments." *Scogin v. Perry*, 32 Tex. 21, 28.

Whatever technical meaning may be given to the words "real estate," in the different provisions of the Revised Statutes, the term "real property," as used in Code, § 132, providing that, in actions affecting the title to real property, notice of lis pendens may be filed, etc., is sufficiently comprehensive to include all estates in land, and as estates in land are expressly declared to include estates for life, for years, at will, and by sufferance, as well as estates of inheritance, it is not easy to perceive any reason why all such estates should not be deemed to be included in the generic designation of "real property." *Wilmont v. Meserole*, 41 N. Y. Super. Ct. (9 Jones & S.) 274, 278.

#### **Statutory definitions.**

The words "real property" are coextensive with "lands, tenements, and hereditaments." Civ. Code Ala. 1896, § 2; Pen. Code Ariz. 1901, par. 7, subd. 11; Sand. & H. Dig. Ark. 1893, § 7207; Pen. Code Cal. 1903, § 7, subd. 11; Pol. Code Cal. 1903, § 17, subd. 2; Code Civ. Proc. Cal. 1903, § 17, subd. 2; Civ. Code Cal. 1903, § 14, subd. 2; Rev. Code Del. 1893, p. 43, c. 5, § 1, subd. 7; *Horne's Rev. St. Ind.* 1901, § 1285; *Hyatt*

v. Vincennes Nat. Bank, 5 Sup. Ct. 573, 578, 113 U. S. 408, 28 L. Ed. 1009; Gen. St. Minn. 1894, § 6842, subd. 14; Rev. St. Mo. 1899, § 4160; Code N. C. 1883, § 3765, subd. 6; Rogers v. Kimsey, 101 N. C. 559, 564, 8 S. E. 159; Rev. Codes N. D. 1899, § 5135; Civ. Code S. D. 1903, § 2469; Code Civ. Proc. S. C. 1902, § 444; Pen. Code Mont. 1895, § 7, subd. 11; In re McCabe, 73 Pac. 1106, 1107, 29 Mont. 28.

The words "real estate" shall include lands, tenements, and hereditaments, and all rights thereto and interests therein. Rev. Laws Mass. 1902, p. 88, c. 8, § 5, subd. 8; Pub. St. R. I. 1882, p. 77, c. 24, § 9; Pub. St. N. H. 1901, p. 269, c. 83, § 5; Mills, Ann. St. Colo. 1891, § 4185, cl. 5; Gen. St. Minn. 1894, § 255, subd. 8; Rev. St. Wis. 1898, § 4971.

Real or immovable property consists of (1) lands; (2) that which is affixed to land; (3) that which is incidental or appurtenant to land; and (4) that which is immovable by law. Civ. Code Mont. 1895, § 1073; Rev. Codes N. D. 1899, § 3270; Civ. Code S. D. 1903, § 186; Rev. St. Okl. 1903, § 4021.

The terms "real property," or "real estate," as used in the act relating to crimes and punishments, include every estate, interest, and right in lands, tenements, and hereditaments. Gen. St. Kan. 1901, § 2313; Rev. Codes N. D. 1899, § 7724; Pen. Code S. D. 1903, § 819; Rev. St. Okl. 1903, § 2697; So, also, as to executions. Rev. St. Mo. 1899, § 3173. See, also, Kiser v. Sawyer, 4 Kan. 503, 505; Bodwell v. Heaton, 18 Pac. 901, 902, 40 Kan. 36; Slattery v. Jones, 8 S. W. 554, 555, 96 Mo. 216, 9 Am. St. Rep. 344; State v. Barr, 28 Mo. App. 84, 85.

In the title relating to taxation the term "real property" shall be held to mean and include, not only land itself, whether laid out in town lots or otherwise, with all things contained therein, but also, unless otherwise specified, all buildings, structures, and improvements, and fixtures of whatever kind thereon, and all rights and privileges belonging or in any wise appertaining thereto. Bates' Ann. St. Ohio 1904, § 2730; Ind. T. Ann. St. 1899, § 4900; Chapman v. First Nat. Bank, 47 N. E. 54, 56, 56 Ohio St. 310.

The word "land" and the phrases "real estate" and "real property" include lands, tenements, hereditaments, and all rights thereto and interests therein, equitable as well as legal. Code Iowa 1897, § 48, subd. 8; Gen. St. Kan. 1901, § 7342, subd. 8; Shannon's Code Tenn. 1896, § 63; Strong v. Garrett, 57 N. W. 715, 716, 90 Iowa, 100; Melhop v. Melnhart, 28 N. W. 545, 546, 70 Iowa, 685; Steers v. Daniel (U. S.) 4 Fed. 587, 599; Burr v. Graves, 72 Tenn. (4 Lea) 552, 556; Nichols v. Guthrie, 73 S. W. 107, 109, 109 Tenn. 535. Hence either of these terms includes a leasehold

interest. Kelley v. Shultz, 59 Tenn. (12 Heisk.) 218, 219.

The words "real estate" or "land" shall be construed to mean tenements and hereditaments, and all rights thereto and interest therein, other than a chattel interest. Ky. St. 1903, § 458; Code Va. 1887, § 5; Code W. Va. 1899, p. 134, c. 13, § 17.

The term "real estate," as used in the chapter relating to conveyances of real estate, shall be construed as coextensive in meaning with lands, tenements, and hereditaments, and as embracing all chattels real. Rev. St. Mo. 1899, § 936; Stull v. Graham, 60 Ark. 461, 474, 31 S. W. 46; Cloyes v. Beebe, 14 Ark. 489, 494.

The term "real property," when used in the chapter of the Code relating to taxation, shall be held to mean and include not only land, city, town, and village lots, but also all things thereunto pertaining, and all structures and other things so annexed or attached thereto as to pass to a vendee by the conveyance of the land or lot. Civ. Code Ala. 1896, § 3906, subd. 1; Citizens' Mut. Ins. Co. v. Lott, 45 Ala. 185, 195; Purifoy v. Lamar, 20 South. 975, 977, 112 Ala. 123.

By statute (Mansf. Dig. § 2540) the term "real estate" is to be construed to include every estate, interest, and right, legal and equitable, in lands, tenements, and hereditaments, except such as are determined or extinguished by the death of the intestate seized or possessed thereof in any manner other than by lease for years and estate for the life of another person. Lenow v. Fones, 4 S. W. 56, 59, 48 Ark. 557; Cloyes v. Beebe, 14 Ark. 489, 494.

By the statute (Sand. & H. Dig. § 6401) it is provided that the terms, "real property" and "lands," as used in the act relating to taxation, include not only the land itself, with all things therein contained, but also all buildings, structures, improvements, and other fixtures of whatever kind thereon, and all rights and privileges belonging or in any wise pertaining thereto. Union Compress Co. v. State, 41 S. W. 52, 64 Ark. 136; School Dist. of Ft. Smith v. Board of Improvement, 46 S. W. 418, 419, 65 Ark. 343.

The term "real estate," as used in the revenue act, includes: (1) The possession of, claim to the ownership of, or right to the possession of land. (2) All mines, minerals, and quarries in and under the land, all timber belonging to individuals or corporations growing or being on the land of the United States, and all rights and privileges appertaining thereto. (3) A mortgage, deed of trust, contract, or other obligation by which a debt is secured, when land is pledged for the payment or discharge thereof, shall, for the purpose of assessment or taxation, be deemed and treated as an interest

in the land so pledged. (4) Improvements. Pol. Code Cal. 1903, § 3617, subd. 2; California & N. R. Co. v. Mecartney, 38 Pac. 448, 449, 104 Cal. 618.

Real or immovable property consists of: (1) Land; (2) that which is affixed to land; (3) that which is incidental or appurtenant to land; (4) that which is immovable by law. Land is the solid material of the earth, whatever may be the ingredients of which it is composed, whether soil, rock, or other substance. A thing is deemed to be affixed to land when it is attached to it by root, as in the case of trees, etc. A thing is deemed to be incidental or appurtenant to land when it is by right used with the land for its benefit, as in the case of a way or water course, or of a passage for light, air, or heat from or across the land of another. *Mt. Carmel Fruit Co. v. Webster*, 73 Pac. 826, 828, 140 Cal. 183; *Lavenson v. Standard Soap Co.*, 22 Pac. 184, 185, 80 Cal. 245, 13 Am. St. Rep. 147.

The term "real estate," as used in the chapter relating to the revenue, includes, first, all lands within the state to which title, or the right to title, has been acquired from the government of the United States; second, all mines, mineral, and quarries in and under the land, and all rights and privileges appertaining thereto; third, improvements. *Mills' Ann. St. Colo. 1891*, § 3782, cl. 1; *Colorado Fuel & Iron Co. v. Pueblo Water Co.*, 53 Pac. 232, 233, 11 Colo. App. 352.

The terms "land" and "real estate," as used in the chapter relating to conveyances, shall be construed as coextensive in meaning with the terms "lands, tenements, and hereditaments," and as embracing all mining claims and other chattels real. *Mills' Ann. St. Colo. 1891*, § 456.

Real property, or real estate, consists of (1) lands, possessory rights to land, ditch and water rights, and mining claims, both lode and placer; (2) that which is affixed to land; (3) that which is appurtenant to land. *Civ. Code Idaho 1901*, § 2348.

The term "real estate," as used in the title relating to the revenue, includes: (1) The possession of claim and ownership of or right to the possession of all land; (2) all mines, minerals, and quarries in or under the land, and all rights and privileges appertaining thereto; (3) improvements. *Pol. Code Idaho 1901*, § 1313, subd. 1.

The term "real property," "real estate," "land," "tract," or "lot," when used in the revenue act, shall be construed to include, not only the land itself, whether laid out in town or city lots or otherwise, with all things contained therein, but also all buildings, structures, and improvements and other permanent fixtures, effects of every kind there-

on, and all rights and privileges belonging or in any wise pertaining thereto, except where the same may be otherwise denominated by this act. *Hurd's Rev. St. Ill. 1901*, p. 1494, c. 120, § 292, subd. 12.

*Rev. St. 1874*, c. 30, § 38, provides that the phrase "real estate," as used in that statute, shall be construed as coextensive with lands, tenements, and hereditaments, and as embracing chattels real. *Knapp v. Jones*, 38 Ill. App. 489, 495; *Willoughby v. Lawrence*, 4 N. E. 356, 357, 360, 116 Ill. 11, 56 Am. Rep. 758; *First Nat. Bank v. Adam* (Ill.) 25 N. E. 578, 577; *Turpin v. Pogle*, 4 Ill. App. (4 Bradw.) 611, 620; *Potter v. Couch*, 11 Sup. Ct. 1005, 1012, 141 U. S. 296, 35 L. Ed. 721.

By the statute of Illinois making judgments a lien upon the real estate of the judgment debtor, the term "real estate" is defined to include all interest of the defendant, or any person to his use, held or claimed by virtue of any debt, bond, covenant or otherwise for a conveyance, or a mortgagee or mortgagor of lands, in fee, for life, or for years. *Brandies v. Cochrane*, 5 Sup. Ct. 194, 196, 112 U. S. 344, 28 L. Ed. 760; *Cottingham v. Springer*, 88 Ill. 90, 94.

The term "real estate," when used in the act relating to judgments, decrees, and executions, shall include lands, tenements, hereditaments, and all legal and equitable rights and interests therein and thereto, including estates for the life of the debtor or of another person, and estates for years, and leasehold estates, when the unexpired term exceeds five years. *Hurd's Rev. St. Ill. 1901*, p. 1091, c. 77, § 3; *Henderson v. Harness*, 176 Ill. 302, 304, 307, 52 N. E. 68, 69.

For the purpose of taxation, real property shall include all lands within the state, and all buildings and fixtures thereon and appurtenances thereto, excepting in cases otherwise expressly provided by law. *Horner's Rev. St. Ind. 1901*, § 6272.

The term "real estate," as used in the act relating to descents and distributions, shall be construed to include every estate, interest, and right, legal and equitable, in lands, tenements, and hereditaments, except such as are determined or extinguished by the death of the intestate seized or possessed thereof in any manner other than by lease for years and estate for life of another person. *Ind. T. Ann. St. 1899*, § 1838.

The term "real estate," as used in the act relating to the recording of decrees for the conveyance of real estate, shall be construed to include all estates and interests in the lands and tenements, whether legally or equitably liable to be sold under execution. *Ind. T. Ann. St. 1899*, § 2636.

By Gen. St. 1901, § 7503, it is declared that the terms "real property," "real estate,"

and "land" usually, except as otherwise provided, include not only the land itself, but the buildings, fixtures, improvements, etc. *Missouri, K. & T. Ry. Co. v. Miami County Com'rs*, 73 Pac. 103, 105, 67 Kan. 434.

For the purpose of taxation, "real property" shall include all lands within the state, and all buildings and fixtures thereon, and the appurtenances thereto, except such as are expressly exempt by law. *Comp. Laws Mich.* 1897, § 3825.

The terms "real property," "real estate," and "land," when used in the article relating to cities of the second class, shall include, not only the land itself, but all buildings, fixtures, improvements, rights, and privileges appertaining thereto. *Rev. St. Mo.* 1899, § 5647.

The term "real property," "real estate," "land," or "lot," whenever used in the chapter relating to the assessment and collection of the revenue, shall be held to mean and include, not only the land itself, whether laid out in town or city lots or otherwise, with all things pertaining therein, but also all buildings, structures, and improvements, and other permanent fixtures, of whatsoever kind, thereon, all shot towers, and all machinery therewith connected, all smelting furnaces, and all machinery therewith connected, all gristmills, sawmills (except portable mills of every description), oil mills, tobacco, hemp, and cotton factories, tobacco stemmeries, ropewalks, manufactories of iron, nails, glass, clocks, and all other property belonging to manufactories, of whatever kind, all wool-carding machines, all distilleries, breweries, all tanneries, all iron, copper, brass, and other foundries, and all rights and privileges belonging or in any wise pertaining thereto, except where the same may be otherwise denominated by the chapter. *Rev. St. Mo.* 1899, § 9123; *Mound City Const. Co. v. Macgurn*, 71 S. W. 460, 461, 97 Mo. App. 403.

The words "real property" are coextensive with lands, tenements, and hereditaments, and possessory titles to public lands. *Pol. Code Mont.* 1895, § 16, subd. 2; *Civ. Code Mont.* 1895, § 4662, subd. 2; *Code Civ. Proc. Mont.* 1895, § 3463, subd. 2.

The term "real estate," as used in the title relating to the revenue, includes (1) the possession of, claim to, ownership of, or right to the possession of lands; (2) all mines, minerals, and quarries in and under the land, all timber belonging to individuals or corporations growing or being on the lands of the United States, and all rights and privileges appertaining thereto; (3) improvements. *Pol. Code Mont.* 1895, § 3680, subd. 2.

The term "real estate," as used in the chapter relating to real property, shall be construed as coextensive with "lands, tenements and hereditaments," and as embracing

all chattels real, except leases for a term not exceeding one year. *Cobbey's Ann. St. Neb.* 1903, § 10,245.

The terms "real property," "real estate," and "lands," when used in the revenue act, except as otherwise provided, shall include city and village lots, and all other land and buildings, fixtures, improvements, mines, minerals, quarries, mineral springs, and wells, oil and gas rights, and privileges pertaining thereto. *Cobbey's Ann. St. Neb.* 1903, § 10,400.

The words "real estate" or "real property," as used in the civil practice act, shall be deemed to include mining claims. *Comp. Laws Nev.* 1900, § 3637.

The term "real estate," when used in the revenue act, shall be deemed and taken to mean and include, and it is hereby declared to mean and include, all houses, buildings, fences, ditches, structures, erections, railroads, toll roads and bridges, or other improvements, built or erected upon any land, whether such land be private property, or property of the state or of the United States, or of any municipal or other corporation, or of any county, city, or town in the state, the ownership of, or claim to, or possession of, or right of possession to any lands within the state, and the claim by or the possession of any person, firm or corporation, association or company to any land. *Comp. Laws Nev.* 1900, § 1082.

The term "real estate," as used in the chapter relating to revenue, includes all lands within the territory to which title or right to title has been acquired, all mines, minerals, and quarries in and under the land, and all rights and privileges appertaining thereto, and improvements. *Comp. Laws N. M.* 1897, § 4019.

The term "real estate," as used in the act relating to conveyances, is applicable to lands, tenements, and hereditaments, including all real and immovable property. *Comp. Laws N. M.* 1897, § 3940.

1 *Rev. St.* p. 754, provides that the term "real estate," as used in the chapter relating to the descent of property, shall be construed to include every estate, interest, and right, legal and equitable, in lands, tenements, and hereditaments, except such as are determined or extinguished by the death of an intestate seised or possessed thereof or in any manner entitled thereto, except leases for years and estates for the life of any other person. *Barber v. Brundage*, 63 N. Y. Supp. 347, 348, 50 App. Div. 123.

The term "land," in the chapter of the New York statute in reference to taxation, is expressly defined "to include the land itself, all buildings and other articles erected upon or affixed to the same, all trees and un-



derwood growing thereon, and all mines, minerals, quarries, and fossils in and under the same, except mines belonging to the state." *People v. Board of Assessors of City of Brooklyn*, 39 N. Y. 81-87.

The expression "real property" includes every estate, interest, and right, legal or equitable, in lands, tenements, or hereditaments, except those which are determined or extinguished by the death of a person seised or possessed thereof, or in any manner entitled thereto, except those which are declared by law to be assets. *Code Civ. Proc. N. Y.* 1899, § 2514, subd. 13.

Laws 1893, c. 189, entitled "An act to provide for the sanitary protection of the sources of the water supply of the city of New York," defines, in section 2, the term "real estate," as used in the act, to "signify and embrace all lands, including lands under water, tenements, and hereditaments, corporeal and incorporeal." *In re Daly*, 72 App. Div. 394, 397, 76 N. Y. Supp. 28, 30.

The term "real property" includes real estate, lands, tenements, and hereditaments, corporeal and incorporeal. *Laws N. Y.* 1892, c. 677, § 3; *Nellis v. Munson*, 15 N. E. 739, 108 N. Y. 453; *State Trust Co. v. Casino Co.*, 39 N. Y. Supp. 258, 262, 5 App. Div. 381; *Olendorf v. Cook* (N. Y.) 1 Lans. 37, 40.

Real property, for the purpose of taxation, includes the land itself, whether laid out in town lots or otherwise, and, except as otherwise provided, all buildings, structures, and improvements (except plowing and trees thereon), and all rights and privileges thereto belonging or in any wise appertaining, and all mines, minerals, and quarries in and under the same. *Rev. Codes N. D.* 1899, § 1178.

The words "real estate" include rights and easements of an incorporeal nature. *Bates Ann. St. Ohio* 1904, § 1536-907.

The words "land," "real estate," and "premises," when used in the chapter relating to conveyances of real estate, or in any instrument relating to real property, are synonyms, and shall be deemed to mean the same thing, and, unless otherwise qualified, to include lands, tenements, and hereditaments. *Rev. St. Okl.* 1903, § 887.

The term "real property," as used in the chapters relating to descent and distribution, includes all lands, tenements, and hereditaments, and rights thereto, and all interests therein, whether in fee simple or for the life of another. *Ann. Codes & St. Or.* 1901, § 5590; *Edwards v. Perkins*, 7 Or. 149, 156.

The phrase "real property" shall be held to mean and include, not only land, city, town, and village lots, but all structures and other things, therein contained or annexed or attached thereto, which pass to the vendee

by the conveyance of the land or lot. *Civ. Code S. C.* 1902, § 265.

The term "real estate," as used in the title relating to real estate, shall be construed as coextensive in meaning with land, tenements, hereditaments, and mining and land claims. *Rev. St. Utah* 1898, § 1963.

The terms "land," "real estate," and "real property" include lands, tenements, hereditaments, water rights, possessory rights, and claims. *Rev. St. Utah* 1898, § 2498; *Conant v. Deep Creek & Curlew Val. Irr. Co.*, 66 Pac. 188, 189, 23 Utah, 627, 90 Am. St. Rep. 721.

The term "real estate," as used in the title on taxation, includes: (1) The possession of, claim to, ownership of, or right to the possession of land. (2) All mines, minerals, and quarries in and under the land, subject to the provisions of section 2504, which relates to the taxation of mines and the net proceeds thereof; all timber belonging to individuals or corporations, growing or being on the lands of the state or the United States; and all rights and privileges appertaining thereto. *Rev. St. Utah* 1898, § 2505.

The words "real estate," when used in the chapter relating to levy of execution, shall mean such lands, tenements, rights, and estates as are made liable to execution by law. *V. S.* 1894, 1815.

The words "land," "lands," and "real estate" shall include lands, tenements, and hereditaments, and all rights thereto and interests therein; and pews or slips in places of public worship shall be treated as real estate. *V. S.* 1894, 9.

The words "real estate," as used in the chapter relating to the descent of real property, include all lands, tenements, and hereditaments, and all rights thereto, and all interests therein, possessed and claimed in fee simple, or for the life of a third person. *Ballinger's Ann. Codes & St. Wash.* 1897, § 4633.

Real property, for the purposes of taxation, shall be construed to include the land itself, whether laid out in town lots or otherwise, and all buildings, structures, and improvements, or other fixtures of whatsoever kind, thereon, and all rights and privileges thereto belonging or in any wise appertaining, and all quarries and fossils in and under the same, which the law defines, or the courts may interpret, declare, and hold to be real property under the letter, spirit, intent, and meaning of the law, for the purposes of taxation. *Ballinger's Ann. Codes & St. Wash.* 1897, § 1656.

The terms "real property," "real estate," and "land," when used in the title relating to taxation, shall include, not only the land

itself, but all buildings, fixtures, improvements, rights, and privileges pertaining thereto. *Rev. St. Wis. 1898, § 1035; Wisconsin Cent. R. Co. v. Price Co., 26 N. W. 93, 99, 64 Wis. 579; Edwards & McCulloch Lumber Co. v. Mosher, 60 N. W. 264, 265, 88 Wis. 672.*

### Buildings.

Code, § 2218, defines real estate as including "lands and the buildings thereon and all things permanently attached to either, or any interest therein or issuing out of or depending thereon. The right of the owner of lands extends downwards and upwards indefinitely." Accordingly, where there is a conveyance of land by deed containing no reservation as to buildings, a parol understanding that the vendor retains the ownership of a house thereon, with the right to enter and remove it, is inconsistent with the deed. *Smith v. Odorm, 63 Ga. 499, 502.*

Under *Rev. St. 1891, c. 30, § 38*, declaring that the term "real estate," as used in the statute regulating conveyances, shall include chattels real, a grain elevator, of permanent structure, built by a lessee on ground held under a lease which provides that the lessor may terminate the lease on 60 days' notice, and that the lessee may remove his buildings at any time before the expiration of the lease, is, together with the leasehold estate, to be classed as real estate. *Knapp v. Jones, 32 N. E. 382, 383, 143 Ill. 375.*

Lands and the buildings thereon are known as "real estate," and the buildings, where nothing is shown to the contrary, are presumed to be held by the fee-simple owner of the land by the same title as the land on which they are situated. *Lycoming Fire Ins. Co. of Muncy v. Haven, 95 U. S. 242, 245, 24 L. Ed. 473.*

"Buildings permanently annexed to the freehold are regarded as real estate." So held in construing the representations in an application for fire insurance. *Pangborn v. Continental Ins. Co., 29 N. W. 475, 62 Mich. 638.*

Under *Rev. St. § 29, subd. 8*, providing that "the word 'land,' and the phrases 'real estate' and 'real property,' include lands, tenements, and hereditaments, and all rights thereto and interests therein, equitable as well as legal," a person erecting improvements on real estate under a parol contract for its purchase acquired an interest in the land to the extent of such improvements, and such interest is, under the statute, a mortgagable one. *White v. Butt, 32 Iowa, 335, 345.*

Where a wooden building is moved to a place within the fire limits of a city in violation of the ordinances of the city, it is personal property while being removed, and,

though it is permanently located, it is not thereafter to be regarded as real estate, as it became such only through the illegal conduct of the persons removing it, and must, in an action to enjoin the destruction of the same by the city officers, be regarded as personal property. *Hine v. City of New Haven, 40 Conn. 478, 484.*

"At common law real estate or property comprehended everything included in the term 'lands, tenements, and hereditaments'; that is, the surface of the earth and everything attached thereto. The difficulty in any case is determining whether a piece of property where movable, and yet attached, is the one or the other species of property; and the general rule has never been changed, but more particularly explained in modern times. Thus, while a building and things fastened for use in it are prima facie real estate, because they answer the general definition of the common law, yet many circumstances are liable to intervene by which the classification of these articles, coming under the head of 'fixtures,' may become personal property." *Bemis v. First Nat. Bank, 40 S. W. 127, 128, 63 Ark. 625.*

Real property, as defined by *Civ. Code Cal. §§ 658, 660*, consists of land and that which is affixed to it. A thing is deemed to be affixed to land when it is permanently resting upon it, as in the case of buildings. A warehouse, with concrete foundation, built by a lessee on land held under a lease for a term of years, and authorizing its removal before the expiration of the term, is real estate as between the holder of a mortgage on the lessee's interest in the land and a subsequent purchaser of the warehouse. *Commercial Bank v. Pritchard, 59 Pac. 130, 132, 126 Cal. 600.*

An action for the use and occupation of a certain grain elevator, with the "fixtures and appurtenances thereto belonging," is, in the absence of any allegation to the contrary, an action for the rent of real property, since the presumption is that the elevator is real property. *Indianapolis, D. & W. Ry. Co. v. First Nat. Bank of Indianapolis, 33 N. E. 679, 134 Ind. 127.*

The revenue law enacts that the terms "real property" and "land," whenever used in the act, shall be held to mean and include, not only the land itself, etc., with all things contained therein, but also the buildings, structures, and improvements, and other fixtures, of whatsoever kind, thereon. Grain warehouses, built by private individuals upon lands leased by a railroad company, along and on the company's right of way, and intended for the private benefit of the lessees, who reserved the right to remove the same before the termination of their leases, are personal property of the lessees, and taxable

as their personal property. *Gilkerson v. Brown*, 61 Ill. 486, 489.

#### Chattels real.

The term "real estate," as used in the Code, means any interest in lands, tenements, or hereditaments, and is sufficiently comprehensive to embrace that interest which by the common law was regarded as a mere chattel, and was therefore termed a "chattel real." *Rankin v. Oliphant*, 9 Mo. 239, 241.

#### Coal.

Coal, before it is mined, is a part and parcel of the "real estate"; and, as between the owner of the land and the assignee of a mortgage executed prior to the sale of the coal in the land, money derived from such sale will be treated as realty. *Appeal of Duff* (Pa.) 14 Atl. 364, 367.

#### Dams and waterways.

For the purpose of taxation "real estate" includes dams, sluices, and waterways connected with the land, within Pub. St. c. 11, § 3, declaring real estate to include things erected or affixed to the land. *Flax Pond Water Co. v. Lynn*, 16 N. H. 742, 744, 147 Mass. 31.

#### Electric light wires and poles.

The term "real property" includes the poles, wires, and lamps erected in the streets for lighting purposes by an electric light company. *Keating Implement Co. v. Marshall Electric Light & Power Co.*, 12 S. W. 489, 490, 74 Tex. 605.

#### Equitable interest.

"Real property," as used in a statute providing that, if the real property of any minor or lunatic is sold for taxes, the same may be redeemed, etc., includes an equitable interest in land, as Revision, § 29, subd. 8, provides that the phrase "real property" shall include lands, tenements, and hereditaments, and all rights thereto and interests therein, equitable as well as legal. *Burton v. Hintrager*, 18 Iowa, 348, 351.

The term "real estate" includes an equitable estate. *Avery's Lessee v. Dufrees*, 9 Ohio (9 Ham.) 145, 147.

Under Act Jan. 16, 1840 (Sess. Acts, p. 76), providing that the term "real estate" must be construed to include lands, tenements, and hereditaments, and all rights thereto and interests therein, a judgment was made a lien on equitable as well as legal interests in real estate. *Blain v. Stewart*, 2 Iowa (2 Clarke) 378, 381.

Although the words "real property" include equitable as well as legal estates, they cannot be construed to cover land in which

the defendant never had any estate or right, and as to which his creditors had only a right in equity to follow a personal fund which had been converted into land as a gift to the defendant's children and in fraud of his creditors. *Wall v. Fairley*, 77 N. C. 105, 109.

"Real property," as used in the statutes regulating attachments, means lands, tenements, and hereditaments, and the holder of an equitable title to lands for which the purchase money has been fully paid is the owner of the land, within the meaning of the law, and hence liable to the summary proceeding by attachment. *Louisville Bank v. Barrick*, 62 Ky. (1 Duv.) 51, 54.

#### Estate for years.

"Real estate," as used in 2 Rev. St. p. 370, § 42, providing that within one year real estate sold by a sheriff under execution may be redeemed by the execution debtor, his devisee, heirs, or grantees, comprehends lands, tenements, and hereditaments, which would include terms for years. *People v. Westervelt* (N. Y.) 17 Wend. 674, 675.

Rev. St. 1879, § 3295, providing that the rents, issues, and products of the real estate of any married woman, and all moneys and obligations arising from the sale of such estate, shall be exempt from attachment or levy of execution for the sole debts of her husband, should be construed to include the interest which a wife had in lands under a will giving and devising all of the husband's real estate situated in a certain county, to be held by the wife for 20 years from the date of the will and at the end of that period the real estate to be divided among the wife and their children. *Burns v. Bangert*, 4 S. W. 677, 680, 92 Mo. 167.

Under Code Tenn. § 51, providing that the words "real estate" include lands, tenements, and hereditaments, and all rights thereto and interests therein, equitable as well as legal, leaseholds are to be treated, for the purposes of levy and sale under execution, as real estate, and judgments are a lien on them. *Steers v. Daniel* (U. S.) 4 Fed. 587, 599.

A leasehold interest from year to year is not "real estate," within the meaning of a statute providing how "all the real estate of a debtor may be sold under execution for the payment of a judgment against him," but is a chattel real, to be sold as personal property. *Buhl v. Kenyon*, 11 Mich. 249, 251, 83 Am. Dec. 738.

As used in Code Civ. Proc. § 3253, restricting the taxation of costs in actions to foreclose mortgages on real estate to a certain sum, the term "real estate" does not include an action to foreclose a mortgage on a leasehold interest, since such interest

is not "real estate," even though the lease may exceed a period of three years, and for that reason be entitled to record. *Huntington v. Moore*, 13 N. Y. Supp. 97, 59 Hun, 351; *Barnes v. Meyer*, 41 N. Y. Supp. 210, 211.

The term "real estate" has a precise and well-settled meaning in the jurisdiction of this state, and the interest of a tenant of realty under a lease for years is not real estate, but is a chattel real, and is not liable to sale on an execution. The term "real estate," in Laws 1893, c. 560, § 4, providing that any person whose real estate is injured by the change of grade made in erecting a bridge may recover damages for the same, does not include the interest of a tenant under a lease for years. In *re Ehram*, 55 N. Y. Supp. 942, 944, 37 App. Div. 272.

The term "real estate," when applied to an interest in lands or other real property, includes all estates or interests in such real property which are held for life or some greater estate, but does not embrace terms for years and other chattels in land, which, as between the heirs at law and the personal representative, belong to the latter upon the death of the owner thereof. *Westervelt v. People* (N. Y.) 20 Wend. 416, 417.

When the term "real estate" is used in statutes protecting the property of married women, or giving mechanics' liens, or providing for the descent of property, leaseholds are embraced, as Code, § 51, provides that, when such word is used in the Code, it shall include lands, tenements, and hereditaments, and all rights thereto and interests therein, equitable as well as legal. *Lewis v. Glass*, 20 S. W. 571, 572, 92 Tenn. 147.

The term "real estate" comprises those lands and tenements or rights in lands and tenements in which the owner has the absolute estate. The legal seisin must be, as respects the duration of his interests, at least a freehold estate. *Bates v. Sparrell*, 10 Mass. 323, 325.

A lease for years is a chattel real, and, being less than a freehold, is considered as personal estate or property, and in statutory interpretation is not included under the word "land" or the phrases "real estate" or "real property," but is included in the phrase "personal property" or the word "chattel." *Meni v. Rathbone*, 21 Ind. 454, 466.

Code Civ. Proc. § 1430, provides that the expression "real property," as used therein and in chapter 13, arts. 3. 4, relating to the execution sale of land, includes leasehold property, where the lessee or his assignee is possessed at the time of the sale of at least five years' unexpired term of the lease. *Taylor v. Wynne*, 8 N. Y. Supp. 759, 55 Hun, 610.

Laws 1892, c. 677 (Statutory Construction Act), defining "real property" as mean-

ing "real estate, lands, tenements, and hereditaments, corporeal and incorporeal," and "personal property" as including "chattels and everything except real property," does not render applicable to mortgages of leasehold interests in land Laws 1883, c. 279, requiring mortgages of "goods and chattels" to be filed. *State Trust Co. v. Casino Co.*, 41 N. Y. Supp. 1, 3, 18 Misc. Rep. 327.

The right to the possession of a farm for five years under a contract is a chattel interest, and, if subject to seizure on attachment, it can be attached as a chattel interest, and not as real estate, and a levy on the farm, as a part of the real estate, making no reference to the mere possessory right, does not reach that interest. *Grover v. Fox*, 36 Mich. 453, 459.

#### **Interest of purchaser at execution sale.**

This term, which is defined by the Illinois statute to include "lands, tenements, hereditaments, and all legal and equitable rights and interests therein and thereto, including estates for the life of a debtor or of another person, and estates for years, and leasehold estates where the unexpired term exceeds four years," does not include the interest acquired by the purchaser of land at an execution sale before the expiration of the time allowed for redemption, and such interest is not liable to be levied on and sold on an execution against him. *Bowman v. People*, 82 Ill. 246, 248, 25 Am. Rep. 316.

#### **Equity of redemption.**

"Real estate," as used in a mortgagor's assignment conveying all his real estate and things in action in trust to sell and dispose of the same and to apply the proceeds for the benefit of his creditors, was sufficient to pass not only the mortgagor's land, in which he held the legal title, but was used in a popular sense, including all the mortgagor's property, consisting of lands, tenements, and hereditaments, which included an equity of redemption.—*Borst v. Boyd* (N. Y.) 3 Sand. Ch. 501, 509.

#### **Fee-simple title.**

Since the only title the owners of real estate in Texas have is a fee simple, and those who have the fee simple, and those only, are the owners of the land, it follows that "real estate" and a "title in fee simple to real estate" are convertible terms, and that no one can be the owner of land or real estate unless he has a title to it in fee simple. A road is not real estate. Therefore a judgment, whether recorded or not, does not appear as a lien thereon. *Scogin v. Perry*, 32 Tex. 21, 28.

#### **Fixtures.**

Ordinarily the distinction between real estate and personal property exists in the

nature of the thing itself, and does not depend upon the convention of the parties with respect to it; but where things originally personal in their nature are attached to the realty in such a manner that they may be detached without being destroyed or materially injured, they are subject to the convention of the parties, who may agree that they shall remain personalty and be subject to removal. *Western Union Tel. Co. v. Burlington & S. W. R. Co.* (U. S.) 11 Fed. 1, 7.

#### Franchise.

The franchise of a corporation is not real estate. *Fidelity Title & Trust Co. v. Schenley Park & H. Ry. Co.*, 42 Atl. 140, 142, 189 Pa. 363, 69 Am. St. Rep. 815.

#### Ground rents.

Ground rents are real estate, bound by judgment, and may be mortgaged like other real estate. *McKibbin v. Peters*, 40 Atl. 288, 290, 185 Pa. 518.

#### Growing trees.

Standing timber is realty. *Balkcom v. Empire Lumber Co.*, 17 S. E. 1020, 1021, 91 Ga. 651, 44 Am. St. Rep. 58.

"Real estate," as used in 3 Rev. St. (5th Ed.) p. 59, § 70, declaring that the term "conveyance," as used in the recording act, shall embrace every instrument in writing by which any estate or interest in real estate is created, aliened, mortgaged, or assigned, includes standing trees, as they are a part of the land; and hence a contract for the sale thereof is a contract for the sale of an interest in land. *Vorebeck v. Roe* (N. Y.) 50 Barb. 302, 306.

Growing trees are real estate, and cannot pass except by an instrument in writing. Where they are wrongfully cut down and converted into lumber, the legal title to the property continues in the original owner so long as their identity can be traced. *Pierrepoint v. Barnard* (N. Y.) 5 Barb. 364, 371.

#### Incorporeal hereditaments.

In Act 1872, authorizing the Metropolitan Railway Company to acquire title to such real estate and interests therein as might be necessary to enable it to construct, maintain, and operate its railway in the manner specified in said general railroad act, the term "real estate" should be construed to include all the incorporeal hereditaments, easements, rights, and privileges which the railroad company seeks to acquire. In re *Metropolitan El. R. Co.*, 2 N. Y. Supp. 278, 281. See, also, *State v. Superior Court of King County*, 72 Pac. 89, 92, 31 Wash. 445.

"Real estate," within Gen. St. c. 3, § 7, cl. 10, declaring that real estate shall include lands, tenements, hereditaments, and all

rights thereto and interests therein, includes easements thereon.—*Googins v. Boston & A. R. Co.*, 30 N. E. 71, 155 Mass. 505.

P. L. p. 957, provides for the appraisalment of damages occasioned by an alteration of a grade of a highway to the owners of any land and real estate on the line of the road. Held, that the words "real estate," as there used, included not only land held in fee by the owners, but hereditaments of an immovable nature, such as easements, and covered all persons having rights in land. *Brower v. Tichenor*, 41 N. J. Law (12 Vroom) 345, 346.

#### Improvements.

"The term 'real estate' embraces not only lands, but all improvements of a permanent character placed on real estate, that are regarded as a part of the land." *Mathes v. Dobschuetz*, 72 Ill. 438, 441.

#### Improvements on public land.

"Real estate," as used in a revenue act relating to the taxation of real estate, cannot be construed to include improvements on lands belonging to the United States. *People v. Owyhee Lumber Co.*, 1 Idaho, 420, 421.

#### As any interest in land.

The phrase "real estate" in legal signification includes all interests in land, whether in possession, reversion, or remainder. *Floyd v. Carow*, 88 N. Y. 560, 569.

Under a statute making all real estate whereof the defendant, or any person for his use, was seised in law or equity, subject to sale on execution, real estate was defined to be all "estate and interest in lands, tenements, and hereditaments." *Block v. Morrison*, 20 S. W. 340, 342, 112 Mo. 343.

In Act Oct. 22, 1779, providing for the forfeiture by attainder of treason of a person's "real estate," that term signifies such an interest as the tenant has in land. It is the condition or circumstance in which the owner stands with regard to his property, which implies, therefore, a right, interest, or ownership existing in the soil. It must be an interest in the land existing in possession, reversion, remainder, by executory devise, or contingent remainder. *Jackson v. Catlin* (N. Y.) 2 Johns. 248, 259, 3 Am. Dec. 415.

In 1 Chase's St. p. 926, providing that, if the personal property or estate of a decedent be insufficient to pay his debts, the court shall direct the administrator to sell so much of the real estate of the deceased as shall be sufficient to discharge all such demands, "real estate" means the interest which a man has in lands, tenements, or hereditaments. If it be such an interest as can be enforced in a court of law, it is a legal estate.

or interest. If it be such as can only be enforced in a court of chancery, it is an equitable estate. But in every case it is real estate. *Avery's Lessee v. Dufrees*, 9 Ohio (9 Ham.) 145, 147.

#### **Lands synonymous.**

"Real estate" as used in the Montana statutes, is synonymous with the words "lands." *Black v. Elkhorn Min. Co.* (U. S.) 49 Fed. 549, 551.

"Real estate," in 2 Rev. St. p. 102, § 20, relating to the sale or lease of decedent's real estate to pay debts, and providing that if it appear that such real estate has been devised, and not charged therein with the payment of debts, the surrogate shall order that the part descended to the heirs be sold before that so devised, and if it appear that any lands devised or descended have been sold by the heirs or devisees, then the lands remaining in their hands unsold shall be ordered to be first sold, is synonymous with "lands," designating the real property of the testator, and is coextensive in meaning with "lands, tenements and hereditaments." *Pelletreau v. Smith* (N. Y.) 30 Barb. 494, 496.

"Real estate security," as used in a will directing that money loaned by the executors should be loaned on real estate security, meant mortgages on land, and was satisfied by a mortgage executed by an individual member of a firm on land the legal title of which was vested in him, but which was in fact owned and used by the firm as partnership property. *Miller v. Proctor*, 20 Ohio St. 442, 448.

#### **Manure.**

The term "realty," in the rule that a tenant at the end of his term cannot take away anything belonging to the realty, includes manure on a rented farm. *Daniels v. Pond*, 38 Mass. (21 Pick.) 367, 371, 32 Am. Dec. 269.

Realty, which passes to the heirs, includes manure made in the course of husbandry on a farm, though in piles, and not in a fit condition for incorporation with the soil. *Fay v. Muzzy*, 79 Mass. (13 Gray) 53, 55, 74 Am. Dec. 619.

#### **Mining claim.**

The term "real estate" should be construed to include the possessory title to a mining claim, which is a grant by the government to the locator of an interest in the public domain. *Hopkins v. Noyes*, 2 Pac. 280, 282, 4 Mont. 550.

A mining claim, being a possessory right, is "real estate," under the provisions of 2 Comp. Laws 1888, § 2997, subd. 2, providing the words "real property" are coextensive with "lands, water rights, possessory rights, and claims." *Lavagnino v. Uhlig* (Utah) 71 Pac. 1046, 1051.

#### **Pier.**

A pier built upon land belonging to a city is real estate, and as such subject to taxation, under the statutory definition of land and real estate, as including "all buildings and other articles erected upon or affixed to" the land. *Smith v. City of New York*, 68 N. Y. 552, 555 (citing 1 Rev. St. p. 87, §§ 1, 2).

#### **Pipe line.**

Real estate includes a pipe line for carrying petroleum which is laid underground, under a grant by the owner of a fee, and is taxable as real estate within the meaning of Act. 1866, § 3, declaring that the term "real estate" shall include all lands, all water power thereon or appurtenant thereto, and all erections thereon or affixed to the same, and all trees and underwood growing thereon. *Tide Water Pipe Line Co. v. Berry*, 21 Atl. 490, 53 N. J. Law, 212.

#### **Railway property.**

Real estate, houses, lands, or lots of ground does not include the property of railroads that is ordinarily and properly appurtenant for their proper operation, such as freight stations, offices, roundhouses, machine shops, grounds covered by tracks and used as ways of approach to the station and buildings in connection with the railroads, and all public works of the company used as such, within the general laws of the state, making "real estate, houses, lands, or lots of ground" taxable. *Northumberland County v. Philadelphia & E. R. Co.* (Pa.) 9 Atl. 504, 507.

In Act 1844, § 32, declaring that all real estate should be subject to taxation "real estate" cannot be construed to include water stations, depots, offices, oil houses, places to hold cars, and such buildings and places as may be deemed necessary and indispensable to the construction and operation of a railroad, for all such things are to be regarded as a part of a franchise or the principal structure. *Pennsylvania R. Co. v. City of Pittsburg* (Pa.) 14 Wkly. Notes Cas. 333, 334.

The rolling machinery of a railroad is intimately connected with the purposes and uses of the track and superstructure, and it is within the power of the legislature to treat such machinery as real property for purposes of taxation. *Louisville & N. A. R. Co. v. State*, 25 Ind. 177, 179, 87 Am. Dec. 358.

The term "real estate" cannot be construed to embrace the rolling stock of a railroad company. *Nelson v. Iowa Eastern R. Co.*, 1 N. W. 434, 439, 51 Iowa, 184.

#### **Railway roadbed.**

The roadbed of a railroad company is "real property" within the meaning of Amended Code, c. 11, § 1, providing that all

real and personal property, etc., with certain exceptions, shall be liable to taxation for public purposes. *Neary v. Philadelphia, W. & B. R. Co. (Del.)* 9 Atl. 405, 412, 7 Houst. 419.

A street railway, including its bed and superstructure, is liable to taxation as real estate, under 2 Rev. St. (7th Ed.) p. 981, § 2, providing that land, real estate, or real property, as used in the chapter concerning taxation, shall include all surface and elevated railroads, structures, etc. *People v. Commissioners of Taxes & Assessments*, 4 N. Y. Supp. 41, 42, 51 Hun, 641.

Rev. St. p. 387, c. 13, tit. 4, relating to taxation, declares that the term "land," as used in said chapter, is to be construed to include the land itself, all buildings and other articles erected upon or affixed to the same, all trees and underwood growing thereon, and all mines, minerals, quarries, and fossils in and under the same, except mines belonging to the state, and the terms "real estate" and "real property," wherever they occur in said chapter, are to be construed as having the same meaning as the term "land" thus defined. Within the meaning of this statute, the foundations, columns, and superstructure of an elevated railway are real estate, and so taxable. *People v. Commissioners of Taxes & Assessments*, 82 N. Y. 459, 462.

Where the roadway of a railroad is in the bed of a public street, or in a tunnel under the street, such easement may be assessed and taxed as real estate. *Appeal Tax Court v. Western Maryland R. Co.*, 50 Md. 274.

Under Rev. St. c. 6, § 4, regulating the taxation of railroad corporations, the track of the road and the land on which it is constructed are not "real estate" for the purposes of taxation. *Portland, S. & P. R. Co. v. City of Saco*, 60 Me. 196.

The revenue acts of this state declare that a railroad right of way shall be held to be real estate for the purposes of taxation. *Chicago & N. W. Ry. Co. v. Village of Elmhurst*, 46 N. E. 437, 438, 165 Ill. 148.

A railroad right of way in a public street is "real estate," within the meaning of a statute authorizing special assessments on the "real estate" benefited thereby, etc., for local improvements. *Rich v. City of Chicago*, 38 N. E. 255, 260, 152 Ill. 18.

Real estate embraces not only lands, but rights in lands, including all hereditaments of an immovable nature; and hence a right of way appurtenant to land is embraced within the phrase "land and real estate." *State v. Tichenor*, 41 N. J. Law (12 Vroom) 345, 346.

Under Gen. St. Nev. §§ 256, 273, giving authority to condemn real estate necessary to carrying on the business of mining, the term "real estate" is held to apply to all lands, whether agricultural, timber, or mineral, and hence to include the power to condemn a right of way for a tunnel to a mining claim, when necessary to the development of the mine. *Douglass v. Byrnes (U. S.)* 59 Fed. 29, 31.

The expression "real estate," in the eleventh section of the Essex public road board act, approved March 31, 1869 (P. L. p. 957), includes a way appurtenant to a farm, because such easement is a hereditament of an immovable nature. *Brower v. Tichenor*, 41 N. J. Law (12 Vroom) 345, 346.

#### Remainder.

"Real estate," as used in a statute authorizing the sale of lands, tenements, and real estate on execution, will be construed to include a remainder in real estate, which will vest in possession if the remainderman outlives the holder of a precedent life estate. *Sheridan v. House (N. Y.)* 4 Abb. Dec. 218, 226.

The term "real estate," as used in the Statutes of 1814 and in the Revised Statutes, includes every freehold estate and interest in lands (that is, an estate in fee or for life), as also every estate, interest, and right, legal and equitable, in lands, tenements, and hereditaments, except such as are determined by the death of an intestate seised or possessed thereof or in any manner entitled thereto, and except leases for years and estates for the life of another person. A remainder in fee in lands is clearly real estate, as that term is used in common law, as well as defined by the statutes, and under the statute of Illinois, authorizing the sale of real estate of an infant, the court has jurisdiction to direct the sale of a remainder in fee, vested in interest in an infant. *Jenkins v. Fahey*, 73 N. Y. 355-362.

The term "real estate" applies as well to life estates or estates in remainder as to absolute or entire fees. *Cooper v. Hepburn (Va.)* 15 Grat. 561, 563.

#### Interest of remote assignee of bond to convey.

Rev. St. p. 111, § 18, provides that all deeds, conveyances, and agreements in writing, of or affecting title to real estate or any interest therein, may be recorded in the office of the recorder of the county where the real estate is situated, and that therefore such rights shall take effect as to subsequent bona fide purchasers and incumbrancers not having notice thereof. Held, that an assignment by the assignee of the second party in a bond for the conveyance of real estate comes within the provision of

the statute, and, unless recorded, will not take effect as against a subsequent bona fide purchaser. *McFarran v. Knox*, 5 Colo. 217, 219, 221.

#### **Right of navigation.**

"Real estate," as used in Comp. Laws, § 4344, requiring actions for the recovery of real estate or for the recovery of possession thereof, or trespass thereon and trespass on the case for injuries thereto, to be tried in the county where the subject of the action shall be situated, means the real estate of the plaintiff—"an interest or property distinct from that of the public at large, and which may be acquired by purchase, grant, or prescription, and conveyed or disposed of as property. Nor do we think the right of navigation in a public river can with propriety be treated as real estate, vested in the public or the state for the benefit of every individual who may have occasion to use it." An action on the case for obstructing a navigable stream is not rendered local by the statute. *Barnard v. Hinkley*, 10 Mich. 458, 459.

#### **Several tracts.**

The term "real estate," as generally used, embraces lands, tenements, and hereditaments. It includes several distinct parcels of land, as well as entire tracts. Under Const. art. 6, § 5, providing that "all actions for recovery of possession of, quieting title to, or for the enforcement of liens upon, real estate shall be commenced in the county in which the real estate or any part thereof \* \* \* is situated," an action for partition of several distinct tracts of land situate in different counties may be brought in the superior court in any county in which any one of the tracts is situated. *Murphy v. Superior Court of Los Angeles County*, 70 Pac. 1070, 138 Cal. 69.

#### **Room.**

A testator by his last will ordered that his wife should have one room in his dwelling house and a comfortable maintenance out of his estate during her natural life or her widowhood. On the same principle that a house is real estate, a room in a house must likewise be so, as having its share in the foundation. If the widow should be put out of the room, she may recover in ejectment and have a writ of possession. *White v. White*, 16 N. J. Law (1 Har.) 202, 214, 31 Am. Dec. 232.

#### **Street railway track.**

The statutory definition of "real property," as fixed by Gen. St. 1878, c. 11, § 2, enacting that "real property," for the purpose of taxation, shall be construed to include the land itself, and all buildings, structures, and improvements, trees, or other fixtures of

whatever kind thereon, and all rights and privileges thereto belonging or in any wise appertaining, has no application to assessments for local improvements. A portion of the track of the St. Paul City Railway Company in a public street is not real estate, and therefore not assessable for the expenses of paving. *State v. District Court*, 17 N. W. 954, 956, 31 Minn. 354.

#### **As testator's realty.**

In a will giving testator's wife one-third of all real estate as long as she remained his widow, and to one son the north half of the real estate and to another son the south half of the real estate, the term "real estate" should be construed to mean testator's real estate, though he does not say "my real estate," or "the real estate I own," or "the real estate of which I shall die seised." *Case v. Young*, 3 Minn. 209, 215 (Gil. 140, 142).

#### **Toll bridge.**

A toll bridge erected by two individuals across a river, between their own lands, by authority of the Legislature, is real estate. *In re Meason's Estate (Pa.)* 4 Watts, 341, 346.

"Real estate," as used in tax laws, would include a toll bridge; and hence the owner would be taxable for such bridge as real estate. *Kittery v. Proprietors of Portsmouth Bridge*, 2 Atl. 847, 78 Me. 93.

#### **Trust property.**

In Wag. St. p. 542, § 23, providing that the widow shall have dower of real estate, though there may have been no actual possession by the husband in his lifetime, and though the same may have been held by him as partner, the term "real estate" cannot be construed to include real estate charged with a trust held by a tenant in common, whether the trust is expressed on the face of the conveyance under which he holds, or is raised by legal implication from its being expressed on the face of the transaction itself, though not expressed in the deed. *Willet v. Brown*, 65 Mo. 138, 148, 27 Am. Rep. 265.

#### **Unlocated land certificate.**

Unlocated land certificates are chattels, and not real estate, and descend to the heirs of the owner as personalty, and not as real estate. *Porter v. Burnett*, 60 Tex. 220, 222.

#### **Vendor's lien.**

"Real estate," as defined by Gen. St. § 1835, declaring that the term includes all interest of the defendant, or any person to his use, held or claimed by virtue of any deed, bond, covenant or otherwise for conveyance, or as a mortgagor, cannot be extended to embrace the right of a vendor who releases his trust deed for the purchase price and merely reserves a lien; that being only a chose in action, and no interest in the land.



Fallon v. Worthington, 22 Pac. 960, 962, 13 Colo. 559, 6 L. R. A. 708, 16 Am. St. Rep. 231.

#### Water and ice.

"It is well settled that under some conditions water and ice are to be regarded as real estate, belonging to the owner of the land which is beneath it, and when that is the case the owner or assignee has the exclusive right to gather and dispose of the ice for his own benefit, subject to the rights of other riparian owners. Where he does not own the soil under the stream, as where it is meandered and his ownership does not include its bed, he has no exclusive right to the ice which forms on it." Marsh v. McNider, 55 N. W. 469, 88 Iowa, 390, 21 L. R. A. 333, 45 Am. St. Rep. 240.

#### Water pipes and hydrants.

"Real estate," as used in Rev. St. c. 6, § 9, which declares that taxes on real estate are to be assessed in the town where the estate lies to the owner or person in possession thereof, includes the water pipes, hydrants, and conduits of a water company laid through the streets of a city or town. Paris v. Norway Water Co., 27 Atl. 143, 145, 85 Me. 330, 21 L. R. A. 525, 35 Am. St. Rep. 371.

#### Water power.

Real property, for the purpose of taxation, being defined by the statute to include all rights and privileges belonging or appertaining thereto, includes listed water powers, which are a part of one's right to the use of the water. State v. Minneapolis Mill Co., 2 N. W. 839, 841, 26 Minn. 229.

#### Waterworks plant.

Code Iowa, § 45, subd. 8, provides that the word "land," and the phrases "real estate" and "real property," include lands, tenements, hereditaments, and all rights thereto and interests therein, equitable as well as legal. In that state the buildings and machinery of a waterworks company located on land under a lease, to continue as long as the waterworks are operated, are for the purpose of taxation real estate, and the whole plant, with the mains, pipes, and hydrants, is assessable in a township where the main works are located. Oskaloosa Water Co. v. Board of Equalization of State of Iowa, 51 N. W. 18, 19, 84 Iowa, 407, 15 L. R. A. 206.

#### REAL RELEASE.

According to Pothier there are two kinds of release—one called a "real release," and the other a "personal discharge." A real release is where the creditor declares that he considers the debt as acquitted. It is equivalent to a payment, and renders the thing no longer due, and consequently it liberates all the debtors of it, as there can be no

debtors without something due. Booth v. Kinsey (Va.) 8 Grat. 560, 568 (citing Pothier, p. 111, c. 3, art. 2, §§ 1, 11).

#### REAL SECURITY.

Real security is security on property, as distinguished from personal security. Merrill v. National Bank, 19 Sup. Ct. 360, 371, 173 U. S. 131, 43 L. Ed. 640.

#### REAL SERVICES.

Ang. Water Courses, § 142, states that easements were treated by the civil law under the name of services, where they were divided into real and personal. The former were defined to be services which one estate owes to another, or the right of doing something or of having a privilege in one man's estate for the advantage and convenience of the owner of another's estate. Morgan v. Mason, 20 Ohio, 401, 402, 410, 55 Am. Dec. 464.

#### REAL SERVITUDE.

"Real servitudes," which are also called "predial or landed servitudes," are those which the owner of an estate enjoys on a neighboring estate for the benefit of his own estate. They are also called "predial or landed servitudes" because, being established for the benefit of an estate, they are rather due to the estate than to the owner personally. Civ. Code La. 1900, art. 646.

#### REAL STATUTE.

According to the jurists of Holland and France, a personal statute is that which follows and governs the party subject to it wherever he goes. The real statute controls things, and does not extend beyond the limits of the country from which it derives its authority. The personal statute of one country controls the personal statute of another country, into which a party once governed by the former, or who may contract under it, should remove; but it is subject to a real statute of the place where the person subject to the personal statute should fix himself, or where the property on which the contest arises may be situated. Bartolus, who was one of the first by whom this subject was examined, and the most distinguished jurist of his day, established as a rule that whenever the statute commenced by treating of persons it was a personal one, but if it began by disposing of things it was real. So that if a law was written thus, "The estate of the deceased shall be inherited by the eldest son," the statute was real; but if it said, "The eldest son shall inherit the estate," it was personal. This distinction, though purely verbal and most unsatisfactory, was followed for a long time, and sanctioned by

many whose names are illustrious in the annals of jurisprudence, but was ultimately discarded by all. Voet has two definitions—one that a real statute is that which affects principally things, though it also relates to persons; and the other that a personal statute is that which affects principally persons, though it treats also of things. *Saul v. His Creditors* (La.) 5 Mart. (N. S.) 569, 582, 16 Am. Dec. 212.

## REALITY.

"The reality of the claim made," as used in the statement that the compromise of a disputed claim is good consideration for a promise, and that the only elements necessary to a valid agreement of compromise are the reality of the claim made and the bona fides of the compromise, means that the claimant shall assert his claim in good faith, believing it is real. *Rue v. Meirs*, 12 Atl. 369, 371, 43 N. J. Eq. 377.

## REALIZE.

When used in connection with the conversion of claims or demands into money, "realize" is a very broad term, and may reasonably be said to include the term "compromise," so that, where defendants agreed to pay an attorney a certain sum for his services in case they realized not less than a certain amount, and they compromised for a less amount, the attorney cannot recover. *Bittiner v. Gomprecht*, 58 N. Y. Supp. 1011, 1013, 28 Misc. Rep. 218.

The word "realize," as used in a contract whereby a party agreed to pay another a certain sum of money in case he should realize a certain amount for certain land, etc., means to bring into actual possession. It is ordinarily used in contrast to "hope" or "anticipation." *Lorillard v. Silver*, 36 N. Y. 578, 579.

The payee of a draft assigned it to one who gave his promissory note; the payee agreeing to release the assignee from paying the note in case he should be unable to "collect or realize" on the draft. The assignee afterwards became indebted to the drawer. Held, that until a suit should be brought by the drawer, enabling the assignee to set off the draft against the debt, it could not be predicated that the assignee had been able to realize on the draft by means of the indebtedness. *Hall v. Henderson*, 84 Ill. 611, 612.

"Realized," as used in a contract for selecting and planting swamp and overflowed lands granted to the county, to be paid for out of the "first money and government scrip" there is realized by said county for state lands, cannot be construed to include a contract for the sale of lands, before it is ex-

ecuted by the purchaser and before any work is done or any benefits result to the county from the contract; for it cannot in justice or truth be said that it realizes anything, either money or government scrip, as soon as such contract was made. *Stanford v. Greene County*, 18 Iowa, 218, 220.

## REALM.

The term "realm," throughout which it is presumed that legal proceedings during their continuance are publicly known, means the state or sovereignty where the property is which is the subject of litigation. *Carr v. Lewis Coal Co.*, 8 S. W. 907, 909, 96 Mo. 149, 9 Am. St. Rep. 328.

## REALTY.

See "Real Property."

## REAR.

"Rear," as used in a will by which the testator devised his messuage No. 90 B. street, and the two stable lots "in the rear thereof," should be construed to apply to both the lots devised, though only one of them was directly behind No. 90; the other being behind No. 89. They are properly described as being in the rear of the testator's dwelling house lot. *Read v. Clarke*, 109 Mass. 82, 83.

## REAR BRAKEMAN.

"Rear brakeman," as used in the business of railroading, means the brakeman posted at or near the rear of the train. *Erb v. Eggleston*, 60 N. W. 98, 41 Neb. 860.

## REASON.

See "Good and Lawful Reasons"; "Good Reason to Believe"; "No Reason to Doubt."

### Reason for appeal.

It is a sufficient statement of the reasons for the appeal from an order denying probate of a will to say that the evidence given before the court showed due execution of the will, and the judge denied the probate of it; for it is nothing more than saying that the judge decided contrary to the evidence, and that the proof showed that a will had been made, while the court decided otherwise and that no such will had been made. *Nelson v. Clongland*, 15 Wis. 392, 393.

### Reason to believe.

Where defendant in slander said his watch had been stolen, and that he had reason to believe plaintiff took it, the words

"had reason to believe" amounted to an averment that plaintiff took the watch. *Miller v. Miller* (N. Y.) 8 Johns. 77.

"Reason to believe," as used in a charge that one accused of homicide need not retreat if he had reason to believe that he was in danger of great bodily harm, is not equivalent to "reasonable belief." *Howard v. State*, 20 South. 365, 366, 110 Ala. 92.

#### Reason to know.

In regard to the liability of warehousemen for a defect existing in their warehouse, of which they knew or had reason to know, means such a defect as could have been discovered by the use of ordinary care. *Moulton v. Phillips*, 10 R. I. 218, 223, 14 Am. Rep. 663.

### REASONABLE.

An attempt to give a specific meaning to the word "reasonable" is trying to count what is not number, and measure what is not space. *Altshuler v. Coburn*, 38 Neb. 881, 57 N. W. 836.

The only limit to the legislative power in prescribing conditions to the right of practicing a profession is that they should be reasonable. By the term "reasonable" is not meant expedient, nor that the conditions must be such as the court would impose if it were called on to prescribe what should be the conditions. They are to be deemed reasonable where, although perhaps not the wisest and best that might be adopted, they are fit and appropriate to the end in view, to wit, the protection of the public, and are manifestly adopted in good faith for that purpose. If the condition should be clearly arbitrary and capricious; if no reason with reference to the end in view could be assigned for it; and especially if it appeared that it must have been adopted for some other purpose—such, for instance, as to favor or benefit some persons or class of persons—it certainly would not be reasonable, and would be beyond the power of the Legislature to impose. *State v. Vandersluis*, 42 Minn. 129, 43 N. W. 789, 6 L. R. A. 119.

"Reasonable" is a relative term, and the facts of the particular controversy must be considered before the question as to what constitutes a reasonable delay can be determined. *In re Nice & Schreiber* (U. S.) 123 Fed. 987, 988.

#### Discretion involved.

"Reasonable," as used in reference to a license tax, does not mean that a tax is unreasonable if it is larger than the judges think wise; but, if it is allowed by an authority endowed with discretion, it must be presumed by the courts to be reasonable. *Ex parte Mirande*, 14 Pac. 890, 892, 73 Cal. 365.

#### Fair synonymous.

Webster's Dictionary gives as a synonym for "fair" the word "reasonable." An instruction, therefore, which used the term "fair" as a synonym of "reasonable" in defining the care required of a physician was not erroneous. *Jones v. Angell*, 95 Ill. 376, 382.

#### Impartial synonymous.

The word "impartial" signifies not partial; not favoring one party more than another; unprejudiced; disinterested; equitable; just. The words "impartial" and "reasonable" are held to be practically synonymous, so that it is held that in a suit for malicious prosecution a definition of probable cause as the existence of such facts and circumstances as would excite in a reasonable mind the belief of the guilt of the person charged is not erroneous because of the use of the word "reasonable" instead of "impartial." *Thompson v. Beacon Valley Rubber Co.*, 56 Conn. 493, 498, 16 Atl. 534.

#### As just.

"Reasonable," as used in a clause of the Constitution requiring taxes levied upon inhabitants and residents and upon estates not only to be proportional, but to be reasonable, should be construed to mean "just." Opinion of the Justices, 4 N. H. 565, 569.

#### As ordinary.

The words "ordinary" and "reasonable," used in defining the nature of the care and skill expected of a physician or surgeon in his employment, have been interchangeably used. *Ritchey v. West*, 23 Ill. (13 Peck) 385. Perhaps the word "ordinary" would indicate more clearly to the common mind the degree of care and skill which he is bound to exercise in his professional engagements, or answer in damages for the want of it. *Kendall v. Brown*, 74 Ill. 232, 237.

### REASONABLE AGREEMENT.

"Reasonable agreement," as used in an application for mandamus, alleging that relator had sought to enter into a reasonable agreement with respondent, which was alleged to be a corporation controlling a monopoly, to admit relator as one of its patrons, is of too vague and indefinite meaning to furnish a basis for a judgment. *State ex rel. Star Pub. Co. v. Associated Press*, 60 S. W. 91, 93, 159 Mo. 410, 51 L. R. A. 151, 81 Am. St. Rep. 368.

### REASONABLE ALLOWANCE.

"Reasonable allowance," as used in Act April 27, 1864, relative to costs in cases of partition, and providing that the costs, with a reasonable allowance for counsel fees, should be paid by all the parties, the reason-

able allowance contemplated does not include expenses of adversary proceedings resulting from a defense to plaintiff's demand for partition or from any other cause. *Appeal of Fidelity Ins. Trust & Safe Deposit Co.*, 108 Pa. 339, 343.

### REASONABLE ATTORNEY'S FEE.

The phrase "reasonable attorney's fee," as used in the act of 1874 concerning actions for the killing of live stock by railroad trains, requires that the fee shall be a reasonable fee, reasonable considering all the elements in the particular case which affect the proper amount of the attorney's compensation. The fee is for the prosecution of the suit, and this covers the entire prosecution, from the commencement until its termination. *Missouri River, Ft. S. & G. R. Co. v. Shirley*, 20 Kan. 660.

"Reasonable attorney's fee," as used in Code, § 2961, providing that if an attachment is wrongfully sued out, and there is no reasonable cause to believe the ground upon which same issued to be true, defendant may recover the actual damages sustained and a reasonable attorney's fee, to be determined by the court, cannot be construed as meaning a fair and reasonable fee for the trial of the whole case, though the question as to whether the defendant was indebted to the plaintiff was in issue, as the fees are to be allowed if the ground upon which the attachment was issued is not true. The action for the supposed debt can be brought, whether there is ground for the attachment or not. The attachment is an auxiliary proceeding, and may be commenced when the action is brought or afterwards, and the attorney's fee is allowed only when it is found that there was no ground for the commencement of such auxiliary proceeding. *Porter v. Knight*, 19 N. W. 282, 285, 63 Iowa, 365.

The amount of the estate must to a large extent govern the court's discretion in determining what is a reasonable attorney's fee to the attorney for the petitioning creditors of a bankrupt, and it must be controlled by the general policy of the law, which requires such estates to be administered with severe economy. *In re Goldville Mfg. Co.* (U. S.) 123 Fed. 579, 584.

Where a deed of assignment provided that after paying the expenses of executing the trust, including reasonable attorney's fees, the balance should be divided among the creditors, the phrase "reasonable attorney's fees" should be interpreted as meaning such fees as the trustee might be allowed to charge by law, and hence it could not include fees for services rendered by himself to himself. *Kentucky Nat. Bank v. Stone*, 14 Ky. Law Rep. 645, 647, 20 S. W. 1040, 1041, 93 Ky. 623.

"Reasonable attorney's fee," as used in the sixty-fifth section of the act concerning

partition, which enacts that the judge of the court before whom any case of partition is had shall allow a reasonable attorney's fee in favor of the attorney bringing the suit, which shall be collected and taxed as other costs, means that the attorney's fee shall be taxed as costs; the judge seeing that it is not too great, leaving the attorney and client to contract for its amount, and not that the judge shall decide as to the amount of the fee. *Draper v. Draper*, 29 Mo. 13, 16.

### REASONABLE BELIEF.

"Reasonable belief" of impending danger, sufficient to justify homicide in self-defense, must be a belief begotten by attendant circumstances fairly creating it, and must be honestly entertained. *Howard v. State*, 20 South. 365, 366, 110 Ala. 92.

### REASONABLE CARE.

Reasonable care and prudence implies the converse of negligence. *Buck v. People's St. Ry., Electric Light & Power Co.*, 46 Mo. App. 555.

Reasonable and proper care and caution is that degree of care and caution that reasonably prudent persons should exercise. *Gawlack v. Michigan Cent. R. Co.*, 11 Ohio Cir. Ct. 59, 64, 5 O. C. D. 313.

Reasonable care is that care and foresight which men of ordinary prudence are accustomed to employ, and which they probably would have employed under the exact circumstances of the particular case. *Johnson v. Hudson River R. Co.*, 13 N. Y. Super. Ct. (6 Duer) 633, 646; *Larsh v. City of Des Moines*, 38 N. W. 384, 385, 74 Iowa, 512; *Helfenstein v. Medart* (Ky.) 36 S. W. 863, 866.

Due and reasonable care and caution means that degree of care and caution which might reasonably be expected of a reasonably prudent man under the circumstances surrounding him or her at the time in question. *Atherton v. Tacoma Ry. & Power Co.*, 71 Pac. 39, 42, 30 Wash. 395 (citing *Spurrer v. Front St. Cable Ry. Co.*, 3 Wash. St. 659, 29 Pac. 346); *Jegglin v. Roeder*, 79 Mo. App. 428, 436.

"Reasonable care" means according to the usages, habits and ordinary risks of the business. *Bonner v. Pittsburg Bridge Co.*, 38 Atl. 896, 897, 183 Pa. 195; *Titus v. Railroad Co.*, 136 Pa. 618, 20 Atl. 517, 20 Am. St. Rep. 944; *Keenan v. Waters*, 37 Atl. 342, 343, 181 Pa. 247.

### As governed by circumstances.

What is due diligence or reasonable care, which are practically synonymous, is nearly always, if not always, a manifest question of law and fact, difficult of definition, and still more so of determination; that depending on the relative facts in each case, and coming peculiarly within the province of the jury.

*Hendricks v. Western Union Telegraph Co.*, 35 S. E. 543, 546, 126 N. C. 304, 78 Am. St. Rep. 658.

"Reasonable care" means such care as is proportionate to the probability of injury. *Gannon v. Laclede Gaslight Co.*, 47 S. W. 907, 912, 145 Mo. 502, 43 L. R. A. 505; *Tompert v. Hastings Pavement Co.*, 55 N. Y. Supp. 177, 179, 35 App. Div. 578.

"Reasonable care and skill" as used in a contract providing that work to be done by one party for the other shall be done with reasonable care and skill, is a relative phrase, and in its application as a rule or measure of duty varies in its requirements, according to all the circumstances under which the care and skill are to be exerted. *Cunningham v. Hall*, 86 Mass. (4 Allen) 268, 276.

Reasonable care "is care in proportion to the danger involved. Whatever may be the dangerous circumstances, reasonable care must be exercised to prevent harm. In deciding whether one exercises reasonable care, all the surrounding circumstances must be considered, and it must be determined therefrom what would be the conduct of a person of ordinary prudence and discretion under such circumstances." *Dexter v. McCready*, 5 Atl. 855, 856, 54 Conn. 171.

Ordinary and reasonable care and diligence are relative terms, and what will constitute the amount or kind of diligence that will be regarded as ordinary and reasonable must necessarily vary under different conditions. It cannot be measured or ascertained by any fixed and inflexible standard, and what under some circumstances would be ordinary and reasonable diligence might under other conditions amount even to gross negligence. *Consumers' Electric Light & Street R. Co. v. Pryor* (Fla.) 32 South. 797, 805; *Read v. Morse*, 34 Wis. 315, 318.

Reasonable care is at least such care as a person whose conduct is in question should have exercised in the particular emergency, in the opinion of the final judge or judges of each case. If there is reasonable room for variation of opinion on that subject, then the criterion is that measure or degree of care which a jury regards as obligatory upon that person in the circumstances of the case in hand. *Appel v. Eaton & Price Co.*, 71 S. W. 741, 743, 97 Mo. App. 428.

#### Ordinary care synonymous.

The term "reasonable care" is synonymous with the term "ordinary care." The terms may be used interchangeably in instructions. *Black v. Chicago, B. & Q. R. Co.*, 46 N. W. 428, 430, 30 Neb. 197; *Baltimore & O. S. W. Ry. Co. v. Faith*, 51 N. E. 807, 808, 175 Ill. 58; *Chicago, B. & Q. R. Co. v. Yorty*, 42 N. E. 64, 65, 158 Ill. 321; *Nolan v. New York & N. H. R. Co.*, 4 Atl. 106, 111, 53 Conn. 461;

*Taylor v. City of Ballard*, 64 Pac. 143, 147, 24 Wash. 191.

Reasonable care "must be understood as meaning ordinary care, since otherwise the word 'reasonable' would have no fixed meaning, and when used in an instruction would authorize the jury to apply any rule as to care and caution which they might deem reasonable." Instructions in which the term "reasonable care" is used are to be treated as though the phrase "ordinary care" had been employed. *Illinois Cent. R. Co. v. Noble*, 32 N. E. 684, 685, 142 Ill. 578.

The term "reasonable care," like the term "ordinary care," is an apt term to use in an instruction to describe the care required by a contractor in keeping a street in a safe condition. *Tompert v. Hastings Pavement Co.*, 55 N. Y. Supp. 177, 179, 35 App. Div. 578.

An instruction that plaintiff could not recover unless she was in the exercise of "reasonable," instead of "ordinary," care, was properly refused in an action against a city for personal injuries resulting from a defective street. *City of Peoria v. Gerber*, 48 N. E. 152, 153, 168 Ill. 318.

#### As necessary care.

The use of the word "reasonable," in an instruction in an action against a carrier for loss of goods by fire while on a railroad train, that the defendant is not liable if the person in charge of the train took all reasonable care and observed all reasonable precautions in the management and conducting of the train, etc., is intended to convey the idea that the carrier is bound to use that care and foresight which is appropriate to the action and necessary to be used in like exigencies and employments, as contradistinguished from that ordinary care which devolves upon an ordinary bailee. A reasonable act is such as the law requires. *Levering v. Union Transp. & Ins. Co.*, 42 Mo. 83, 95, 97 Am. Dec. 320.

By "reasonable care" is meant that degree of care which a person of prudence would ordinarily exercise under the same circumstances as those in question. *International & G. N. R. Co. v. Williams*, 50 S. W. 732, 20 Tex. Civ. App. 587.

The reasonable care which a plank road company is required to exercise to keep its road in proper repair and safety includes acts of omission as well as those of commission. When the danger is such as to imperil human safety, the care required should be such as may reasonably be regarded as enough to prevent the probability of mischief. *Carver v. Detroit & S. Plank Road Co.*, 25 N. W. 183, 185, 69 Mich. 616.

#### Commission merchants.

"Reasonable care," as used in the rule that commission merchants are liable for rea-

sonable care of property in their possession, means "such care as an ordinarily prudent man would exercise under the same circumstances with reference to his own property, taking into consideration the usages of trade, the state of the market, and the situation of the property." *Rice v. Brook* (U. S.) 20 Fed. 611, 614.

#### Physicians and surgeons.

The reasonable and ordinary care, skill, and diligence which the law requires of physicians and surgeons are such as those in the same general line of practice in the same general locality ordinarily have and exercise in like cases. Surgeons should, however, keep up with the latest advance in medical science, and use the latest and most improved methods and appliances, having regard to the general practice of the profession in the locality where they practice. *Akridge v. Noble*, 41 S. E. 78, 114 Ga. 949.

#### Shipbuilders.

"Reasonable care or skill" is a relative phrase, and what this requires is always to be determined by consideration of the subject-matter to which it is applied. In its application as a rule or measure of duty to which a builder is subject in the building of a ship, and especially when it is constructed in part of materials known to be subject to defects which may essentially impair its strength or endanger its safety, it calls for the most vigilant inspection of every article used and the employment of every known test or means by which they may be detected. *Cunningham v. Hall*, 86 Mass. (4 Allen) 268, 276.

#### Trustees.

Reasonable care, as applied to the duties of trustees in connection with the securities in which the trust fund was invested, requires such trustees to act according to the best of their judgment, and to exercise such care as a man of average prudence, under precisely the same circumstances, would use. *Smith v. Bank of New England* (N. H.) 54 Atl. 385, 387.

### REASONABLE CAUSE.

Other reasonable cause, see "Other."

In Act 1790, providing that a district attorney and customs collector shall not be liable to an action for the seizure of goods for which they believed there was "reasonable cause," that term is synonymous with probable cause, and means a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that a ground existed for the seizure, or such a state of facts as would lead a man of ordinary caution to believe, or to entertain an honest and strong

suspicion, that such ground existed. *Stacey v. Emery*, 97 U. S. 642, 646, 24 L. Ed. 1035.

In a reference in the bankrupt act to a security taken for a debt by a creditor having reasonable cause to believe the person giving such security insolvent, the phrase "reasonable cause to believe" means a knowledge of some fact or facts calculated to produce a belief of the debtor's insolvency in the mind of an ordinarily intelligent man, and not a mere suspicion of the debtor's insolvency. *Grant v. First Nat. Bank*, 97 U. S. 80, 81, 24 L. Ed. 971.

To constitute a reasonable cause to believe that a debtor is insolvent, it is not enough that a creditor or purchaser has merely some cause to suspect his solvency, but there must be knowledge of some fact or facts calculated to produce a reasonable belief that the debtor is insolvent. *Daniels v. Bank of Zumbrota*, 29 N. W. 165, 35 Minn. 351.

"Reasonable cause to believe," as used in Bankr. Law, § 52, relating to fraudulent preferences made by the debtor to one having reasonable cause to believe that the debtor was insolvent, does not mean that the creditor has some cause to suspect the insolvency of his debtor. A man may have many grounds of suspicion that his debtor is in failing circumstances, and yet have no cause for a well-grounded belief of the fact. He may be willing to trust him further. He may feel anxious about his claim, and have a strong desire to secure it; and yet such belief as the act requires may be wanting. *Morey v. Milliken*, 30 Atl. 102, 105, 86 Me. 464 (citing *Grant v. First Nat. Bank*, 97 U. S. 80, 24 L. Ed. 971; *King v. Storer*, 75 Me. 62, 63).

Bankr. Act 1867, § 35, enacts that if any creditor receiving an assignment, transfer, or conveyance from his debtor has reasonable cause to believe such debtor insolvent, and he be insolvent, the conveyance shall be void. Held, that the phrase "reasonable cause" means such a state of facts brought to the creditor's notice respecting the affairs and the pecuniary condition of the debtor as would lead a prudent business man to the conclusion that the debtor is unable to meet his obligations as they mature in the ordinary course of business.—*Toof v. Martin*, 80 U. S. (13 Wall.) 40, 50, 20 L. Ed. 481. .

The "reasonable cause" which will justify a wife or husband in quitting and abandoning the other is that which would entitle the party so separating himself or herself to a divorce. "The contention that reasonable cause in this connection is not definable by any precise rule of law, but includes rather such causes as in any case submitted will satisfy a court or jury that the separation was a justifiable act, should not be sustained, since too liberal a con-

struction given to the words 'reasonable cause' could not fail to invite separation between husband and wife which might otherwise never occur, while a construction too limited might subject those most meriting legal protection, because most needing it, to hardships and sufferings which are revolting to every right-minded man." *Butler v. Butler* (Pa.) 1 Pars. Eq. Cas. 329, 337.

"Reasonable cause," as used in the bankrupt act (14 Stat. 534), providing that if any insolvent debtor, within four months before filing his petition in bankruptcy, shall suffer his property or any part thereof to be attached or seized on execution, or makes any payment, assignment, transfer, or conveyance of his property within that period, such assignment, transfer, or conveyance shall be void, if the person receiving the same or to be benefited thereby had reasonable cause to believe that such debtor was insolvent, signifies that the debtor was actually insolvent, and that such facts and circumstances were known to the creditor securing the preference as clearly ought to have put a prudent man on inquiry as to such insolvency. *Dutcher v. Wright*, 94 U. S. 553, 557, 24 L. Ed. 130.

#### REASONABLE CERTAINTY.

Reasonable certainty means that which on a fair and reasonable construction may be called certain, without resorting to possible facts which do not appear. *Hollingsworth v. Holsbousen*, 17 Tex. 41, 44.

"Reasonable certainty is the being free from reasonable doubt." As used in an instruction in a criminal case, stating that the jury should be satisfied to reasonable certainty of the defendant's guilt, it is equivalent to an instruction that they should be "free from reasonable doubt as to his guilt," and the instruction is not erroneous. *State v. Shaw*, 49 N. C. 440, 443.

#### REASONABLE COMPENSATION.

"Reasonable compensation," as applicable to V. S. 5384, authorizing the probate court to allow a special administrator, "in case of unusual difficulty or responsibility, such further sum as it judges reasonable," means such as will fairly compensate, when the character, effectiveness, and ability entering into the service are considered. *Powell v. Foster's Estate*, 44 Atl. 96, 97, 71 Vt. 160.

A statute which permits the damages on the condemnation of land to be assessed as of the date of the former taking, but postpones interest until possession is actually taken, provides the reasonable compensation which the Constitution requires in such cases. *Norcross v. City of Cambridge*, 44 N. E. 615, 616, 166 Mass. 608, 33 L. R. A. 843.

An assignment in trust for creditors, providing for the payment of all expenses which might be incurred by the assignment in the execution of the trust, including a reasonable compensation for labor, time, and services of such assignees, means a compensation or commission for labor, time, services, and attention of the assignee, actually done, spent, given, and bestowed in and about the business of the trust created, and can be construed as meaning no more than the commissions fixed by law. *Campbell v. Woodworth*, 24 N. Y. 304, 306.

P. L. 49, authorizing cities of the second class by ordinance to issue certain bonds, which shall not be sold at less than par, with accrued interest, but providing that the councils may allow a reasonable compensation for the sale or negotiation of said bonds, does not authorize the allowance of a commission to the purchasers thereof. *Appeal of Whelen*, 108 Pa. 162, 1 Atl. 88.

What is a reasonable compensation for physical and mental suffering is for the jury to ascertain and assess under the facts in each case. Such compensation cannot be measured by any unvarying mathematical rule or standard. *Larkin v. Chicago & G. W. Ry. Co.*, 92 N. W. 891, 892, 118 Iowa, 652.

#### REASONABLE COSTS.

The term "reasonable costs," as used in V. S. 1403, providing that, in case of discontinuance, the defendant is entitled to judgment for reasonable costs, covers also such costs as had accrued to the defendant before the suit was discontinued, though before the return day, as costs for summoning witnesses or in taking depositions. *Woods v. Darling*, 45 Atl. 750, 751, 71 Vt. 348.

#### REASONABLE CREATURE.

Under the common-law rule that murder is taking away the life of a reasonable creature under the king's peace with malice aforethought, express or implied, the phrase "reasonable creature" means a human being, and includes a lunatic, an idiot, or even a child unborn, or a slave. *State v. Jones* (Miss.) Walk. 83, 85.

#### REASONABLE DANGER.

"Reasonable danger" is defined, as the force of the term imports, as a danger to be judged of by an exercise of reason and judgment, exercised on acts which require construction to render their meaning apparent. *Allen v. State*, 6 S. W. 187, 189, 24 Tex. App. 216.

#### REASONABLE DILIGENCE.

The phrase "reasonable diligence" is held to be incapable of exact definition and to

have only a relative signification. *Paul Hopkins & Son v. Seattle Scandinavian Fish Co.*, 73 Pac. 495, 496, 32 Wash. 513.

Reasonable diligence means such diligence as an ordinarily prudent and diligent person would exercise under similar circumstances. *Missouri, K. & T. R. Co. v. Gist*, 73 S. W. 857, 858, 31 Tex. Civ. App. 662.

Reasonable diligence is that diligence which would be deemed reasonable by reasonable and prudent men under the same circumstances. *Bacon v. Casco Bay Steamboat Co.*, 37 Atl. 328, 329, 90 Me. 46.

"By reasonable diligence is meant merely reasonable attention to business, and a person who settles a store account and waits more than five years to examine the same cannot have the same reopened on an alleged discovery of mistakes of addition of credits therein," not having exercised reasonable diligence. *Bodkin v. Rollyson*, 37 S. E. 617, 48 W. Va. 453.

A person in the act of purchasing a piece of property is required to exercise reasonable diligence to ascertain the character of the title thereof. What is meant by reasonable diligence is, not the diligence or skill that would be employed by a practiced conveyancer or an acute or skillful attorney, but the diligence exercised by ordinary men generally. If, after he has found that there appears in the case presented to him that which would lead a reasonable man to the conclusion that the conveyance received by him would give a good title, and he acts in good faith upon that, he exercises reasonable diligence. *Latta v. Clifford* (U. S.) 47 Fed. 614, 620.

By the words "reasonable diligence," as used in Act April 22, 1856 (P. L. 532), limiting to five years the time within which an action may be brought to enforce any implied or resulting trust as to realty, "provided that as to any one affected with a trust by reason of his fraud the said limitation shall begin to run only from the discovery thereof, or when by reasonable diligence the party defrauded might have discovered the same," is meant where there is some reason to awaken inquiry and direct diligence in a channel in which it would be successful. *Maul v. Rider*, 59 Pa. (9 P. F. Smith) 167, 171.

Reasonable diligence, in cases of absent debtors, requires that the plaintiff shall at least take some steps from time to time to ascertain whether his debtors can be reached by suit or not. *Dukes v. Collins* (Del.) 30 Atl. 639, 7 Houst. 3.

Reasonable diligence, within the meaning of the rule that presentment and notice of dishonor of negotiable paper must be made with reasonable diligence, means that the diligence required must be measured by

the general convenience of the commercial world and the practicability of accomplishing the end required by ordinary skill, caution, and effort. A bill of exchange deposited in a post office within due time to reach the place of payment before it fell due, but taken to the wrong place by mistake of the postmaster, and reaching the place where payable on the day after it became due, was held to have been presented with sufficient diligence. *Windham Bank v. Norton Converse & Co.*, 22 Conn. 213, 221, 56 Am. Dec. 397.

As the term is used in speaking of the duty of a commission merchant to exercise "reasonable diligence" in the care of property which is in his possession, it means "such diligence as an ordinarily prudent and diligent man would exercise under the circumstances with reference to his own property, taking into consideration the usage of trade, the state of the market, and the situation of the property." *Rice v. Brook* (U. S.) 20 Fed. 611, 614.

#### REASONABLE DOUBT.

"A reasonable doubt is an honest misgiving generated by the insufficiency of the proof, which reason sanctions as a substantial doubt." *United States v. Means* (U. S.) 42 Fed. 599, 607; *United States v. Graves* (U. S.) 53 Fed. 636, 659.

"A reasonable doubt is the doubt which makes you hesitate as to the correctness of the conclusion which you reach. If under your oaths and upon your consciences, after you have fully investigated the evidence and compared it in all its parts, you say to yourselves, 'I doubt if he is guilty,' then it is a reasonable doubt. It is a doubt which settles in your judgment and finds a resting-place there." *Brown v. State*, 42 Atl. 811, 828, 62 N. J. Law, 666.

An instruction in a criminal case that jurors have sometimes said, after the acquittal of the prisoner, that they had no doubt of his guilt, but did not think there was sufficient evidence to warrant a conviction, but that this is wrong, for if a juror goes into the trial with his mind unprejudiced and knowing nothing of the facts, and becomes satisfied without doubt from the testimony offered that the prisoner is guilty, then there can be no reasonable doubt in his mind, is not prejudicial to the accused. *State v. James*, 37 Conn. 355, 360, 361.

Every person charged with an offense is to be considered innocent, unless his guilt is proved so clearly that the jury can conscientiously see that no reasonable doubt remains in their minds as to his guilt. The term "reasonable doubt" does not signify a mere skeptical condition of the mind. It does not require that the proof should be so clear that no possibility of error can exist, for if that



were the case no criminal prosecution would prevail. It means simply that it must be so conclusive and complete that all reasonable doubts of the fact are removed from the mind. *Tompkins v. Butterfield* (U. S.) 25 Fed. 556, 558.

If, after an impartial comparison and consideration of all the evidence, the jury can candidly say that they are not satisfied of defendant's guilt, then they have a reasonable doubt. *United States v. Meagher* (U. S.) 37 Fed. 875, 881; *United States v. Lewis* (U. S.) 111 Fed. 630, 636.

What the law refers to as a reasonable doubt is such a doubt as would exist if the jury, after a careful review of all the evidence, rejecting that which they considered unreliable, and retaining that which they considered reliable, and weighing all the facts and circumstances, find that its judgment is not convinced of the guilt of the prisoner. *State v. Zdanowicz*, 55 Atl. 743, 746, 69 N. J. Law, 619.

Reasonable doubt is such a doubt as honest, conscientious, painstaking men may entertain upon a state of facts presented to them. *People v. Stott*, 4 N. Y. Cr. R. 306, 316.

By reasonable doubt is ordinarily meant such a one as would govern or control in business transactions or the usual pursuits of life. *State v. Millain*, 3 Nev. 409, 451.

#### Absolute certainty.

By "reasonable doubt" is not meant certainty beyond all doubt whatever, but that defendant should be acquitted if there is some substantial doubt arising from the evidence, or the want of it, which is not a mere possibility of innocence. *State v. Turner*, 19 S. W. 645, 647, 110 Mo. 196; *United States v. Youtsey* (U. S.) 91 Fed. 864, 868; *State v. Fisher* (Del.) 41 Atl. 208, 213, 1 Pennewill, 303; *State v. Miller* (Del.) 32 Atl. 137, 141, 9 Houst. 564.

Absolute, mathematical, or metaphysical certainty is not essential, and, besides, in judicial investigation it is wholly unattainable. Moral certainty is all that can be required. The truth should be such as to control and decide the conduct of men in the highest and most important affairs of life, and not a mere vague conjecture, a fancy, a trivial supposition, a bare possibility of innocence. To acquit upon such doubts is a virtual violation of the juror's oath, and an offense of great magnitude against the interests of society, tending directly to the disregard of the obligation of a judicial oath, the hindrance and disparagement of justice, and the encouragement of malefactors. *Giles v. State*, 6 Ga. 270, 285 (citing 1 Starkie, Ev. 514).

#### Captious or imaginary doubt.

"Reasonable doubt is not a mere imaginary, captious, or possible doubt, but a fair doubt, based on reason and common sense, and growing out of the testimony in the case." *State v. McCune*, 51 Pac. 818, 819, 16 Utah, 170; *United States v. Youtsey* (U. S.) 91 Fed. 864, 868; *United States v. Graves* (U. S.) 53 Fed. 636, 659; *State v. Maxwell*, 42 Iowa, 208, 210; *State v. Williamson*, 62 Pac. 1022, 1024, 22 Utah, 248; *People v. Swartz*, 76 N. W. 491, 494, 118 Mich. 292; *Maxey v. State*, 52 S. W. 2, 3, 66 Ark. 523.

A doubt which demands an acquittal must be a reasonable doubt. A possible or speculative doubt is not sufficient. It is only a reasonable doubt of defendant's guilt which entitles him to an acquittal, not a speculative or imaginary doubt. *State v. May*, 72 S. W. 918, 924, 172 Mo. 630 (citing *Watson v. State*, 83 Ala. 60, 3 South. 441).

A reasonable doubt is not every doubt. It is not a captious doubt. It is such a condition of mind resulting from the consideration of the evidence as makes it impossible for the jury as reasonable men to arrive at a conclusion. It is not a consciousness that a conclusion arrived at may possibly be erroneous, but such a state of mind that deprives the jury of the ability to reach a conclusion that is satisfactory. *State v. Roberts*, 13 Pac. 896, 900, 15 Or. 187.

A reasonable doubt is not a whimsical, arbitrary, or purely speculative doubt, nor a mere conjecture or guess, but one which rests on a reasonable foundation. *United States v. Wyatt* (U. S.) 122 Fed. 316, 317.

A reasonable doubt, which would justify a jury in acquitting upon that ground, is a state of mental uncertainty arising out of the testimony in the case, the facts and circumstances of which, under the direction of the court, have been given the jury in evidence as bearing upon the issue. "It must not be some mere fancy of the imagination, some ideal, unsubstantial figment of the brain, conjured up outside of the evidence as a possible hypothesis of innocence, unfounded in any reasonable view of the testimony, but some substantial and tangible perception, which, arising out of the facts and circumstances before you, would cause you to hesitate and pause as to the guilt of the party charged." *Commonwealth v. Childs* (Pa.) 2 Pittsb. R. 391, 400.

Reasonable doubt is not a mere imaginary, whimsical, or even possible doubt of the guilt of the accused, but is such a real and substantial doubt as intelligent and impartial men may reasonably entertain upon a careful consideration of all the facts proven in the case. *State v. Di Guglielmo* (Del.) 55 Atl. 350, 352.

**Concurrence of all jurors.**

An instruction that "a reasonable doubt is such a doubt as fairly and naturally arises in the minds of the whole jury," when preceded by an instruction that, if the jury were "satisfied of the defendant's guilt beyond all reasonable doubt, they should convict, and otherwise acquit," was erroneous, as the jury was liable to be misled, and conclude that, unless the doubt arose in the minds of all the jurors, it was something less than a reasonable doubt, and should be disregarded. *State v. Sloan*, 7 N. W. 516, 517, 55 Iowa, 220.

An instruction that a reasonable doubt is such a doubt as fairly and naturally arises in the minds of the whole jury, after fully and carefully weighing and considering all the facts and circumstances surrounding the same, is prejudicial to defendant, as authorizing a conviction when one or more of the jurors may have entertained a reasonable doubt of his guilt. *State v. Stewart*, 3 N. W. 99, 101, 52 Iowa, 284.

Reasonable doubt must be such doubt as is raised by the evidence in the case, or by the want of evidence, and each juror and all the jurors must be satisfied from the evidence beyond a reasonable doubt that defendant is guilty before they can agree upon a verdict of guilty; that is, if a juror has in his mind a reasonable doubt, it would be the duty of such juror not to agree to a verdict of guilty. This, however, does not mean that, if some of the jurors are satisfied beyond a reasonable doubt that defendant is guilty, such jurors so satisfied must agree to a verdict of acquittal.—*State v. Nicholson*, 32 S. E. 813, 815, 124 N. C. 820.

**As arising from any one defense.**

Where the jury has a reasonable doubt as to the truth of any one of his defenses, the defendant is entitled to an acquittal (Code Civ. Proc. § 380), for in such case there would be a reasonable doubt whether his guilt was satisfactorily shown. *People v. Downs*, 8 N. Y. Supp. 521, 524, 56 Hun, 5.

**As doubt arising from evidence.**

A reasonable doubt must be such as fairly and naturally arises in the mind after comparing the whole evidence and deliberately considering the whole case. *State v. Hennessy*, 7 N. W. 641, 642, 55 Iowa, 300; *State v. Lynn* (Del.) 51 Atl. 878, 884, 3 Pennewill, 316; *United States v. Youtsey* (U. S.) 91 Fed. 864, 868; *Welsh v. State*, 11 South. 450, 96 Ala. 92; *United States v. Niemeyer* (U. S.) 94 Fed. 147, 149; *United States v. Jones* (U. S.) 31 Fed. 718, 724, 725; *Hoffman v. State*, 73 N. W. 51, 52, 97 Wis. 571; *Langford v. State*, 49 N. W. 766, 32 Neb. 782; *Lovett v. State*, 11 South. 550, 554, 30 Fla. 142, 17 L. R. A. 705; *State v. David*, 33 S. W.

28, 29, 131 Mo. 380; *State v. Senn*, 11 S. E. 292, 295, 32 S. C. 392; *People v. Parsons*, 105 Mich. 177, 184, 63 N. W. 69.

A reasonable doubt must be a doubt arising out of the evidence, and not a fanciful conjecture or a strained inference. *United States v. Politzer* (U. S.) 59 Fed. 273, 279.

A reasonable doubt must be a doubt arising from the evidence in the case, and not derivable from or dependent upon any extraneous fact or circumstance. *State v. Kruger*, 61 Pac. 463, 464, 7 Idaho, 178.

A reasonable doubt is a strong doubt based on the testimony, and not on some imaginary matter outside. *State v. Summer*, 32 S. E. 771, 55 S. C. 32, 74 Am. St. Rep. 707.

A reasonable doubt is a doubt which arises from the evidence and its character, or from the absence of satisfactory evidence in the case, and is such a doubt as a reasonable man might entertain after a fair review and consideration of the evidence. *People v. Barberi*, 47 N. Y. Supp. 168, 174.

"The law presumes that a defendant in a criminal case is innocent of the offense charged, and it is necessary to conviction that the state overcome such presumption and prove him guilty beyond a reasonable doubt, and if the jury have a reasonable doubt of defendant's guilt they must acquit. But a doubt, in order to authorize an acquittal, must be a substantial one arising from the insufficiency of the evidence, and not from the mere possibility of innocence. *State v. Talmage*, 17 S. W. 990, 991, 107 Mo. 543.

Reasonable doubt means that the doubt should arise out of the case, not outside of it, not some outside suggestion or reflection of a juror, that a juror might create in his mind, but it means a doubt that ought to arise from an examination of the case itself, seeking to determine the truth, either from the evidence, statement of the defendant, the conflict in the evidence, or some deficiency or lack of testimony. *Lewis v. State*, 15 S. E. 697, 699, 90 Ga. 95; *Harris v. State*, 58 N. E. 75, 77, 155 Ind. 265.

An instruction that by the words "reasonable doubt" was meant an actual substantial doubt of guilt arising from the evidence or want of evidence in the case was not erroneous, on the theory that it was impossible to tell whether the doubt of guilt must arise from the evidence on the part of the state or want of evidence on the part of defendant. *Ferguson v. State*, 72 N. W. 590, 591, 52 Neb. 432, 66 Am. St. Rep. 512.

The jury have no right to go outside of the evidence to search for or hunt up doubts (in order to acquit the defendant) not arising

ing from the evidence or want of evidence. *Earl v. People*, 73 Ill. 329.

"It is error to limit a reasonable doubt to something which is suggested by, or arises from, or springs out of, the evidence adduced, as this gives too narrow a definition of a reasonable doubt. Such a doubt may arise from a want of evidence as to some fact having a natural connection with the cause. It has reference to that uncertain condition of mind which may remain after considering what has not been proved, as well as what has." *Knight v. State*, 20 South. 860, 74 Miss. 140 (quoting note to *Burt v. State*, 48 Am. St. Rep. 570).

A reasonable doubt is one that exists in the mind after a full and careful examination and comparison of all the evidence, and one that is consistent with the facts that are fully proved to the satisfaction of the jury. The doubt must not be an unreasonable one, nor a mere supposition inconsistent with the evidence which the jury credit and believe. *State v. Conally*, 3 Or. 69, 73.

Reasonable doubt is a doubt that grows out of the evidence, if it exists at all. It cannot originate anywhere else. It is not an imaginary doubt, not a speculative doubt, not a doubt based on fancy. *People v. Rich* (Mich.) 94 N. W. 375, 377.

"A reasonable doubt is one that must grow out of the evidence alone; one that keeps your mind from reaching a clear conclusion of the guilt of the accused after a careful and conscientious consideration of the case, interpreting the facts in the light of the rules ordinarily governing human actions under like circumstances." *State v. Brown* (Del.) 53 Atl. 354, 355.

A reasonable doubt is not a remote and far-fetched or fanciful doubt. It must be suggested by the evidence in the case, and of such strength as would influence a reasonable man in the conduct of his own affairs. *United States v. Carr* (U. S.) 25 Fed. Cas. 306, 308.

A reasonable doubt is one that arises reasonably from the evidence. *State v. Harris*, 97 Iowa, 407, 409, 66 N. W. 728.

An instruction that a reasonable doubt must be one suggested by the proof is too narrow, as implying that the doubt must be such a one as is created by the proof. *Densmore v. State*, 67 Ind. 306, 307, 33 Am. Rep. 96.

A doubt, to justify an acquittal, must be reasonable, and it must arise from a candid and impartial investigation of all the evidence. If, after considering all the evidence in this case, you can say that you have an abiding conviction of the truth of

the charge, then you are satisfied beyond a reasonable doubt, and should convict. *State v. Gile*, 8 Wash. 12, 22, 35 Pac. 417, 421.

A reasonable doubt, such as will entitle an accused on trial for crime to an acquittal, need not necessarily arise out of the testimony, but it may be the result of a want of testimony sufficient to satisfy the mind. Hence an instruction that, if the jury have a reasonable doubt as to defendant's guilt he is entitled to an acquittal, but it must be a reasonable doubt arising from and growing out of the evidence, and not an unreasonable doubt not growing out of the evidence, is erroneous. *Massey v. State*, 1 Tex. App. 563, 570.

Where there is a plain conflict of testimony, and one side or the other must be believed without qualification, there is no room for a reasonable doubt, and the error in defining it to the jury is immaterial. *People v. Marble*, 38 Mich. 117, 124.

#### As not including every doubt.

Not every doubt which may arise is of necessity a reasonable doubt, but, in order to be a reasonable doubt, it must amount to a real doubt of the guilt of defendant. *Williams v. United States* (Ind. T.) 69 S. W. 871, 874.

A mere doubt, however honestly entertained, is not enough on which to base an acquittal, nor is a doubt for which a reason may be given necessarily a reasonable doubt, although a reasonable doubt may be a doubt for which a reason can be assigned. *Roberts v. State*, 25 South. 238, 240, 122 Ala. 47.

"A reasonable doubt is not every possible doubt, because everything relating to human affairs and depending on moral evidence is open to some possible doubt. It is that state of a case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say and feel that they have an abiding conviction to a moral certainty of the truth of the charge. \* \* \* A reasonable doubt does not consist of possible or conjectural doubts," etc. *Carleton v. State*, 61 N. W. 699, 714, 43 Neb. 373.

#### As excluding every hypothesis but guilt.

Evidence sufficient to convince beyond a reasonable doubt must exclude every other hypothesis but that of defendant's guilt. *Pullen v. State*, 12 S. W. 502, 503, 28 Tex. App. 114; *Cox v. State*, 12 S. W. 493, 494, 28 Tex. App. 92; *Stout v. State*, 90 Ind. 1, 12; *State v. Wilcox*, 44 S. E. 625, 631, 132 N. C. 1120; *Carlton v. People*, 37 N. E. 244, 247, 150 Ill. 181, 41 Am. St. Rep. 346; *Commonwealth v. Costley*, 118 Mass. 1, 23.

An instruction that, in applying the rule as to reasonable doubt, the jury would be required to acquit if all the facts and circumstances proven can be reasonably reconciled with any other theory than that the defendant is guilty, is held to be an erroneous definition of "reasonable doubt"; the court observing that this attempted explanation of the term "reasonable doubt" would eliminate it from the Criminal Code, and leave juries to find verdicts in criminal cases upon the mere preponderance of the evidence. The doctrine expressed in this explanation is, says the court, exactly that which is applicable in a civil action, in which, if the facts proven can be reasonably reconciled with the theory that the defendant owes what he is sued for, as that he does not, the defendant is entitled to a verdict. *State v. Shaeffer*, 1 S. W. 293, 296, 89 Mo. 271.

A charge that the prisoner's guilt must be proved to the exclusion of all reasonable doubt, and that, if the testimony could be reconciled with any rational theory other than the guilt of the accused, the jury should acquit, held all that defendant was entitled to. *Hall v. People*, 39 Mich. 717, 719.

#### As incapable of explanation.

The term "reasonable doubt" is so plain that an attempt to explain it would lead to confusion. *Endowment Rank K. P. v. Steele*, 69 S. W. 336, 337, 108 Tenn. 624; *State v. Wilcox*, 44 S. E. 625, 631, 132 N. C. 1120.

It is impossible to frame a satisfactory definition of the expression "reasonable doubt." *Kane v. Hibernia Ins. Co.*, 39 N. J. Law (10 Vroom) 697, 706, 23 Am. Rep. 239.

In most cases it is better to leave the phrase "reasonable doubt" undefined, save as the words carry their own definition. *People v. Cox*, 38 N. W. 235, 240, 70 Mich. 247.

The phrase "reasonable doubt," while well understood, is difficult to define; but the idea may, no doubt, be sufficiently expressed in other language conveying the same meaning. *Lawless v. State*, 72 Tenn. (4 Lea) 173, 180.

As has been often said by this court, the term "reasonable doubt" best defines itself. All attempts at definition are likely to prove confusing and dangerous. *State v. Morrison*, 72 Pac. 554, 559, 67 Kan. 144 (citing *State v. Wilson*, 71 Pac. 849, 66 Kan. 472; *State v. Davis*, 48 Kan. 1, 28 Pac. 1092).

The idea intended to be expressed by the words "reasonable doubt" can scarcely be expressed so clearly or truly by any other words, and generally attempted definitions by courts or others are simply mis-

leading, and not proper explanations of their meaning at all. *State v. Davis*, 28 Pac. 1092, 1093, 48 Kan. 1.

There is no exact mathematical test by which we may certainly know whether a doubt entertained in any given case is reasonable or otherwise. What would be reasonable to one person might be far otherwise to another. Therefore no certain line, as upon a plan, can be drawn, that shall be recognized by every one as the dividing line between the mere skeptical doubt and that which has the sanction of reason. Hence, whatever explanations may be given to the phrase, its meaning practically must depend very largely upon the character of the mind of the person acting. Lexicographers tell us that reasonable is that which is "agreeable or conformable to reason." The doubt, therefore, which conforms to the reason of the person examining, is to him a reasonable doubt. If it does not so conform to him, it is unreasonable, and will not be entertained. When the jurors are told that, in order to convict, the proof must remove every reasonable doubt of guilt from their minds, whatever the form of words used, if any heed is given to the instruction the result must be that each individual juror will understand it, and act according to the dictates of his own reason; and if, tried by that test, the doubt is reasonable, conviction must fail, otherwise it would follow. *State v. Reed*, 62 Me. 129, 143.

It is so nearly impossible to define precisely in a few words what a reasonable doubt is, that courts instructing jurors in criminal cases should make no such attempt, but merely follow the language of the Code—that, where there is a reasonable doubt of the defendant being proven guilty, he is entitled to an acquittal. *Mickey v. Commonwealth*, 72 Ky. (9 Bush) 593, 598.

The terms of the expression "reasonable doubt" import the most exact idea of its meaning, and are incapable of simplification, and there is no equivalent phrase more easily understood. *Lipscomb v. State*, 23 South. 210, 212, 75 Miss. 559.

All the definitions are little more than metaphysical paraphrases of an expression invented by the common-law judges for the very reason that it was capable of being understood and applied by plain men in the jury box. *Barney v. State*, 68 N. W. 636, 639, 49 Neb. 515 (citing *Thomp. Trials*, § 2469).

After a circuit judge had given the jury the benefit of what others had said in their efforts to accurately define the meaning of "reasonable doubt," it was proper for him to say that the phrase was self-explanatory. *State v. Aughtry*, 26 S. E. 619, 623, 49 S. C. 285.

"It would seem \* \* \* that the phrase 'reasonable doubt' explains itself. Certainly the meaning is obvious, and will be readily appreciated by the average juror without further explanation. Mr. Bishop, in his new Criminal Procedure, says there are no words plainer than 'reasonable doubt.'" *Battle v. State* (Ga.) 29 S. E. 491, 492, 103 Ga. 53.

It is difficult to define a reasonable doubt in any plainer terms than the words themselves import. To attempt to define a reasonable doubt is like attempting to define a definition, and the better practice is not to attempt it. *Chavez v. Territory* (N. M.) 30 Pac. 903, 905, 6 N. M. 455.

It is difficult to explain simple terms like "reasonable doubt" so as to make them plainer. Every attempt to explain them renders an explanation of the explanation necessary. *State v. Robinson*, 23 S. W. 1066, 1069, 117 Mo. 649.

In answer to a contention that failure to define "reasonable doubt" in a criminal case was error, the court says: "We do not think it is customary for courts to undertake such a task. *Miles v. United States*, 103 U. S. 304, 26 L. Ed. 481; *Costley v. Commonwealth*, 118 Mass. 1; *Commonwealth v. Tuttle*, 66 Mass (12 Cush.) 502; *Commonwealth v. Cobb*, 80 Mass. (14 Gray) 57. The reason why courts are generally disinclined to enter into an explanation of the term is that, while the expression is itself well calculated to convey to the jurors a correct idea of what is expected of them, any effort at further elucidation tends to misleading refinements. To attempt to give a specific meaning to the word 'reasonable' would be 'trying to count what is not number, and to measure what is not space.'" *State v. Smith*, 31 Atl. 206, 207, 65 Conn. 283.

It is held that an instruction stating that it is very difficult to explain what is a reasonable doubt more fully than the words imply, but that it means fully satisfied, or satisfied to a moral certainty, is not error. *State v. Whitson*, 16 S. E. 332, 334, 111 N. C. 695.

The court's statement to a jury, who returned to ask additional instruction as to the meaning of the term "reasonable doubt," to the effect that the words "reasonable doubt" were words of common use, which the jury could understand as well as the court could, and that he had a reasonable doubt as to whether he could instruct them as to their meaning, was held not error, in *Lenert v. State* (Tex.) 63 S. W. 563, 565.

In approving an instruction in a homicide case, that, to raise a reasonable doubt,

the evidence must be such as to produce in the minds of prudent men such certainty that they would act without hesitation in their own most important affairs, *Brewer, J.*, said: "It has been often said by courts of the highest standing that perhaps no definition or explanation can make any clearer what is meant by the phrase 'reasonable doubt' than that which is imparted by the words themselves." *State v. Kearley*, 26 Kan. 77, 87.

When the jury, in the performance of their duties, applying the correct principles of the law given them by the court, as conscientious men, naturally and reasonably from the evidence, either of a positive or circumstantial character, reach the conclusion of guilt, the principle that the conviction must be beyond reasonable doubt has been satisfied. If the jury cannot reach such conclusion naturally and reasonably, then innocence must be declared, for then reasonable doubt of guilt exists; and to all intelligent jurors the term "reasonable doubt" best defines itself. *State v. Collins*, 43 Atl. 896, 898, 63 N. J. Law, 316.

Reasonable doubt is that state of the case which, after the entire comparison and consideration of the evidence, leaves the minds of the jury in that condition that they cannot say that they feel an abiding conviction, to a moral certainty, of the truth of the charge. "I think it very questionable," says the court, "whether the trial court, in giving instructions to the jury, should undertake to define 'reasonable doubt.' The term reasonably imports its own signification, and an attempt to explain its meaning is liable to be misleading." *State v. Ching Ling*, 18 Pac. 844, 848, 16 Or. 419.

If a jury cannot understand their duty when told that they must not convict when they have a reasonable doubt of the prisoner's guilt, or of any fact essential to prove it, they can very seldom get any help from such subtleties as require a trained mind to distinguish. Jurors are presumed to have common sense and to understand good English, but they are not presumed to have professional or any high degree of technical or linguistic training. *Hamilton v. People*, 29 Mich. 173, 194.

A failure to define "reasonable doubt" is not error, where a defendant did not ask further instructions. *People v. Waller*, '38 N. W. 261, 262, 70 Mich. 237.

#### May be raised by evidence of good character.

It is held that evidence of good character only may operate to raise a reasonable doubt in criminal prosecution. *Commonwealth v. Cleary*, 19 Atl. 1017, 1018, 135 Pa. 64, 8 L. R. A. 301.

Evidence of good character may generate a doubt where without such proof the jury would be satisfied beyond a reasonable doubt of defendant's guilt, but proof of good character, independent of the other evidence in the case, is not sufficient to raise a reasonable doubt, but is to be taken into consideration with all the evidence, and weighed with it; and if, upon the whole evidence, the jury entertain no reasonable doubt of guilt, they must convict. *Shepperd v. State*, 10 South. 663, 666, 94 Ala. 102.

**As one sufficient to cause hesitation in important affairs.**

Evidence is sufficient to remove a "reasonable doubt" when it convinces the judgment of an ordinarily prudent man of the truth of a proposition with such force that he would voluntarily act upon that conviction, without hesitation, in his own most important affairs. *Stout v. State*, 90 Ind. 1, 12; *Jarrell v. State*, 58 Ind. 293, 296; *Arnold v. State*, 23 Ind. 170; *Toops v. State*, 92 Ind. 13, 16; *Harris v. State*, 58 N. E. 75, 77, 155 Ind. 265; *Williams v. United States* (Ind. T.) 69 S. W. 871, 874; *Miles v. United States*, 103 U. S. 304, 309, 26 L. Ed. 481; *United States v. Allis* (U. S.) 73 Fed. 165, 167; *United States v. Kenney* (U. S.) 90 Fed. 257, 262; *United States v. Youtsey* (U. S.) 91 Fed. 864, 868; *United States v. Fitzgerald* (U. S.) 91 Fed. 374, 376; *United States v. Wright* (U. S.) 16 Fed. 112, 114; *United States v. Niemeyer* (U. S.) 94 Fed. 147, 149; *United States v. Politzer* (U. S.) 59 Fed. 273, 279; *United States v. Jones* (U. S.) 31 Fed. 718, 724; *United States v. Allis* (U. S.) 73 Fed. 165, 167; *United States v. Graves* (U. S.) 53 Fed. 636, 659; *United States v. Cassidy* (U. S.) 67 Fed. 698, 782; *May v. People*, 60 Ill. 119, 120; *Gannon v. People*, 21 N. E. 525, 528, 127 Ill. 507, 11 Am. St. Rep. 147; *Painter v. People*, 35 N. E. 64, 72, 147 Ill. 444; *Miller v. People*, 39 Ill. 457, 463; *Wacaser v. People*, 25 N. E. 564, 565, 134 Ill. 438, 23 Am. St. Rep. 683; *Little v. People*, 42 N. E. 389, 391, 157 Ill. 153; *Sples v. People*, 12 N. E. 865, 989, 122 Ill. 1, 3 Am. St. Rep. 320; *Territory v. Owings*, 3 Mont. 137, 138; *State v. Gilbert* (Idaho) 69 Pac. 62, 63; *Leonard v. Territory*, 7 Pac. 872, 873, 2 Wash. St. 381; *Welsh v. State*, 11 South. 450, 96 Ala. 92; *State v. Crockett*, 65 Pac. 447, 449, 39 Or. 76; *People v. Hughes*, 32 N. E. 1105, 1108, 137 N. Y. 29; *People v. Barberi*, 47 N. Y. Supp. 168, 174; *Ryan v. State*, 53 N. W. 836, 839, 83 Wis. 486; *Butler v. State*, 78 N. W. 590, 591, 102 Wis. 364; *State v. Serenson*, 64 N. W. 130, 132, 7 S. D. 277; *Collins v. State*, 64 N. W. 432, 436, 46 Neb. 37; *Minich v. People*, 9 Pac. 45, 8 Colo. 440; *Butler v. State*, 19 S. E. 51, 92 Ga. 601.

A reasonable doubt is one based on reason. It is not mere possible doubt, but is such a doubt as would govern or control a person in the more weighty affairs of life. If

the minds of the jurors, after the entire comparison and consideration of all the evidence, are in such a condition that they can say they feel an abiding conviction of the truth of the charge, there is not a reasonable doubt. Doubt, to be reasonable, must be actual and substantial, not mere possibility or speculation. *Comp. Laws Nev.* 1900, § 4648.

A reasonable doubt is a doubt based on reason, and which is reasonable in view of all the evidence, and if, after an impartial comparison and consideration, the jury can say candidly that they are not satisfied of defendant's guilt, they have a reasonable doubt; but if, after such comparison and consideration of the evidence, the jury can truthfully say that they have an abiding conviction of defendant's guilt, such as they would be willing to act upon in more weighty and important matters relating to their own affairs, they have no reasonable doubt. *United States v. Lewis* (U. S.) 111 Fed. 630, 636.

A doubt, to justify an acquittal, must be reasonable, etc., and it must arise from a candid and impartial investigation of all the evidence in the case; and unless it is such that, were the same kind of doubt interposed in the graver transactions of life, it would cause a reasonable and prudent man to hesitate and pause, it is insufficient to authorize a verdict of not guilty. If, after considering all the evidence, you can say that you have an abiding conviction of the truth of the charge, you are satisfied beyond a reasonable doubt. In *May v. People*, 60 Ill. 119, a "reasonable doubt" was defined as follows: "A reasonable doubt, beyond which the jury should be satisfied, in a criminal case, before finding the accused guilty, is one arising from a candid and impartial investigation of all the evidence, and such as in the graver transactions of life would cause a reasonable man to hesitate and pause." *Willis v. State*, 43 Neb. 102, 111, 61 N. W. 254, 256.

"A reasonable doubt is one arising from a candid and impartial investigation of all the evidence, and such as, in the graver transactions of life, would cause a reasonable and prudent man to hesitate and pause." *Dunn v. People*, 109 Ill. 635, 645 (citing *May v. People*, 60 Ill. 119; *Miller v. People*, 39 Ill. 457; *Connaghan v. People*, 88 Ill. 460).

The proof is deemed to be beyond a reasonable doubt when the evidence is sufficient to impress the judgment and understanding of ordinarily prudent men with a conviction on which they would act in their most important concerns or affairs of life. While there are some decisions which probably do not sustain this definition of "reasonable doubt," there are others which do, and we are satisfied with and approve it. It is not visionary, but has the qualities of being reasonable, practical, and capable of being understood

by ordinary minds. *Polln v. State*, 16 N. W. 898, 900, 14 Neb. 540.

In defining "reasonable doubt," the court quotes with approval Starkie's statement that a juror ought not to condemn unless the evidence exclude from his mind all reasonable doubt as to the guilt of the accused, or, in other words, unless he be so convinced by the evidence that he would venture to act upon that conviction in matters of the highest concern and importance to his own interest. There must be this certainty of conviction before a reasonable doubt can be excluded, and, says the court, we may add to Mr. Starkie's definition this qualification: that it must be such a conviction of the truth of the proposition that a prudent man would feel safe to act upon it under circumstances where there was no compulsion resting upon him to act at all. In other words, a prudent man compelled to do one of two things affecting matters of the utmost moment to him might, and doubtless would, do that thing which the mere preponderance of the evidence would satisfy him was for the best, and yet such a conviction would fall short of that required to satisfy the mind of a juror in a criminal case. So it is held that an instruction stating that a moral certainty sufficient to justify conviction in a criminal case was reached when the jury were convinced to such an extent as would induce one to act in regard to his own important affairs, was too narrow; but that there must be such a certainty as would justify action not only in matters of importance, but in those of the highest import; nothing short of this constituting that moral certainty which alone can authorize a verdict of guilty. *Bradley v. State*, 31 Ind. 492, 505.

An instruction defining "reasonable doubt" as such a doubt as would make a man waiver or hesitate in arriving at a conclusion in considering a matter of like importance to himself as the case on trial is to defendant is not objectionable as requiring less positive proof of facts in cases of minor importance than in those of a graver nature. *State v. Rosener*, 35 Pac. 357, 358, 8 Wash. 42.

It is held that a definition of "reasonable doubt" as "such a doubt as would influence or control your actions in any of the important transactions of life" is an incorrect definition of reasonable doubt. A doubt that would control our actions in the important transactions of life would, says the court, be one that was so strong as not to be overcome by contrary arguments, and hence would be practically an unconquerable one. *Commonwealth v. Miller*, 21 Atl. 138, 140, 139 Pa. 77, 23 Am. St. Rep. 170.

A doubt which would cause a reasonable and prudent man to hesitate before accepting a given proposition as not true is not necessarily a reasonable doubt. A man, of

whatever prudence and reason, might pause and hesitate and consider because of a doubt as to the propriety or expediency of proposed conduct, though such doubt would not be one for the existence of which a good reason could be given, and the hesitation to act might well be only for the purpose of considering whether the doubt was substantial and reasonable, or chimerical and shadowy; and, the consideration resulting in a conclusion that the intruding was without foundation, he may then proceed to act without any reasonable doubt of the wisdom of his course. Jurors are assumed to be careful and prudent men. In considering a case submitted to them, many doubts of guilt may arise which will cause them to pause and hesitate before reaching a verdict. But if, after stopping to think over the matter, they conclude that the doubt is unsubstantial and unsupported by any sufficient reason, they cannot be said to have entertained a reasonable doubt of guilt. *Allen v. State*, 20 South. 490, 494, 111 Ala. 80.

In a murder trial, an instruction "that by 'reasonable doubt' is ordinarily meant such a one as would govern or control you in your business transactions or usual pursuits of life," was erroneous. The jurors are not, by this instruction, so satisfied as to convince them that they would venture to act on such conviction in matters of the highest concern and importance to their own interests. Ordinarily men act in the usual business pursuits of life without considering that their acts involve any question of the life or liberty of an individual. Men frequently act in their business transactions or usual pursuits of life without any firm or settled conviction that the conclusion upon which they act is correct. In these transactions, men usually obtain such information as is within their reach, and, after deliberating upon the same, they form a conclusion upon which they are willing to act without being fully convinced of its correctness; but if it was a matter of the highest concern and importance to their own interests they would not, or at least should not, venture to act, unless convinced to a moral certainty of the truth of the proposition on which they are called upon to act. The preponderance or weight of testimony on which men ordinarily will be willing to act in their business transactions, or in the usual pursuits of life, is not the rule that should govern jurors in deciding questions that involve the life or liberty of an individual. In such cases, the law requires a much greater degree of certainty, and the guilt of the accused must be fully proved. *State v. Rover*, 11 Nev. 343, 344.

"The rule of law touching reasonable doubt is a practical rule for the guidance of practical men when engaged in the solemn duty of assisting in the administration of justice. It is not, therefore, a rule about which there is anything whimsical or chimer-

ical. It is not a mere possibility of error or mistake that constitutes such reasonable doubt. Despite every precaution that may be taken to prevent it, there may be in all matters pertaining to human affairs a mere possibility of error. If, then, you are so convinced by the evidence, of whatever class it may be, and considered all the facts and circumstances in the evidence as a whole, of the guilt of the defendant, that, as prudent men, you would feel safe to act upon such conviction in matter of the highest concern and importance to your own dearest and most important interests, under circumstances where there was no compulsion or coercion upon you to act at all, then you will have attained such degree of certainty as excludes reasonable doubt and authorizes conviction." *Garfield v. State*, 74 Ind. 60, 62.

**As not arising from ingenuity of counsel or jury.**

A doubt suggested by the ingenuity of counsel, or that of the jury, not legitimately warranted by the evidence, or the want of it, or one born of a merciful inclination to permit defendant to escape the penalty of the law, is not a reasonable doubt. *Coffin v. United States*, 15 Sup. Ct. 394, 402, 156 U. S. 432, 39 L. Ed. 481; *United States v. Allis* (U. S.) 73 Fed. 165, 167; *United States v. Graves* (U. S.) 53 Fed. 636, 659; *United States v. Carpenter* (U. S.) 41 Fed. 330, 341.

"A doubt suggested by the ingenuity of counsel, or by the ingenuity of the jury, not legitimately warranted by the testimony, or one born of a merciful inclination or disposition to permit the defendant to escape the penalty of the law, or one prompted by sympathy for him, or those connected with him, is not a reasonable doubt." *United States v. Harper* (U. S.) 33 Fed. 471, 483.

**As requiring moral certainty.**

Reasonable doubt is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction to a moral certainty of the truth of the charge—a certainty that convinces and directs the understanding and satisfies the reason and judgment of those who are bound to act conscientiously upon it. *Commonwealth v. Webster*, 59 Mass. (5 Cush.) 295, 320, 52 Am. Dec. 711; *Commonwealth v. Kendall*, 162 Mass. 221, 222, 38 N. E. 504; *People v. Wreden*, 59 Cal. 392, 395; *State v. Bridges*, 29 Kan. 138, 141; *People v. Cadd*, 60 Cal. 640, 642; *State v. Sheppard*, 39 S. E. 676, 688, 49 W. Va. 582; *Cowan v. State*, 35 N. W. 405, 408, 22 Neb. 519; *State v. Powers*, 37 S. E. 690, 695, 59 S. C. 200; *Donnelly v. State*, 26 N. J. Law (2 Dutch.) 601, 614; *Coleman v. State*, 59 Ala. 52, 55; *People v. Finley*, 38 Mich. 482, 483; *Chapman v. State*, 3

Tex. App. 67, 68; *Collins v. State*, 64 N. W. 432, 436, 46 Neb. 37; *State v. Nelson*, 11 Nev. 334, 340; *People v. Schryver* (N. Y.) 1 Cow. Cr. R. 188, 189, 194; *State v. Van Winkle*, 6 Nev. 340, 341; *State v. Harrison*, 23 Mont. 79, 81, 57 Pac. 647.

In *People v. Kernaghan*, 72 Cal. 609, 610, 14 Pac. 566, it is said: "The definition, or, rather, description, of 'reasonable doubt' given by Chief Justice Shaw in the *Webster Case*, has been adopted by this court, and by nearly all American courts, as a statement of that mental condition sufficiently accurate. Therefore, where a court had given the language used by Chief Justice Shaw, and confined itself to such language, we would be slow to reverse the case, though other instructions upon the subject, not objectionable, have been asked by defendant and refused." *People v. Paulsell*, 46 Pac. 734, 115 Cal. 6.

In criminal cases the practice prevails, in instructing juries, for the courts to attempt to define "reasonable doubt," and the familiar definition of Chief Justice Shaw in the celebrated *Webster Case* is generally adopted. This definition, although it has been criticised as not being strictly accurate, is perhaps more generally recognized as a correct one than any other to be found in the books; and trial courts should adopt it, rather than struggle for originality. *State v. Morey*, 36 Pac. 573, 577, 25 Or. 241.

Proof "beyond a reasonable doubt" is synonymous with "moral certainty." *Woodruff v. State*, 12 South. 653, 658, 31 Fla. 320; *Jones v. State*, 14 South. 772, 773, 100 Ala. 88; *Taylor v. Pegram*, 37 N. E. 837, 839, 151 Ill. 106. What is meant by the term "reasonable doubt" is "fully satisfied," or "satisfied to a moral certainty." *State v. Wilcox*, 44 S. E. 625, 631, 132 N. C. 1120 (citing *State v. Matthews*, 66 N. O. 106); *State v. Hamilton*, 13 Nev. 386, 394.

To be convinced from the facts in evidence of the accused's guilt to a reasonable and moral certainty is to be convinced beyond a reasonable doubt of such fact of guilt. *State v. Abrams*, 8 Pac. 327, 332, 11 Or. 169; *State v. Long*, 43 Atl. 493, 495, 72 Conn. 39; *Territory v. Owings*, 3 Mont. 137, 138; *United States v. Allis* (U. S.) 73 Fed. 165, 167; *Miles v. United States*, 103 U. S. 304, 309, 26 L. Ed. 481; *Carr v. State*, 37 N. W. 630, 631, 23 Neb. 749; *State v. Miller* (Del.) 32 Atl. 137, 141, 9 Houst. 564; *People v. Swartz*, 76 N. W. 491, 494, 118 Mich. 292; *State v. Williamson*, 62 Pac. 1022, 1024, 22 Utah, 248, 83 Am. St. Rep. 780; *Dick v. State*, 6 South. 395, 87 Ala. 61; *State v. Staley*, 14 Minn. 105, 123 (Gil. 75, 91).

An instruction that a reasonable doubt is that state of the case which, after hearing all the evidence, leaves the minds of the ju-



ers in that condition that they cannot say they feel an abiding conviction to a moral certainty of the truth of the charge, was not error. *People v. Sensabaugh*, 2 Utah, 473, 478.

A reasonable doubt, to authorize an acquittal, must be a substantial doubt, arising from the full and fair consideration of all the facts and circumstances in proof, and not a mere possibility of innocence. A juror is understood to entertain a reasonable doubt when he does not have an abiding conviction of truth of the charge to a moral certainty. *State v. Milligan*, 70 S. W. 473, 475, 170 Mo. 215.

Proof beyond a reasonable doubt is proof to a moral certainty, as distinguished from absolute certainty. The two phrases "proof beyond a reasonable doubt" and "proof to a moral certainty" are synonymous and equivalent. Each signifies such proof as satisfies the judgment and conscience of the jury, as reasonable men, on applying their reason to the evidence before them, that the crime charged has been committed by defendant, and so satisfies them as to leave no other conclusion possible. *Carlton v. People*, 37 N. E. 244, 247, 150 Ill. 181, 41 Am. St. Rep. 348.

A reasonable doubt is such a doubt as will leave one's mind, after a careful examination of all the evidence, in such a condition that he could not say that he has an abiding conviction, to a moral certainty, of defendant's guilt. An instruction in the foregoing words was not prejudicial, though the court failed to charge that the accused was presumed to be innocent; the court having stated that nothing could be presumed against him. *People v. Parsons*, 105 Mich. 177, 184, 63 N. W. 69.

No error can be predicated on the refusal of the court to define a reasonable doubt as an impression, after a full comparison and consideration of all the evidence, that does not amount to a certainty that the charge against the accused is true, since the word "certainty" is unqualified by the terms "reasonable and moral." *State v. Powers*, 59 S. C. 200, 214, 37 S. E. 690.

A reasonable doubt is a doubt that arises naturally in the mind after a fair and impartial consideration of all the evidence in the case, and leaves the mind in that condition that a person does not feel an abiding conviction, to a moral certainty, of the truth of the charge. The law, in order to convict, does not require the guilt of a defendant to be established to an absolute certainty, but it does require his guilt to be established to a moral certainty, and that is a certainty that convinces and directs the understanding, and satisfies the reason and judgment of the truth of the charge. *Maxey v. State*, 52 S. W. 2, 3, 66 Ark. 523.

Proof beyond a reasonable doubt is proof to a moral certainty, as distinguished from an absolute certainty. As applied to a judicial trial for crime, the two phrases are synonymous and equivalent. Each has been used by eminent judges to explain the other, and each signifies such proof as satisfies the judgment and conscience of the jury, as reasonable men, by applying their reason to the evidence before them, that the crime charged has been committed by the defendant, and so satisfies them as to leave no other reasonable conclusion possible. Baron Parke, in *Reg. v. Sterne*, expressed the same thought conversely thus: "Such a moral certainty as convinces the minds of a tribunal of reasonable men beyond all reasonable doubt." *Commonwealth v. Costley*, 118 Mass. 1, 23.

#### As doubt not arising from the oath.

In a trial for murder, an instruction upon the subject of "reasonable doubt" is not erroneous, on the ground that it contains the words, "You are not at liberty to disbelieve as jurors if from the evidence you believe as men." *Spies v. People*, 12 N. E. 865, 989, 122 Ill. 1, 3 Am. St. Rep. 320.

On a criminal prosecution, it was not error to state to the jury that they were not at liberty to disbelieve as jurors if they believed as men. *Bartley v. State*, 73 N. W. 744, 759, 53 Neb. 310.

The expression, "You should be convinced as juror where you would be convinced as citizens, and you should doubt as jurors only as you would doubt as men," is not erroneous when it occurs in the charge of the court, immediately following an instruction that "reasonable doubt" is not one that the jury will reach out for, to relieve them from finding a verdict for guilt, but such a doubt as is left from the failure of the evidence to convince your minds of the guilt of the defendant." However, since the doubt or the verdict of guilt should always be found from the evidence alone, and since the expression, standing alone, does not convey this idea, it would be better if it had never found its way into the books. *McMeen v. Commonwealth* (Pa.) 9 Atl. 878, 879.

#### As not arising from obstinacy or sympathy.

"Reasonable doubt" does not mean an obstinacy or resolution not to consider the testimony of the witnesses carefully, but is that condition of the mind in which hesitancy arises after having given the evidence a fair consideration. *Commonwealth v. Mudgett*, 34 Atl. 588, 593, 174 Pa. 211.

Reasonable doubt is not a doubt born of a merciful inclination to permit the defendant to escape conviction, nor prompted by sympathy with him or those connected with him. *United States v. Graves* (U. S.) 53 Fed.

634, 659; *United States v. Carpenter* (U. S.) 41 Fed. 330, 341.

It is held that a charge that a reasonable doubt is a doubt growing out of the facts of the case, and not a doubt generated by sympathy, is not error. *State v. Robinson*, 4 S. E. 570, 571, 27 S. C. 615; *United States v. Youtsey* (U. S.) 91 Fed. 864, 868.

**As not a bare possibility.**

"By a 'reasonable doubt' is meant a substantial doubt, based on the evidence or want of evidence in the case, and not a bare possibility of defendant's innocence." *State v. Gonce*, 79 Mo. 600, 602; *State v. Wells*, 20 S. W. 232, 233, 111 Mo. 533; *State v. Clayton*, 13 S. W. 819, 820, 821, 100 Mo. 516, 18 Am. St. Rep. 565; *State v. Holloway*, 56 S. W. 734, 735, 156 Mo. 222; *State v. Fannon*, 59 S. W. 75, 76, 158 Mo. 149; *State v. Ashcraft*, 70 S. W. 898, 900, 170 Mo. 409; *State v. Taylor*, 71 S. W. 1005, 1008, 171 Mo. 465; *State v. Privitt*, 75 S. W. 457, 459, 175 Mo. 207; *State v. McMullin*, 71 S. W. 221, 225, 170 Mo. 608; *State v. Duncan*, 142 Mo. 456, 461, 44 S. W. 263, 264; *State v. Jefferson*, 10 South. 199, 200, 43 La. Ann. 995; *Harris v. State*, 58 N. E. 75, 77, 155 Ind. 205; *State v. Neel*, 65 Pac. 494, 495, 23 Utah, 541; *United States v. Allis* (U. S.) 73 Fed. 165, 167; *United States v. Kenney* (U. S.) 90 Fed. 257, 262; *Carr v. State*, 37 N. W. 630, 631, 23 Neb. 749; *Polln v. State*, 16 N. W. 898, 900, 14 Neb. 540; *Collins v. State*, 64 N. W. 432, 436, 46 Neb. 37; *Chapman v. State*, 3 Tex. App. 67, 68; *Earl v. People*, 73 Ill. 329; *May v. People*, 6 Pac. 816, 823, 8 Colo. 210; *Little v. State*, 8 South. 82, 83, 89 Ala. 99; *State v. Long*, 43 Atl. 493, 495, 72 Conn. 39; *Territory v. Barth* (Ariz.) 15 Pac. 673, 676; *State v. Rounds*, 76 Me. 123, 125; *State v. Van Winkle*, 6 Nev. 340, 341.

"Reasonable doubt" does not mean beyond a mere doubt or possibility of innocence. If guilt is established by evidence beyond any doubt founded in reason and common sense, as applied thereto, a conviction should follow, though the jury may believe there is doubt on the question, not arising, however, to the certainty of a reasonable doubt, or though the jury yet believe in the possibility of innocence. *Emery v. State*, 78 N. W. 145, 152, 101 Wis. 627.

An instruction on "reasonable doubt" that "if, however, all the facts established necessarily lead the mind to the conclusion that the defendant is guilty, though there be a bare possibility that he is innocent, you should find him guilty," is not erroneous, where there are other clear instructions on the subject favorable to defendant, and all the instructions on the subject requested by defendant were also given. *McIntosh v. State*, 51 N. E. 354, 356, 151 Ind. 251.

Reasonable doubt must be actual and substantial doubt, and not merely possible or

ideal, and the expressions "It is possible," or "It may be," or "perhaps the defendant is not guilty," constitute only a possible conjecture or imaginary doubt, and a conviction is not inhibited on the existence of such doubt, merely; and the different phrases, "beyond a reasonable doubt," "a moral certainty," and "so convincing as to lead to the conclusion that the defendant cannot be guiltless," are equivalent expressions of the same rule. *McKleroy v. State*, 77 Ala. 95, 97.

A reasonable doubt must be a substantial doubt. It must be a doubt of the guilt of the accused before a jury can acquit by reason of such doubt. This doubt must be a real state or condition of the jurors, in which they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge. It is not a mere possible doubt. It must be an actual and substantial one, not mere possibility or speculation. *State v. Nueslein*, 25 Mo. 111, 124 (citing *Commonwealth v. Harman*, 4 Pa. [4 Barr] 270).

**Preponderance of evidence distinguished.**

"Preponderance" and "reasonable doubt" are not synonymous terms, so that an instruction that, if the jury believe from the preponderance of the evidence that defendant took certain cattle under the honest belief that he was the owner, they should acquit, is erroneous, as the state is bound to show guilt beyond a reasonable doubt. *Richardson v. Harrell*, 36 S. W. 573, 576, 62 Ark. 469.

**Presumption of innocence distinguished.**

The "presumption of innocence" is a conclusion drawn by law in favor of the citizen, by virtue whereof, when brought to trial on a criminal charge, he must be acquitted unless proven guilty. In other words, this presumption is an instrument of proof created by law in favor of one accused, whereby his innocence is established until sufficient evidence is introduced to overcome the proof which the law has created. Reasonable doubt is, of necessity, the condition of mind produced by the proof resulting from evidence in the cause; it is the result of the proof, not the proof itself; whereas the presumption of innocence is one of the instruments of proof going to bring about the proof from which reasonable doubt arises. Thus, one is a cause; the other, an effect. *Coffin v. United States*, 15 Sup. Ct. 394, 404, 156 U. S. 432, 39 L. Ed. 481. See, also, *Davis v. United States*, 16 Sup. Ct. 353, 358, 160 U. S. 469, 40 L. Ed. 499.

The legal presumption of innocence which arises in favor of the defendant on the trial of every criminal case is to be regarded by the jury as a matter of evidence in favor of the accused, introduced by the law in his behalf, to be considered as proof by the jury, and involves more in the trial of the case

than reasonable doubt, which is only the result of insufficient proof. *State of North Carolina v. Gosnell* (U. S.) 74 Fed. 734, 737.

#### **As a rational doubt.**

A rational doubt is equivalent, in an instruction, to reasonable doubt. *Shipp v. Commonwealth*, 10 S. E. 1065, 1068, 86 Va. 746; *McCabe v. Commonwealth* (Pa.) 8 Atl. 45, 47.

A "reasonable doubt," within the meaning of the law, is not a mere imaginary or possible doubt, but a substantial doubt, based upon reason and common sense, and induced by the facts and circumstances attending the particular case, and growing out of the testimony. *State v. Harrison*, 23 Mont. 79, 81, 57 Pac. 647, 648.

#### **As a real and substantial doubt.**

In a trial for murder, an instruction on the subject of reasonable doubt that, to authorize an acquittal on the ground of reasonable doubt alone, such doubt should be real, substantial, well-founded doubt, arising out of the evidence in the cause, and not a mere possibility that the defendant is insane, is held not to be a ground for reversal, although the use of the word "real" in the definition is criticised. *State v. Blunt*, 4 S. W. 394, 91 Mo. 503; *State v. Payton*, 2 S. W. 394, 396, 90 Mo. 220; *United States v. Fitzgerald* (U. S.) 91 Fed. 374, 376.

"A reasonable doubt, in legal contemplation, is not a mere imaginary, whimsical, or even possible doubt of the guilt of the accused, but is such a real and substantial doubt, naturally arising out of all the relevant evidence in the case, as intelligent and impartial men may reasonably entertain after a careful consideration of all such evidence." *State v. Magnell* (Del.) 51 Atl. 606, 607, 3 Pennewill, 307.

#### **As doubt influencing reasonable men.**

A reasonable doubt is such as reasonable and prudent men ordinarily listen to, and such as controls their consciences, so that they are unable clearly and honestly to reach a conclusion of guilt. Such a doubt, when founded on the evidence, and not tainted with sentiment, passion, or prejudice, should inure to the acquittal of the defendant. *State v. Davis* (Del.) 45 Atl. 394, 395, 2 Pennewill, 139.

What is meant by a "reasonable doubt" is such doubt as honest, conscientious men, acting under the solemn obligations of their oaths, in full view of all the testimony, find themselves constrained to entertain. *State v. Mills* (Del.) 52 Atl. 266, 267, 3 Pennewill, 508.

"Reasonable doubt" does not mean the doubt of a man of eccentric mind or a crank, or a man with oversensitive conscience. It means the doubt of ordinary men, sworn jurors, who try cases. *Lewis v. State*, 15 S. E. 697, 699, 90 Ga. 95.

It is error to charge that a "reasonable doubt" is such a doubt "as would induce a man of reasonable firmness and judgment to act on it in matters of importance to himself," for the judgment of reasonable men, in the ordinary affairs of life, however important, is influenced and controlled by the preponderance of evidence, while in a criminal case there must be in the minds of the jury an abiding conviction, to a moral certainty, of the truth of the charge, derived from a comparison and consideration of the evidence. *People v. Bemmerly*, 87 Cal. 117, 121, 25 Pac. 266.

#### **A doubt founded on reason.**

A "reasonable doubt," the absence of which is essential to a conviction for a crime, means a doubt founded on reason. *State v. Meyer*, 58 Vt. 457, 462, 3 Atl. 195; *State v. Neel*, 65 Pac. 494, 495, 23 Utah, 541; *United States v. Graves* (U. S.) 53 Fed. 634, 659; *United States v. Allis* (U. S.) 73 Fed. 165, 167; *United States v. Meagher* (U. S.) 37 Fed. 875, 881; *United States v. Lewis* (U. S.) 111 Fed. 630, 636; *Welsh v. State*, 11 South. 450, 451, 96 Ala. 92.

It would be difficult to select words that would define their meaning better than those defining "reasonable doubt" in St. N. M. 1889, p. 27, declaring that a reasonable doubt is one based on reason. *State v. Potts*, 22 Pac. 754, 758, 20 Nev. 389.

#### **As doubt for which reasons could be given.**

The able law writer, Austin Abbott, in his *Brief for Criminal Cases*, at page 487, says: "The gist of the rule is that the law contemplates a doubt for which a good reason, arising on the evidence, can be given." *State v. Serenson*, 64 N. W. 130, 132, 7 S. D. 277.

An instruction defining "reasonable doubt" as "a doubt arising out of the facts and circumstances of the case, in maintaining which you can give some good reason," while not accurate, held not of sufficient consequence, in a trial for manslaughter, to be error. *People v. Stubenvoll*, 28 N. W. 883, 885, 62 Mich. 329.

An instruction defining a "reasonable doubt" as one that the jury are able to give a reason for is erroneous. *State v. Lee*, 85 N. W. 619, 620, 113 Iowa, 348; *Childs v. State*, 51 N. W. 837, 34 Neb. 236.

It is very doubtful whether the statement that a reasonable doubt must be one for which a reason is given is correct. *Rhodes v. State*, 27 N. E. 866, 868, 128 Ind. 189, 25 Am. St. Rep. 429.

"The definition of 'reasonable doubt,' setting over the requirement of a reason for doubt against capriciousness, conjecture, indulgence of speculation upon possibilities,

and the invasion of the realm of imagination, has been approved in the following cases: *Hodge v. State*, 97 Ala. 37, 12 South. 164, 38 Am. St. Rep. 145; *Vann v. State*, 83 Ga. 44, 9 S. E. 945; *State v. Jefferson*, 10 South. 199, 200, 43 La. Ann. 995; *People v. Guidici*, 3 N. E. 493, 495, 100 N. Y. 503; *State v. Harras* (Wash.) 65 Pac. 774, 775; *Wallace v. State*, 26 South. 713, 724, 41 Fla. 547; *Butler v. State*, 78 N. W. 590, 591, 102 Wis. 364; *State v. Rounds*, 76 Me. 123, 125; *State v. Serenson*, 64 N. W. 130, 132, 7 S. D. 277. And judges of the federal courts have frequently employed equivalent phrases in charging juries in criminal cases. *United States v. Butler* (U. S.) 25 Fed. Cas. 213; *United States v. Johnson* (U. S.) 26 Fed. 682, 685; *United States v. Jackson* (U. S.) 29 Fed. 503, 504; *United States v. Jones* (U. S.) 31 Fed. 718, 724. Similar instructions have been criticised, however, in a number of states. *State v. Morey*, 36 Pac. 573, 577, 35 Pac. 655, 25 Or. 241; *State v. Sauer*, 38 Minn. 438, 38 N. W. 355; *People v. Stubenvoll*, 28 N. W. 883, 885, 62 Mich. 329; *Morgan v. State*, 48 Ohio St. 371, 27 N. E. 710; *Klyce v. State*, 78 Miss. 450, 28 South. 827. And like charges have been declared to be erroneous in the following states: *Siberry v. State*, 133 Ind. 677, 33 N. E. 681, 684; *Avery v. State*, 124 Ala. 20, 27 South. 505; *State v. Cohen*, 78 N. W. 857, 858, 108 Iowa, 208, 75 Am. St. Rep. 213; *Carr v. State*, 23 Neb. 749, 37 N. W. 630." *State v. Patton* (Kan.) 71 Pac. 840, 841.

"A reasonable doubt is a doubt for which a reason may be given." Approved by the courts as one of the correct definitions of a reasonable doubt. *Jones v. State*, 25 South. 204, 206, 120 Ala. 303; *Cohen v. State*, 50 Ala. 108; *Hodge v. State*, 12 South. 164, 166, 97 Ala. 37, 38 Am. St. Rep. 145; *Ellis v. State*, 25 South. 1, 2, 120 Ala. 333; *State v. Serenson*, 64 N. W. 130, 132, 7 S. D. 277; *United States v. Jones* (U. S.) 31 Fed. 718, 724; *United States v. Cassidy* (U. S.) 67 Fed. 698, 782; *United States v. Johnson* (U. S.) 26 Fed. 682, 685; *State v. Jefferson*, 10 South. 199, 200, 43 La. Ann. 995; *State v. Gilbert* (U. S.) 69 Pac. 62, 63; *Woodruff v. State*, 12 South. 653, 657, 31 Fla. 320. By "reasonable doubt" is meant a doubt of guilt for which a reason can be given arising out of the evidence. *Secor v. State*, 95 N. W. 942, 947, 118 Wis. 621; *People v. Rich* (Mich.) 94 N. W. 375, 377.

An instruction that a "reasonable doubt" means a doubt for which one could give a reason is not a desirable one, since it is liable to be misunderstood as meaning a doubt for which a juror could express or state a reason in words, and a juror might feel a reasonable doubt, and yet find it difficult to state the reason for the doubt. *State v. Sauer*, 38 Minn. 438, 38 N. W. 355.

An instruction defining a reasonable doubt as one that the jury are able to give a rea-

son for is erroneous, as, in effect, placing the burden on defendant to furnish reasons for acquittal, and is also erroneous as requiring jurors to give reasons for their conclusions. *State v. Cohen*, 78 N. W. 857, 858, 108 Iowa, 208, 75 Am. St. Rep. 213.

A reasonable doubt is a doubt for which a reason can be given, based on the evidence in the case. A doubt cannot be reasonable unless a reason therefor exists, and, if such reason exists, it can be given. *Butler v. State*, 78 N. W. 590, 591, 102 Wis. 364.

A charge that a reasonable doubt is a doubt growing out of the evidence, for which a reason may be given, was confusing and misleading, and hence properly refused. A charge that a reasonable doubt is such a doubt growing out of the evidence as would occur to the mind of a reasonable man was also confusing and misleading, and properly refused. *Avery v. State*, 27 South. 505, 124 Ala. 20.

Instructions to the effect that a reasonable doubt is a doubt for which a reason could be given, or one for which some good reason arising from the evidence may be given, or a serious, sensible doubt, "such as I could give a good reason for, or one for which some fair, just reason could be given," has been approved in *Hodge v. State*, 97 Ala. 37, 12 South. 164, 38 Am. St. Rep. 145; *Ellis v. State*, 25 South. 1, 120 Ala. 333; *People v. Guidici*, 100 N. Y. 503, 3 N. E. 493. The authorities pro and con have been fully considered in *State v. Morey*, 25 Or. 242, 35 Pac. 655, and the court declined to reverse the conviction because the trial judge, in his definition of reasonable doubt, stated that it is such a doubt as a juror can give a reason for. *Wallace v. State*, 26 South. 713, 723, 41 Fla. 547.

"Reasonable doubt" is said to be a term pretty well understood, but not easily defined. The term "reasonable doubt" would seem to imply a doubt for which there is a reason; but, when analyzed and considered in the connection in which it is used in a criminal case, this definition seems to be erroneous and misleading. It is possible that the term "beyond a reasonable doubt," which has crept into the criminal law as expressing the degree of certainty with which the guilt of the accused shall be proven to justify a conviction, is not as comprehensive as some other language would be; that the term, of itself, is uncertain. We have a doubt in relation to things about which we can give no reason, and of which we have imperfect knowledge. It is the want of sufficient knowledge in relation to the facts constituting the guilt of the accused that causes the juror to doubt. It is the want of information and knowledge that creates the doubt. The court has said, in effect, that, to justify a conviction, the evidence must satisfy such juror of the guilt

of the accused with such a degree of certainty as he would not hesitate to act in matters of the highest importance to himself, affecting his dearest and nearest interests, under circumstances where he was not compelled to act, but was free to act or not, as he deemed proper. It is the lack of information and knowledge satisfying the members of the jury of the guilt of the accused with that degree of certainty required by the law which constitutes a reasonable doubt, and, if jurors are not satisfied of the guilt of the accused with such degree of certainty as the law requires, they must acquit, whether they are able to give a reason why they are not satisfied to that degree of certainty or not. The burden is on the state to furnish each juror such information as, that he, acting under oath, is so convinced of the defendant's guilt that he would not hesitate to act upon his convictions of the guilt of the defendant in relation to matters involving his most important interests. *Siberry v. State*, 33 N. E. 681, 684, 133 Ind. 677.

**As doubt spontaneously arising.**

By the term "reasonable doubt" is not meant a possible doubt or an imaginary doubt, or a doubt which might arise in a supposed case, but such a doubt as naturally presents itself to the mind in view of the evidence. *Robertson v. State*, 9 Tex. App. 209; *Smith v. State*, 9 Tex. App. 150; *State v. Neel* (Utah) 65 Pac. 494, 495.

A reasonable doubt is such a doubt as naturally and spontaneously arises in, or suggests itself to, the mind of a reasonable man, after a full, careful, and considerate examination of all the evidence. *State v. Maxwell*, 42 Iowa, 208, 210.

**As state of uncertainty.**

If the whole evidence in the case leaves the jurors' minds in such condition that they are neither morally certain of the defendant's guilt, nor morally certain of his innocence, then a reasonable doubt exists. *State v. David*, 33 S. W. 28, 29, 131 Mo. 380.

A reasonable doubt is an honest misgiving as to the guilt of the defendant upon the proof, which the reason entertains or sanctions as a substantial doubt. When, after the evidence, the arguments, and the charges have all gone to the jury, and have been thoroughly weighed and considered, the ingenuous and impartial juror, in an honest quest of the truth, finds himself hesitating and pausing to ask himself if all these things may not be true and yet this man innocent, and still reasoning upon his doubts, and finding a substantial reason for them all, then we would say the juror entertained such reasonable doubts as would demand an acquittal. *Purkey v. State*, 50 Tenn. (3 Heisk.) 28, 28.

A reasonable doubt is that condition of the case when the jury, after fully examining, comparing, and considering all the evidence of the case, including the testimony of the defendants, cannot say to a reasonable certainty whether the defendants are guilty or not. *Commo wealth v. Hollister*, 27 Atl. 386, 387, 157 Pa. 13, 25 L. R. A. 349.

**As not vague or speculative.**

Reasonable doubt is not a vague, fanciful, whimsical doubt, but a doubt naturally arising out of all the evidence in the case, and such a doubt as intelligent, impartial, fair-minded jurors may reasonably entertain after a careful consideration of all the relevant evidence before them. *State v. Davis* (Del.) 50 Atl. 99, 100, 3 Pennewill, 220; *State v. Conlan* (Del.) 50 Atl. 95, 3 Pennewill, 218; *State v. McKinney*, 3 Pac. 356, 364, 31 Kan. 570. A reasonable doubt is a doubt arising out of the evidence, and not imaginary doubt, a fanciful conjecture, or a strained inference. *United States v. Cassidy* (U. S.) 67 Fed. 698, 782; *United States v. Knowles* (U. S.) 26 Fed. Cas. 800, 802; *United States v. Jones* (U. S.) 31 Fed. 718, 721; *United States v. Kenney* (U. S.) 90 Fed. 257, 262; *State v. Deputy* (Del.) 50 Atl. 176, 177, 3 Pennewill, 19; *State v. Miller* (Del.) 32 Atl. 137, 141, 9 Houst. 564; *Wallace v. State*, 26 South. 713, 723, 41 Fla. 547 (citing *Lovett v. State*, 30 Fla. 142, 11 South. 550, 17 L. R. A. 705; *Woodruff v. State*, 31 Fla. 320, 12 South. 653); *Powell v. State*, 20 S. E. 483, 95 Ga. 502; *State v. Fisher* (Del.) 41 Atl. 208-213, 1 Pennewill, 303; *Welsh v. State*, 11 South. 450, 451, 96 Ala. 92; *State v. Gilbert* (Idaho) 69 Pac. 62, 63.

A reasonable doubt is not a mere whim, guess, or surmise, nor is it a mere subterfuge to which resort may be had in order to avoid doing a disagreeable thing, but is such a doubt as reasonable men may entertain after a careful and honest review and consideration of the evidence in the case. *People v. Barker*, 47 N. E. 31, 32, 153 N. Y. 111.

A "reasonable doubt" which will justify an acquittal on a criminal charge is a rational doubt; that is, it must not be fanciful, conjured by an overwhelming sense of responsibility or apprehension of consequences, but must arise out of the evidence in the case. It exists where the careful consideration of all the evidence leaves upon the mind an honest and conscientious difficulty in believing; where the evidence, by reason of its insufficiency or want of credibility, fails to convince the mind. In this connection, the evidence should be scrutinized with the greatest carefulness, but the mind should not be placed in an attitude of resistance, and so doubt because of unwillingness to be convinced. *McCabe v. Commonwealth* (Pa.) 8 Atl. 45, 47.

**As doubt arising from the whole evidence.**

The reasonable doubt that will justify and require an acquittal must be as to the guilt of the accused when the whole of the evidence is considered, and not as to any particular fact in the case. *Little v. People*, 42 N. E. 389, 391, 157 Ill. 153.

It is proper to refuse to instruct the jury to acquit if they entertain a reasonable doubt as to defendant's sanity, since reasonable doubt, in order to acquit, must be a doubt as to defendant's guilt, and not as to any particular fact in the case. *Hornish v. People*, 32 N. E. 677, 142 Ill. 620, 18 L. R. A. 237.

The reasonable doubt the jury is permitted to entertain must be as to the guilt of the accused on the whole of the evidence, and not as to any particular fact in the case. The rule is so well settled by repeated decisions that the reasonable doubt that will justify and require an acquittal must be as to the guilt of the accused where the whole of the evidence is considered, that citation of cases is unnecessary. *Weaver v. People*, 24 N. E. 571, 573, 132 Ill. 536.

There is no error in refusing to instruct that every material fact must be established beyond a reasonable doubt, where the court has instructed the jury to acquit if entertaining a reasonable doubt of defendant's guilt on the whole of the evidence in the case. *State v. Whalen*, 11 S. W. 576, 577, 98 Mo. 222.

A "reasonable doubt" means such a doubt as fairly and naturally arises in the mind when comparing the whole evidence and deliberately construing the whole case. If the jury, in construing the whole case, have a reasonable doubt upon any essential ingredient of the offense, this entitles the defendant to an acquittal, because it generates a doubt of guilt. *State v. Hennessy*, 7 N. W. 641, 642, 55 Iowa, 299; *United States v. Allis* (U. S.) 73 Fed. 165, 167; *United States v. Kenney* (U. S.) 90 Fed. 257, 262; *May v. People*, 60 Ill. 119, 120; *Gannon v. People*, 21 N. E. 525, 528, 127 Ill. 507, 11 Am. St. Rep. 147; *Painter v. People*, 35 N. E. 64, 72, 147 Ill. 444; *Wacaser v. People*, 25 N. E. 564, 565, 134 Ill. 438, 23 Am. St. Rep. 683; *Polin v. State*, 16 N. W. 898, 900, 14 Neb. 540; *State v. Neel*, 65 Pac. 494, 495, 23 Utah, 541.

"The well-settled rule that a defendant shall not be convicted unless the evidence proves his guilt beyond a reasonable doubt applies to the whole and every material part of the case, no matter whether it is as to the act of killing, or the reason for, or manner of, its commission. *People v. Bushton*, 22 Pac. 127, 129, 80 Cal. 160.

A reasonable doubt, to warrant a conviction of crime, does not require that the

jury should be satisfied beyond a reasonable doubt of each link in the chain of circumstances relied on to establish the defendant's guilt. It is sufficient if, taking the evidence all together, the jury are satisfied beyond a reasonable doubt that the defendant is guilty. *Gott v. People*, 58 N. E. 293, 297, 187 Ill. 249.

**REASONABLE EFFORT.**

"Reasonable effort," as the term is used in speaking of the reasonable effort required to be made by an officer in the service of an attachment, means such effort as "men ordinarily would exercise in their own business to protect their rights and interests." *Springett v. Colerick*, 34 N. W. 683, 688, 67 Mich. 362.

**REASONABLE EXPECTATION.**

An expectation of a company to meet a bill, based only upon assets and credits, and that utterly ignores the general financial condition of the company, no matter how stringent and pressing it may be, is not necessarily a reasonable expectation of ability to pay. It is entirely possible the general indebtedness may be of such a character and amount, and in part or in whole to mature at such periods, as to stamp any expectation of being able to pay the particular indebtedness at a specified time as utterly unreasonable. *Edelhoff v. Horner-Miller Mfg. Co.*, 39 Atl. 314, 318, 86 Md. 595.

"Reasonable expectation," as used in the law of negligence, means an expectation that some such disaster as that which occurred will arise in the long run from a series of such negligences as those with which the defendant is charged. *Clifford v. Denver, S. P. & P. R.*, 12 Pac. 219, 221, 9 Colo. 333.

**REASONABLE EXPENSES.**

Reasonable expenses which are allowable to a wife for the purpose of prosecuting an action for divorce should be construed to include her attorney's fees. *Yost v. Yost*, 41 N. E. 11, 12, 141 Ind. 584.

The word "reasonable," as used in Gen. Laws, c. 184, § 7, entitling a guardian to recover the reasonable expenses incurred in resisting an application by the ward for his removal, includes such expenditures as are made in good faith and in the exercise of a sound discretion. *Dearborn v. Batten*, 15 Atl. 149, 150, 64 N. H. 568.

"Reasonable," as used in Gen. St. 626, § 24, providing that it should be the duty of an overseer of the poor of a town or city in which a person not an inhabitant thereof should be lying sick, or in distress, without friends or money, who should die, to employ some person to provide for and superintend the burial of such deceased person, and the

necessary and reasonable expense thereof should be paid by and upon the order of such overseer, must be construed to mean "reasonable" in fact. *Commissioners of Pottawatomie County v. Morrall*, 19 Kan. 141, 143.

The phrase "reasonable and necessary expenses actually paid in the discharge of his official duties," in Rev. St. § 897, authorizing the allowance of such expenses to a county commissioner, means official expenses only, as distinguished from those which pertain to the commissioner's personal comfort and necessities. The statute contemplates that emergencies may arise when it will become reasonable and necessary to pay out money in the performance of some official duty by the commissioner, in order to properly protect the interests of the county, without awaiting a meeting of the board; and the purpose of the provision was to reimburse him when, in the language of the statute, the money had been actually paid in the discharge of his official duty. For his personal expenses of any kind he can claim nothing beyond his per diem and mileage. It is a fair inference that, if it had been intended to reimburse the commissioner for board or traveling expenses in addition to mileage, when traveling on county business, the Legislature would have expressed that intention in plain terms. *Richardson v. State*, 63 N. E. 593, 594, 66 Ohio St. 108.

#### REASONABLE FACILITIES.

"Reasonable facilities," as used in Acts 1876, c. 64, describing the rates to be charged by a railroad for the transportation of coal over its road, and making it such road's duty to provide and furnish reasonable facilities and all cars where required for local trade, and other vehicles for receiving and forwarding of coal that may be offered for transportation over such railway, means cars, motive power, and other conveniences necessary for such purposes, and does not impose upon the company the obligation of permitting all persons and corporations having coal for transportation to make connections with its road. *Frostburg Min. Co. v. Cumberland & P. R. Co.*, 31 Atl. 698, 699, 81 Md. 28.

#### REASONABLE GROUND OF SUSPICION.

"Reasonable ground," as used to define a defense to an action of false imprisonment, means such a state of facts known to influence the person who made, or caused to be made, the arrest and detention, as would lead a man of ordinary caution and prudence, acting reasonably and impartially and without prejudice, to entertain an honest belief or strong suspicion that the person accused is guilty of the matters charged against him. *Zimmerman v. Knox*, 8 Pac. 104, 106, 34 Kan. 245.

The reasonable ground of suspicion which will justify an officer in arresting a person without a warrant is a deceptive appearance of guilt, arising from facts and circumstances misapprehended or misunderstood so far as to produce belief. *State v. Cushenberry*, 56 S. W. 737, 742, 157 Mo. 168 (citing *Smith v. Ege*, 52 Pa. [2 P. F. Smith] 419).

#### REASONABLE IMPROVEMENTS.

Where a testator devises land to a trustee, and directs that all reasonable repairs and improvements shall be provided for out of the annual rents before certain devises of the annual income be paid, the words "reasonable improvements" will be construed to include the paving of a street in front of a lot, and the putting down of a sewer therein, for which the trustee may pay special assessments therefor out of the rents. *Warren v. Warren*, 36 N. E. 611, 614, 148 Ill. 641.

#### REASONABLE INQUIRY.

Under Code, § 1816, imposing a penalty on any register of deeds who shall knowingly and without reasonable inquiry issue a marriage license to persons under the age of 18 years, or to a person to whose marriage there is any lawful impediment, the question as to what is reasonable inquiry, under a known state of facts, is one of law for the court. *Trolinger v. Boroughs*, 45 S. E. 662, 133 N. C. 312.

#### REASONABLE INSPECTION.

A rule that a railroad company is bound to make a reasonable and ordinary inspection of foreign cars received for transportation means such an inspection as the time, place, means, and opportunity and the requirements and exigencies of commerce, will permit. *Louisville, N. A. & C. Ry. Co. v. Bates*, 45 N. E. 108, 111, 146 Ind. 564.

#### REASONABLE LINE OF CREDIT.

"Reasonable line of credit," as used in a contract by defendant with the plaintiff sewing machine company to purchase and sell its machines, and make settlements therefor in cash or by note at four months, providing that on this basis of settlement he should have any reasonable line of credit for which satisfactory security would be furnished, must be understood to refer to the quantum of goods to be furnished on credit, and not as modifying the provision that R.'s notes on monthly settlement should be made payable at four months. *American Button Hole Overseaming & Sewing Mach. Co. v. Gurnee*, 44 Wis. 49, 61.

**REASONABLE MANNER.**

Within the rule that a navigable stream may be used for both milling and log purposes "in a reasonable manner," notwithstanding such uses may mutually interfere with and injure each other, a "reasonable manner" means in such manner as will not destroy or impair the common-law or constitutional rights of a prior mill operator. *Pickens v. Coal River Boom & Timber Co.*, 41 S. E. 400, 401, 51 W. Va. 445, 90 Am. St. Rep. 819.

**REASONABLE MEN.**

Reasonable men are those who think and reason intelligently. *Patterson v. Nutter*, 7 Atl. 273, 275, 78 Me. 509, 57 Am. Rep. 818.

The use of the term "reasonable men," instead of "prudent men," in an instruction that ordinary care is the care which reasonable men exercise under ordinary circumstances, is not of sufficient importance to be erroneous. *Overman Wheel Co. v. Griffin* (U. S.) 67 Fed. 659, 662, 14 C. C. A. 609.

**REASONABLE MIND.**

"Reasonable mind," as used in the definition that probable cause for an arrest is the existence of such facts and circumstances as would excite the belief in a reasonable mind, acting on the facts within the knowledge of the prosecutor, that the person charged was guilty of the crime for which he was prosecuted, means "a sensible one, fairly judicious in its actions, and at least somewhat cautious in reaching its conclusions." *Brewer v. Jacobs* (U. S.) 22 Fed. 217, 222.

The phrase "reasonable mind," as employed in the statement of the principle that probable cause, in malicious prosecution, means existence of facts to excite a belief in a reasonable mind, etc., signifies a sensible mind, fairly judicious in its actions, and at least somewhat cautious in reaching its conclusions. *Brewer v. Jacobs* (U. S.) 22 Fed. 217, 222.

To make a valid will, testator must have a "reasonable mind"; that is, he must be capable of reasoning upon and comparing, by means of his own recollection (conception and reflection), the facts perceived and remembered, so as to come to the rational conclusion which constitutes the mental and moral will of every dispassionate and unbigoted man, as drawn by his own induction from known facts. *Farr v. Thompson* (S. C.) 1 Speers, 93, 105.

**REASONABLE NOTICE.**

Reasonable notice is defined to be such notice or information of a fact as may be

expected or required under the particular circumstances. *Sterling Mfg. Co. v. Hough*, 49 Neb. 618, 621, 68 N. W. 1019, 1020.

The phrase "reasonable notice," as used in the doctrine that an indorsee of a promissory note, in order to hold the indorser liable, must give a reasonable notice of the maker's failure to pay, is, under the circumstances of the particular case, a question of law for the determination of the court. If the parties live in the same town, notice can be given on the same day; if at a distance, by the next post. It will not do to say that among agricultural districts this mercantile strictness need not be observed. If we adopt mercantile law, we must abide by it. *Halsey v. Salmon*, 3 N. J. Law (3 Penning.) 916, 917.

A person on trial under a commission of alleged lunacy has a right to a reasonable notice of the time and place of the taking of the inquisition of lunacy, and the want or defect of notice is not aided by his appearing before the jury and attempting a defense. This notice must be a reasonable notice—such as will give to the alleged lunatic a fair opportunity for preparing his defense. In *re Vanauken*, 10 N. J. Eq. (2 Stockt.) 186, 190.

Under a law requiring the selectmen of a town to give reasonable notice to the owners of land over which they are about to lay out a townway, what is reasonable notice depends on circumstances. Where a majority of the trustees resided in the town, a notice of seven days held sufficient and reasonable. *Trustees of Belfast Academy v. Salmond*, 11 Me. (2 Fairf.) 109, 114.

"Reasonable notice" of a defect in a highway means notice presumed from its open exposure and its long existence. *Hari v. Ohio Tp., Saline County*, 62 Pac. 1010, 1011, 62 Kan. 315.

Creditors of a firm composed of B. and others, then in failing circumstances, entered into a written agreement with the firm that if the firm would assign all their property to a trustee in trust for their benefit, and if B. and wife would give to such trustee a mortgage on certain land, conditioned to make good any deficiency that might accrue in the assets of the firm, for the payment of such creditors, the creditors would extend the time of payment of their claims. The firm conveyed the property to the trustee pursuant to the agreement, and provided that if any portion of the indebtedness remained unpaid, and the firm, after reasonable notice of the sum so unpaid, should fail to pay the same, then B. and wife were to pay such deficiency, and, in case of their failure to pay, the trustee might sell the mortgaged premises, and retain from the proceeds the amount unpaid. The trustee gave a notice to two members of the firm, within 10 days after the assets of the firm had been disposed of, that there was



a deficiency, and gave a like notice to the other members of the firm within 12 months thereafter. Held, that such notices constituted a reasonable notice, within the meaning of the agreement. *Jamison v. Bancroft*, 20 Kan. 169.

"Reasonable notice," as used in Code 1858, § 310, providing that a party to an action could not testify in the cause until he had given the adverse party reasonable notice of his intention so to do, meant such notice as would give the opposite party an opportunity to prepare his case to meet such testimony by being present to testify himself, or to procure the attendance of witnesses who would strengthen his case, contradict the party testifying, or impeach his testimony, and hence a notice given on the day of trial was not reasonable. *Mallory v. Leiby*, 1 Kan. 97, 102.

The "reasonable notice" to a town of a defect in a highway necessary to fix the liability of the inhabitants of the town for an injury resulting therefrom is undefined in the statute requiring it, and to determine what shall constitute such notice is in many cases attended with difficulty. It is not necessary to prove notice to the town in its corporate capacity, nor that the majority of the inhabitants should have had notice, nor is it even necessary to bring home the knowledge to any officer of the town, and it has sometimes been considered that, if it be proved that some principal inhabitant had notice, it would be sufficient. Where numbers of the inhabitants of the town were concerned in placing the obstruction, which caused the accident across the highway, of whom one, at least, was a man of substance, and the obstruction was so left for a short time, it was held that the notice was sufficient to render the town liable. *French v. Inhabitants of Brunswick*, 21 Me. (8 Shep.) 29 32. 38 Am. Dec. 250.

#### REASONABLE PERSON.

The words "reasonable person" and the words "ordinarily cautious person" are used synonymously in describing the degree of care that should be exercised in instituting criminal proceedings to avoid the charge of malicious prosecution. *Billingsley v. Maas*, 67 N. W. 49, 50, 93 Wis. 176.

#### REASONABLE POSSIBILITY.

In a criminal case it is proper to refuse to charge that, if there is a "reasonable possibility," the jury should acquit. *Sims v. State*, 14 South. 560, 561, 100 Ala. 23.

A reasonable possibility is no more than a possibility, and hence, in a criminal case, it was proper to refuse an instruction that if there was a reasonable possibility of inno-

cence the jury should acquit. *Nichols v. State*, 14 South. 539, 540, 100 Ala. 23.

#### REASONABLE PRECAUTION.

The words "reasonable precaution," as used in an instruction to a jury that a railroad company is bound to use all reasonable precaution for the safety of its employes, are synonymous with "reasonable care." *Knott v. Dubuque & S. C. Ry. Co.*, 51 N. W. 57, 60, 84 Iowa, 462.

In an instruction requiring defendant in an action for negligence to have used all reasonable precautions, no higher degree of care is required than reasonable care and caution. *Allen B. Wrisley Co. v. Burke*, 67 N. E. 818, 821, 203 Ill. 250.

#### REASONABLE PRICE.

A contract to furnish a cargo at a reasonable price means such a price as a jury on a trial of the cause would, under all the circumstances, decide to be reasonable. This may or may not agree with the current price of the commodity at the port of shipment at the time when such shipment is made, as the current price may be unreasonable from accidental circumstances. *Acebal v. Levy*, 10 Bing. 376, 378.

#### REASONABLE PROMPTNESS.

The term "reasonable promptness," in a contract for the manufacture and sale of gas pipes, which provides that the pipes, when laid, shall be tested with reasonable promptness, without indicating the nature of the test to be used, imports that they shall be tested with reasonable promptness by the usual and customary methods in the trade. *Tasker v. Crane Co. (U. S.)* 55 Fed. 449.

#### REASONABLE PROVOCATION.

"Reasonable," as used in the definition of manslaughter as the killing of a person when acting upon a sudden passion, and engendered by reasonable provocation, is used interchangeably with the words "adequate," "sufficient," "lawful," and "legal." *State v. Ellis*, 74 Mo. 207, 217.

"Reasonable," as used in an instruction defining the term "deliberately" as meaning "in a cool state of blood, and not in that state which the law denominates passion, and passion here meant is not that which comes of no cause, but that, and that only, which is produced by some reasonable provocation," is used interchangeably with the words "lawful" and "adequate." *State v. Kotovsky*, 74 Mo. 247, 251.

"Reasonable provocation" is synonymous with "legal, lawful, or adequate provoca-

tion," and to constitute such provocation there must be an assault or personal violence. *State v. Bulling*, 15 S. W. 367, 371, 105 Mo. 204.

### REASONABLE PRUDENCE.

The terms "reasonable prudence," "ordinary care," and such like terms, as applied to the conduct and affairs of men, have a relative significance, and cannot be arbitrarily defined. What may be ordinary care in one case may under different surroundings and circumstances be gross negligence. *Grand Trunk Ry. Co. v. Ives*, 12 Sup. Ct. 679, 683, 144 U. S. 408, 36 L. Ed. 485; *Crane Elevator Co. v. Lippert* (U. S.) 63 Fed. 942, 947, 11 C. C. A. 521; *Northern Pac. Ry. Co. v. Charles* (U. S.) 51 Fed. 562, 575, 2 C. C. A. 380 (citing *Grand Trunk Ry. Co. v. Ives*, 12 Sup. Ct. 679, 144 U. S. 408, 36 L. Ed. 485). The policy of the law has relegated the determination of such questions to the jury, under proper instructions from the court. It is their province to know the special circumstances of each particular case, and then say whether the conduct of the parties in that case was such as would be expected of reasonably prudent men under a similar state of affairs. It is only where the facts are such that all reasonable men must draw the same conclusion from them that the question is one of law for the court. *Johnson v. Boston & M. Consolidated Copper & Silver Min. Co.*, 40 Pac. 298, 302, 16 Mont. 164.

### REASONABLE RATE.

Where a railroad company was authorized by law to charge and receive compensation for the transportation of property, not exceeding a specified rate per mile, when the same was transported a distance of 30 miles or more, and, in case the same is transported for a less distance than 30 miles, such reasonable rate as may be from time to time fixed by the company, a rate fixed by the company for transportation of less than 30 miles, which exceeded the rate that it would be authorized to charge for 30 miles, is not reasonable, and not authorized by such statute. *Campbell v. Marietta & C. R. Co.*, 23 Ohio St. 168, 191.

What is a reasonable rate of freight over a railroad is, at best, a mere matter of opinion, depending on a great variety of complicated facts, which but few persons could intelligently investigate, and which it would be wholly in the power of the company to furnish or withhold. The establishment permanently of less rates of freight at points of competition with other roads than is fixed at other places for the same distance cannot be justified by showing that the rates charged at such other places were reasonably low, and that the rates charged at competing

points were unreasonably low, even if the higher rates were reasonably low. When regarded with reference to the profit on the capital invested in the road, they are not "reasonable," in the true sense of the term, if no satisfactory reason can be given for charging less rates for the same or greater services to persons at other stations. *Chicago & A. R. Co. v. People*, 67 Ill. 11, 21, 16 Am. Rep. 599.

### REASONABLE REGULATION.

A rule that the telegraph company will not be responsible for mistakes in the transmission of unrepeatable messages, from whatever cause they may arise, is a reasonable regulation, within 16 & 17 Vict. c. 203, § 66, providing that the use of the telegraph to be constructed shall be open for the sending and receiving of messages by all persons alike, without favor or preferences, subject to "such reasonable regulations as may from time to time" be made by the company. *MacAndrew v. Electric Tel. Co.*, 17 C. B. 3, 10.

### REASONABLE REWARD.

A "reasonable reward," in a contract that a boat should pass through a canal for a reasonable reward, was construed to mean prima facie the legal toll. *Muir v. Louisville & Portland Canal Co.*, 38 Ky. (8 Dana) 161.

### REASONABLE SAFETY.

"Reasonable safety" means safe according to the usages, habits, and ordinary risks of the business. No man is held to a higher degree of care than the fair average of men in the same line of business, conducted under substantially similar circumstances, *Sawyer v. J. M. Arnold Shoe Co.*, 38 Atl. 333, 334, 90 Me. 369.

### REASONABLE SATISFACTION.

An instruction requiring the jury to find the necessary facts to their "reasonable satisfaction" is held in *O'Neill v. Blase*, 68 S. W. 764, 769, 94 Mo. App. 648, not to be prejudicial to the defendant; but it is said that, if any just criticism can be passed upon the language, it is that it called for too much, rather than too little, proof on the part of the plaintiff.

### REASONABLE SKILL.

The reasonable skill in making a collection which an agent is bound to use is understood to be such as is ordinarily possessed and exercised by persons of common capacity engaged in the same business or employment. *Mechanics' Bank at Baltimore v. Merchants' Bank at Boston*, 47 Mass. (6 Metc.) 13, 26 (citing *Story*, Ag. § 183).

**REASONABLE SPEED.**

The term "reasonable speed," as applied to horse cars, means the average rate of carriages used to convey passengers by horse power, and that is a lawful speed in the absence of statute or ordinance on the subject. *Adolph v. Central Park, N. & E. R. R. Co.*, 76 N. Y. 530, 537.

**REASONABLE SUPPORT.**

"Reasonable support," as used in a will providing that the testator's wife, together with his daughter, should have a "reasonable and competent support" out of the proceeds of the estate, does not mean merely food and clothing necessary to sustain life, nor any other fixed quantity or allowance, but must depend upon circumstances and exigencies. *Ellerbe v. Ellerbe's Heirs* (S. C.) 1 Speers, Eq. 323, 340, 40 Am. Dec. 623.

"Reasonable support," as used in a will wherein the testator directed that his wife should receive such sum out of his estate as the executors of his will should think proper and necessary for her reasonable support, must not be determined by the amount necessary for her bare subsistence, but reference must be also had to the extent and income of the estate, and the propriety of her living with her children. *Thompson v. Carmichael* (N. Y.) 3 Sandf. Ch. 120, 130.

An instruction that it is the duty of a husband to provide for his wife a "reasonable support, according to her rank and station in society, and, to that end, she is entitled to share in his property and the proceeds of his labor," means no more than that the husband shall use his property and labor for the reasonable support of his family, having regard for their station in society. *Thill v. Pohlman*, 41 N. W. 385, 386, 76 Iowa, 638.

**REASONABLE SUSPICION.**

Wharton says that "reasonable suspicion" "may be treated as convertible with that of probable cause, as laid down in civil actions of malicious prosecution." *State v. Grant*, 79 Mo. 113, 135, 49 Am. Rep. 218 (quoting Whart. Crim. Pl. & Pr. § 9).

**REASONABLE TIME.**

"That is a reasonable time that preserves to each party the rights and advantages he possesses, and protects each party from losses that he ought not to suffer." *Scannell v. American Soda Fountain Co.*, 61 S. W. 889, 892, 161 Mo. 606.

"Reasonable time" is defined to be so much time as is necessary, under the circumstances, to do conveniently what the contract or duty requires should be done in a particular case. *Bowen v. Detroit City Ry. Co.*, 54

*Mich.* 496, 501, 20 N. W. 559, 562, 52 Am. Rep. 822.

If it is proper to attempt any definition of the words "reasonable time," as applied to completion of a contract, the distinction given by Chief Baron Pollock may be suggested, namely, that a "reasonable time" means as soon as circumstances will permit. *Lund v. St. Paul, M. & M. R. Co.*, 71 Pac. 1032, 1034, 31 Wash. 286, 61 L. R. A. 506, 96 Am. St. Rep. 906 (citing 2 Thomp. Trials, § 1531).

In determining what is a reasonable time or an unreasonable time, regard is to be had to the nature of the instrument, the usage of trade or business, if any, with respect to such instruments, and the facts of the particular case. *Bates' Ann. St. Ohio* 1904, § 3178b; *Rev. Laws Mass.* 1902, p. 653, c. 73, § 209; *Code Supp. Va.* 1898, § 2841a; *Ann. Codes & St. Or.* 1901, § 4592.

A proposition, to become binding on the one making it, must be accepted within a reasonable time; but what constitutes a reasonable time, when no time is specified, is a question of law, and depends on the subject-matter and the situation of the parties. *Morse v. Bellows*, 7 N. H. 549, 28 Am. Dec. 372.

What is a reasonable time within which an act must be done may be a question of law. Where the facts are clearly established, or are undisputed or admitted, the reasonable time is a question of law. But where what is a reasonable time depends upon certain other controverted points, or where the motives of the party enter into the question, the whole is necessary to be submitted to a jury, before any judgment can be formed as to whether the time was or was not reasonable. *Hill v. Hobart*, 16 Me. (4 Shep.) 164, 168.

In an application of the rule that, for an unauthorized sale of stock by a broker who is to carry the stock for another, the measure of damages is the difference between the purchase price and the price the owner would have been obliged to pay in the market for the stock within a reasonable time after the sale, it was said that the space of 30 days was a reasonable time, but that the decision was not to be construed as indicating that a less time would not be reasonable. *Colt v. Owens*, 47 N. Y. Super. Ct. (15 Jones & S.) 430, 435.

A "reasonable time" certainly means more protracted space than "directly," as used in a contract to purchase goods to be put on board a ship directly. *Duncan v. Topham*, 8 Man., G. & S. 225, 230; *Sentenne v. Kelly*, 13 N. Y. Supp. 529, 530, 59 Hun, 512; *Lewis v. Hojer*, 16 N. Y. Supp. 534, 536.

**Acceptance of offer.**

What is a reasonable time for the acceptance of an offer to sell goods at a certain

price is to be determined by the circumstances and the situation of both parties. Where several letters passed between the parties, prior to which both parties had made prompt replies to letters received, so that at no time more than one day intervened between the receipt of a letter and the posting of a reply, a delay of six days in answering an ultimatum as to the price of goods is unreasonable, so that the seller of such goods is not bound to fill the order. *Hargadine-McKittrick Dry Goods Co. v. Reynolds* (U. S.) 64 Fed. 560, 563.

Defendant, who resided within 20 miles of plaintiff, offered to sell trees on certain terms, which plaintiff did not accept until after the expiration of 20 days. Defendant refused to deliver the trees. Held, that plaintiff could not recover for breach of contract, as the offer was not accepted within a reasonable time. *Mizell v. Burnett*, 49 N. C. 249, 252, 49 Am. Dec. 744.

Plaintiff wrote April 25th inquiring the price of 1,000 tons of coal, and was answered on May 1st. June 13th plaintiff wrote, agreeing to take the coal at the price named, and was answered June 16th that he was too late. Held, that there was no contract, plaintiff not having accepted in a reasonable time. *Carmichael v. Newell* (Pa.) 2 Phila. 289.

Where a party to whom an offer was made neglected for six months to give notice that he had accepted, held, that his notice was not sent in such reasonable time as to make the acceptance binding on the party who made the offer. *McCurdy v. Rogers*, 21 Wis. 197, 201.

If no definite time is stated, the inquiry as to what is a reasonable time within which a proposition must be accepted is as to what time it is rational to suppose that the parties contemplated; and the law will decide this to be that time which, as rational men, they ought to have understood each other to have in mind. *Moxley v. Moxley*, 59 Ky. (2 Metc.) 309, 311.

Acceptance of an offer to sell real estate five days after the offer was made is a reasonable time. *Kempner v. Cohn*, 47 Ark. 519, 1 S. W. 869, 58 Am. Rep. 775.

#### **Alighting from train.**

The reasonable time which a passenger is entitled to in alighting from a train is such time as is usually required by passengers in getting off and on the train in safety at the particular station in question. *Little Rock & Ft. S. Ry. v. Atkins*, 46 Ark. 423, 430.

#### **Appearance for taking of deposition.**

A reasonable time to appear and be present at the taking of a deposition, within Gen.

St. c. 36, § 6, providing that the adverse party shall have a reasonable time to appear and be present at the taking of the deposition of a witness, means a reasonable time for such party to appear and be present with his counsel. *Kimpton v. Glover*, 41 Vt. 283, 285.

Within a statute providing that the adverse party should have a reasonable time to appear and be present at the taking of a deposition, the length of notice to be given was a matter within the discretion of the court. *Hough v. Lawrence*, 5 Vt. 299, 303.

#### **Appropriation of water.**

What constitutes a reasonable time within which the waters of a stream should be appropriated to some beneficial use, in order to establish a right thereto, is a question of fact, dependent on all the circumstances of the case; and it has been held that a prior appropriator of water for irrigation forfeits his right to increase the appropriation by failing for 13 years to increase the area cultivated, during which time subsequent rights have accrued. *Low v. Rizer*, 37 Pac. 82, 84, 25 Or. 531.

#### **Avoidance of sale of corporate property.**

A "reasonable time," within the rule that the right of a corporation to avoid the sale of its property by reason of the fiduciary relations of the purchaser must be exercised within a reasonable time, has never been held to be any determined number of days or years, as applied to every case, like the statute of limitations, but must be decided in each case upon all the elements of it which affect that question. These are generally the presence or absence of the parties at the place of transaction; their knowledge or ignorance of the sale, and of the facts which render it voidable; the permanent or fluctuating character of the subject-matter of the transaction, as affecting its value; and the actual rise or fall of the property in value during the period within which this option might have been exercised. *Twin Lick Oil Co. v. Marbury*, 91 U. S. 587, 591, 23 L. Ed. 328.

#### **Calling for baggage.**

The reasonable time within which the owner of baggage must call for it on the arrival of a train is directly on its arrival, making reasonable allowance for delay caused by the crowded state of the depot at the time. The lateness of the hour makes no difference, if the baggage has been left on the platform. *St. Louis & S. F. Ry. Co. v. Terrell* (Tex.) 72 S. W. 430 (citing *Galveston, H. & S. R. Co. v. Smith*, 81 Tex. 485, 17 S. W. 133).

**Delivery of goods by carrier.**

The reasonable time within which a carrier is bound to deliver goods is the usual time, unless it appears that there were peculiar circumstances which made it practically impossible to deliver in the usual time. *Schwab v. Union Line*, 13 Mo. App. 159, 162.

**Demand for payment of loan.**

What is to be considered a reasonable time, within which a demand must be made by a person who is entitled to a payment, does not appear to be settled by any precise rule. It must depend on circumstances. If no cause for delay can be shown, it would seem reasonable to require the demand to be made within the time limited by the statute for bringing the action. What is a reasonable time is a question of law, to be determined with reference to the nature of the contract, and the probable intention of the parties as indicated by it. Where a servant, from time to time, through a series of years, deposited money saved from her earnings with her cousin, in preference to depositing it in a bank—he to keep it for her until she wanted it—the deposit was not an ordinary loan, since an element of trust entered into it, and she was not bound to demand the money within six years (the statutory period), and thirteen years after the date of a memorandum of the amount given her by him was a reasonable time within which to make demand. *Campbell v. Whoriskey*, 48 N. E. 1070, 1072, 170 Mass. 63.

**Demand for deed.**

A purchaser of land must demand a deed and tender payment within a reasonable time. Waiting two years before making such a demand and tender is not a reasonable time. *Force v. Dutcher*, 18 N. J. Eq. (3 Cl. E. Green) 401, 405.

**Disaffirmance of infant's deed.**

"What constitutes a reasonable time," said the court in *Sims v. Bardoner*, 86 Ind. 87, 44 Am. Rep. 263, "within which a person who has executed a deed during infancy shall disaffirm it, depends on the particular circumstances of each case. The right must be exercised before the statute of limitations has become a bar to an action to recover the land conveyed, and it may be, under the circumstances of the particular case, that it should be exercised within a shorter period." *Shroyer v. Pittenger*, 67 N. E. 475, 476, 31 Ind. App. 158.

**Duration of offer of reward.**

An offer of reward made by a city for the apprehension and conviction of any person engaged in incendiary attempts should not be regarded as an unlimited offer, continuing

until it should be formally withdrawn, but is limited to a reasonable time, and in this case it was held that it ceased to be an offer after the lapse of three years and eight months. *Loring v. City of Boston*, 48 Mass. (7 Metc.) 409, 414.

**Furnishing proofs of loss.**

What constitutes a reasonable time within which to furnish proofs of loss under an insurance policy making no provision as to the time within which such proof should be furnished is a question depending on the circumstances. *Springfield Fire & Marine Ins. Co. v. Brown*, 18 Atl. 396, 128 Pa. 392.

Where no time is specified within which a particular account of the loss under a fire policy shall be furnished, it must be furnished within a reasonable time. What is a reasonable time must depend on the circumstances of each particular case, and is probably, under proper instructions, a question for the jury. *Miller v. Hartford Fire Ins. Co.*, 29 N. W. 411, 413, 70 Iowa, 704.

**Holding seized liquors.**

Rev. St. c. 27, § 34, provides that, in a case where an officer, is authorized to seize intoxicating liquors, he may seize them without a warrant, and keep them a reasonable time, until he can procure a warrant. Held, that what is a reasonable time must be determined by the circumstances of the case, but, unless a sufficient reason is given for a longer delay, it should not exceed 24 hours from the time of the seizure. *Weston v. Carr*, 71 Me. 356, 358.

**Institution of receivership.**

The phrase "reasonable time," under the principles governing the administration of the assets of a railroad operated by receivers, so as to require that all debts for current supplies contracted within a reasonable time before the receivership shall be paid from surplus earnings before any part can be spent on improvements, payment of interest, or any investment favorable to the bondholders, cannot be exactly defined; and what is a reasonable time is a question of law, depending on the circumstances of the particular case. The fact that the receivers were appointed, not at the suit of a mortgagee, but at the instance of creditors and stockholders, to protect the property from disruption and hold it together until the plan to reorganize could be adopted, is a circumstance favoring the equity of supply claimants, and in such a case a claim for steel rails furnished from 9 to 11 months prior to the receivership, was not lost by laches; it appearing that renewal notes were taken for the debt, which were accordingly renewed, and that claim was promptly made

at their maturity. *Southern Ry. Co. v. Carnegie Steel Co.* (U. S.) 76 Fed. 492, 497.

#### **Moving for administrator's sale.**

When it becomes necessary to sell the real estate of an intestate to pay his debts, the administrator is required to move for a sale at the earliest opportunity. It is for the court to determine whether the administrator moves for such sale within a reasonable time. Where the administrator, 17 years after the estate was reported insolvent, petitioned for the sale of real estate, it was held, without reference to the question whether the action of the creditors against the administrator was barred by the statute, that the administrator's right to the order of sale was barred by the lapse of time. *In re Godfrey's Estate*, 4 Mich. 308, 314.

#### **Notice of hearing.**

A reasonable time, within the meaning of the rule that notice must be served a reasonable time before the hearing, means such time that the party notified will have ample time to prepare himself, and be able to be present at the time and place of the hearing. *Sterling Mfg. Co. v. Hough*, 49 Neb. 618, 621, 68 N. W. 1019, 1020.

#### **Notice of tax sale.**

What is a reasonable and sufficient notice by a county commissioner of the place where the tax sales will be made, posted at the courthouse, county treasurer's office, and other public buildings, at the county seat, must depend on the circumstances of each particular case. Thus, in the case where the county seat was but a very small place, with but few buildings, all in view of each other, a very short notice would be reasonable, while in a larger town a longer period would be required to bring it within the rule. As there is no tribunal or officer to prescribe in advance what shall be a reasonable time or reasonable notice, each county treasurer must judge for himself, and this under circumstances in which it is impossible for him to know, or for any lawyer to inform him, what such reasonable time or reasonable notice is. A notice by the county treasurer of the place where the tax sale will be made, posted at the courthouse, county treasurer's office, and other public places at the county seat a week before the day of sale, was a reasonable and sufficient notice. *Clark v. Mowyer*, 5 Mich. 462, 472.

#### **Payment.**

Where a guaranty on an overdue judgment note read, "For value received, I hereby guarantee payment of the within note, and waive demand, notice, and protest on the same when due," and was silent as to the time of extension and of payment by the guarantor, the agreement imported a reason-

able time, and such reasonable time was applicable both to the time of extension and of payment. *Citizens' Sav. Bank & Trust Co. v. Babbitt's Estate*, 44 Atl. 71, 72, 71 Vt. 182.

#### **Performance of contract.**

What is a reasonable time for the performance of a contract, when time is not of its essence, is to be determined by all the circumstances of each case, and is a question of law. *McFadden v. Henderson*, 29 South. 640, 642, 128 Ala. 221.

In an action for breach of contract to purchase land, it appeared that plaintiff was to furnish an abstract, and that the contract did not specify when it was to be performed. The evidence showed that plaintiff had time after receiving defendant's letter of acceptance to execute and forward the deed, and to procure and send an abstract with it, and there was no evidence that he required a longer time. Held, that the question whether or not he had a reasonable time within which to perform the contract was one of law, and that he had such reasonable time. *Randolph v. Frick*, 57 Mo. App. 400.

#### **Presentation of bill or note.**

As to what constitutes a reasonable time within which to present a note payable on demand after date, it is held that the question of reasonable time is identical with that of due diligence. *Foley v. Emerald & Phoenix Brewing Co.*, 39 Atl. 650, 651, 61 N. J. Law, 428.

An averment that a draft was to be presented within a reasonable time will be taken to mean within the time limited by the law merchant and by custom of banks. *Citizens' Nat. Bank v. Third Nat. Bank*, 49 N. E. 171, 172, 19 Ind. App. 69.

What is a reasonable time within which the holder of a bank check must present it for payment will depend on the facts of each case. Yet, in the absence of exceptional circumstances, such reasonable time has been fixed. Thus it has been defined to be "the shortest period within which, consistently with the ordinary employment and duties of commercial business, the duty of presentment and demand could be performed." *Watt v. Gans*, 21 South. 1011, 1012, 114 Ala. 264, 62 Am. St. Rep. 99.

Speaking generally, what is reasonable time depends on the facts of each particular case; but it is thoroughly settled that the reasonable time allowed the holder for presenting a check when he receives it in the same place where the bank on which it is drawn is located is till the close of banking hours on the next secular day; and, if in the meantime the bank fails, the loss will fall on the drawer. *Anderson v. Gill*, 29 Atl. 527, 528, 79 Md. 312, 25 L. R. A. 200, 47 Am.

St. Rep. 402 (citing Daniel, Neg. Inst. § 1591; Byles, Bills, side page 14; Moule v. Brown, 4 Bing. N. C. 266; Boddington v. Schlencker, 4 Barn. & Adol. 752).

That an indorsee of a note has to make a demand on the makers for payment, and give notice of dishonor to the indorser in the event of nonpayment, in order to recover from the indorser, is conceded. The time at which demand must be made and notice of protest given must be within a reasonable time, and what is a reasonable time cannot always be measured by months. What constitutes a reasonable time depends upon, and can be ascertained from, the facts of each particular case. Where notice of protest was not given until two weeks after demand of payment was made, the delay discharged the indorser. *German-American Bank v. Atwater*, 58 N. E. 763, 764, 165 N. Y. 36.

What is a reasonable time, within the meaning of the rule that the holder of a check is bound to present it within a reasonable time, will depend upon the circumstances, and will in many cases depend upon the time, the mode, and the place of receiving the check, and upon the relations of the parties between whom the question arises. *Mohawk Bank v. Broderick* (N. Y.) 13 Wend. 133, 27 Am. Dec. 192. In a case in which it was understood between the parties to a check that the person receiving the same intended to use it in paying a debt, and it was given on a bank at a distance away, where it did not arrive until three days after it was given, and after the bank had failed, a presentment for payment at such time was held to be within a reasonable time. *Woodruff v. Plant*, 41 Conn. 344, 347.

The phrase "reasonable time," in the statement of the rule that the holder of a check must present it for payment within a reasonable time, has no fixed meaning, but what is a reasonable time depends on circumstances. But it is a principle of general recognition that, if a bank on which a check is drawn be in the same place where the payee receives it, it should be presented for payment within banking hours on the day it is received, or on the following day, or in the meantime, if the bank fails, the loss will be on the drawer. *Industrial Trust, Title & Savings Co. v. Weakley*, 15 South. 854, 855, 108 Ala. 458, 49 Am. St. Rep. 45.

What is a reasonable time within the general rule that the holder of a check is bound to present it for payment in a reasonable time, and, if not paid, to give notice thereof to the director in a like reasonable time, will depend on circumstances, and will depend on the time, the mode, and the place of receiving the check, and on the relation of the parties between whom the question arises. Where a check is postdated, and deposited for collection on the day of its date,

it will be regarded as issued the day it bears date, in considering whether the holder presented it for payment in a reasonable time. *Taylor v. Sip*, 30 N. J. Law (1 Vroom) 284, 290.

The reasonable time within which payment must be demanded, in order to render an indorser liable, varies according to the circumstances and situation of the parties, to be determined by the jury under the direction of the court. It is impossible to fix any precise period, each case depending upon its own circumstances. A demand and notice eight months after the date and indorsement of a promissory note payable on demand—all the parties living in the same town—were not given within a reasonable time. *Field v. Nickerson*, 13 Mass. 131, 136.

What shall be deemed "reasonable time," within which a demand must be made for payment of a promissory note payable on demand, in order that the indorser be not discharged through delay, must depend, to some extent, upon the peculiar circumstances of each case. Sixty days held a reasonable time. *Lockwood v. Crawford*, 18 Conn. 361, 372.

#### **Removal of goods from depot.**

With respect to what is a reasonable time, within the rule that a consignee of goods transported by a railroad company is entitled to a reasonable time in which to remove them after they have arrived at their destination, the courts say the general rule as to what is a reasonable time in such cases is not to be determined by any peculiar circumstances in the condition or situation of the consignee or plaintiff, which might render it necessary, for his convenience or accommodation, that he should have a longer time or better opportunity than if he resided at the place of consignment, and was prepared with the means and facilities for removing the goods. But what is meant by "reasonable time" is such as would give a person residing at the place to which the goods are consigned, and informed of the usual course of business on the part of the company, a suitable opportunity within business hours, after the goods are ready for delivery, to come to the place of delivery, inspect the goods, and take them away. *Pinney v. First Division of St. Paul & P. R. Co.*, 19 Minn. 251, 253 (Gil. 211, 212).

#### **Removal of property from leased premises.**

A reasonable time within which a lessee may remove personal property placed on the premises after the expiration of his lease is not a fixed period. What would be a reasonable time in one case would not be a reasonable time in another, and therefore in every case the question, what is a reasonable time? must be determined from the facts and cir-

cumstances peculiar to that case. Where a lessee places machinery on mining premises for the operation of the mine, his failure for nine months after notice of forfeiture by the lessor to remove is not such unreasonable delay as entitles the lessor to retain possession, where there was no change in the position of the parties, and the lessors suffered no injury from the delay. *Updegraff v. Lessem*, 62 Pac. 342, 346, 15 Colo. App. 297.

#### **Removal of goods purchased at execution sale.**

The reasonable time in which a purchaser at an execution sale may remove the goods from the premises leased by the execution debtor is the time required to remove them with diligence in the ordinary manner of removing such goods. *Stern v. Stanton*, 39 Atl. 404, 184 Pa. 468.

#### **Rescission of contract.**

What is a reasonable time within which a party should rescind a contract on the ground of fraud is a mixed question of law and fact. When the facts are ascertained, it becomes a question of law. *Wingate v. King*, 23 Me. (10 Shep.) 35, 37.

The phrase "reasonable time," as used in the statement of the rule that the purchaser of an article is bound to act within a reasonable time after he discovers a defect, means a reasonable time under all the circumstances of that particular case. *Gridley v. Globe Tobacco Co.*, 39 N. W. 754, 755, 71 Mich. 528.

Where, in a contract of sale of goods, no time is fixed within which the buyer may return the same, the buyer will be obliged to do so within a reasonable time, in order to enable him to rescind the contract. And what is a reasonable time, where the facts are ascertained, is a question of law for the court, to be determined on consideration of all the circumstances; but where the facts are not clearly established, or where the question depends upon controverted matters, it is, under proper instructions, for the jury. *Hickman v. Shimp*, 109 Pa. 16, 20.

#### **Return of deed.**

When a deed is sent to a purchaser for his acceptance, he has an unquestionable right to hold it a reasonable time, in order to investigate the title and the incumbrances on record, and to take advice of counsel before he pays the money. But if he detains it longer than necessary with reasonable diligence, he cannot afterwards return it, but the contract, as to him, will then be no longer open, but closed and executed, and he will be liable for the purchase money, and he must resort to an action on the covenant in the deed, for damages, if the title is defective. Where a vendor had taken seven or eight months' time after the sale for his own convenience to make out the deed, a pur-

chaser retaining it for a week or less, and then rejecting it, could not be deemed to have detained it beyond a reasonable time, and the question whether he detained it an unreasonable length of time was for the jury. *Earle v. Earle*, 16 N. J. Law (1 Har.) 273, 285.

#### **Service of complaint.**

Twenty-four hours after defendant's demand for a copy of plaintiff's complaint is a reasonable time within which plaintiff may serve the same. *Littlefield v. Merwin* (N. Y.) 2 Code Rep. 128.

#### **Sale of realty by executor.**

A will whereby testator, in making certain gifts, ordered and directed his executors to sell and dispose of his lands, and to give deeds for the same, as he might do if alive, and also his household furniture, except such articles as his wife might think proper to keep, gave to his executors a reasonable time, in the exercise of their discretion, within which to make a sale of the land. Held, that a year would be a reasonable time, for the executors should be allowed for the sale of the real estate. *McCoury's Ex'rs v. Leek*, 14 N. J. Eq. (1 McCart.) 70, 71.

"The reasonable time" within which an executor directed to convert an estate into money may exercise his discretion is determined by no rigid or arbitrary standard, but depends upon the circumstances of each particular case. It seems that, where no special modifying facts are shown to shorten or lengthen the reasonable time, the period allowed before the executor can be compelled to account—that is, 18 months—may serve as a just standard. *In re Gray*, 91 N. Y. 502, 510.

#### **Suit by cestui que trust.**

What shall be termed a reasonable time, within the rule that a cestui que trust must sue in a reasonable time to set aside a sale made by his trustee, is not susceptible of a definite rule, but must, in a degree, depend upon the circumstances of the particular case, and be guided by sound discretion in the court. Thus in the case at bar the lapse of 16 years was held not a reasonable time. *Bergen v. Bennett* (N. Y.) 1 Caines, Cas. 1, 20, 2 Am. Dec. 281.

#### **Suit for specific performance.**

What is a reasonable time within which to file a bill for the specific performance of a contract cannot be fixed with precision by any general rule. *Chabot v. Winter Park Co.*, 15 South. 756, 759, 34 Fla. 258, 43 Am. St. Rep. 192.

#### **Suit for taxes.**

Where a city has a reasonable time in which to bring suits for taxes after the stat-



ute of limitations takes effect, it is a question of fact for the court whether a suit was brought within a reasonable time. What is a reasonable time in such a case must be determined by the court in each instance. *Link v. City of Houston*, 50 S. W. 566, 567, 84 Tex. 378.

#### **Suit on note.**

There is no fixed period known to be a reasonable time in which to sue on a note, but two years will be deemed more than a reasonable time in which to bring such action. *Mehelm v. Barnet*, 1 N. J. Law (Coxe) 86.

#### **Taking possession of purchased personalty.**

"Reasonable time," within the meaning of the rule that a purchaser of personal property is bound to take possession of the property within a reasonable time, must be construed not with reference to the mere convenience of the party, but only with reference to the time fairly required to perform the act of taking possession, or doing what is equivalent. *Seymour v. O'Keefe*, 44 Conn. 128, 131.

#### **Transportation by carrier.**

"Reasonable time of transportation by a common carrier" means that the transportation must be accomplished with all convenient dispatch, with such suitable and sufficient means as a carrier is required to provide for his business. The question of reasonable time is one of fact, and may be determined by the length of the journey, the modes of conveyance, season of the year, state of the weather, and any other circumstances which may properly be taken into consideration by the jury in finding whether the carrier has been guilty of improper delay. *Helliwell v. Grand Trunk Ry. of Canada* (U. S.) 7 Fed. 68, 73 (citing *Hutchinson on Carriers*, §§ 328, 329).

#### **Unloading ship.**

"Reasonable time," as used in a declaration alleging that a ship was unloaded within a reasonable time after her arrival at a certain port, means a space of time within which a ship may with proper speed be unloaded, whenever she is in a condition for that process, not a reasonable period to be dated from a given time. *Taylor v. Clay*, 9 Q. B. 713, 724.

In a case involving the duty of unloading a ship within a reasonable time, it was said that "our reason teaches that the time that is reasonable under ordinary circumstances—that is, customary time—is always unreasonable under extraordinary circumstances. If the extraordinary circumstances can never be considered to determine the reasonableness of the time, then the charter-

er must always unload all vessels that arrive under unusual circumstances in an unreasonable time." Lord Blackburn said: "In *Taylor v. Great Northern Ry. Co.*, L. R. 1 C. P. 385, it was laid down that a reasonable time meant what was reasonable under all the circumstances. Byles, J., there says: 'My Brother Hayes treats "ordinary time" and "reasonable time" as meaning the same thing; but I think "reasonable time" means a reasonable time, looking at all the circumstances of the case. The delay in this case was an accident, so far as the defendants were concerned, entirely beyond their control, and therefore I think they are not liable.' " *Empire Transp. Co. v. Philadelphia & R. Coal & Iron Co.* (U. S.) 77 Fed. 919, 924, 23 C. C. A. 564, 35 L. R. A. 623.

#### **REASONABLE USE.**

Reasonable use is that which does not unreasonably prejudice the rights of others. *Town of Rindge v. Sargent*, 9 Atl. 723, 724, 64 N. H. 294.

What constitutes a reasonable use of water by a riparian proprietor depends upon a number of circumstances, as the subject-matter of the use itself, the size of the stream, the velocity of the current, the nature of the banks, the character of the soil, and a variety of other facts. *Low v. Schaffer*, 33 Pac. 678, 680, 24 Or. 239.

Under the rules of the common law riparian proprietors have the right to a reasonable use of the waters of a stream running through their respective lands for the purpose of irrigation. It is declared in all the authorities on this subject that it is impossible to lay down any precise rule which would be applicable to all cases. The question must be determined in each case with reference to the size of the stream, the velocity of the water, the character of the soil, the number of proprietors, the amount of water needed to irrigate the lands per acre, and a variety of other circumstances and conditions relating to each particular case; the true test in all cases being whether the use is of such a character as to materially affect the beneficial use of the waters of a stream by the other proprietors. A riparian proprietor is entitled to the reasonable use of running water for irrigation, but not to the exclusion or prejudice of other riparian proprietors. *Jones v. Adams*, 6 Pac. 442, 444, 19 Nev. 78, 3 Am. St. Rep. 788.

A reasonable use of a stream for mill purposes is one adapted to the character and capacity of the stream. In determining this capacity its condition throughout the year is to be considered. A reasonable use must permit the water to flow in its accustomed way as far as this can be done, and a beneficial use, though a limited one, to be

made of the reduced stream; each riparian mill owner having his fair proportion. *Mason v. Hoyle*, 56 Conn. 255, 262, 14 Atl. 786, 788, 789.

#### REASONABLE WEAR AND TEAR.

"Natural and reasonable wear and tear," as used in an article of agreement for the sale of real estate, by which the vendor stipulated to deliver possession of the premises at a future day in as good repair as they were at the time of the execution of the contract, natural and reasonable wear and tear excepted, means such decay or depreciation in value of the property as may arise from ordinary and reasonable use, and does not include an injury to the property by a freshet. The word "reasonable" was inserted in the agreement to meet the case of a destruction of the property by the freshet, and to qualify the exception to such wear and tear as might be reasonably supposed to arise from ordinary causes and the action of the elements. *Green v. Kelly*, 20 N. J. Law (Spencer) 544, 549.

#### REASONABLY.

Webster defines "reasonably" as meaning in a reasonable manner; in a moderate degree; moderately. *Smith v. City of Brunswick*, 61 Mo. App. 578, 581.

"Reasonably" is defined as follows: "In a reasonable manner; consistently with reason; not extravagantly or excessively; tolerably; moderately; fairly." *Horn v. Territory*, 56 Pac. 846, 847, 848, 8 Okl. 52.

The adverb "reasonably," whatever it may originally have meant, as now used qualifies the condition of things, as well as the conduct of persons. One of its definitions is "in a moderate degree; not fully; moderately; tolerably." The statement that a horse was reasonably or moderately safe, or a reasonably or tolerably good one, would be allowable. *Village of Warren v. Wright*, 3 Ill. App. (3 Bradw.) 602, 610 (quoting *Webst. Dict.*).

"Reasonably," as used in Pen. Code, art. 570, providing that, to justify homicide, it must reasonably appear by the acts, or by words coupled with the acts, of the person killed, that it was his purpose and intention to commit one of certain offenses, is not equivalent to "necessarily," as used in an instruction that, to justify homicide in such cases, it must necessarily appear that it was the deceased's purpose to kill or injure the defendant. "Reasonably" is defined by Webster as follows: "In a reasonable manner; in consistency with reason." "Necessary" is defined by Webster: "Unavoidable; necessary; such as must be impossible to be otherwise; not to be avoided; inevitable."

It is quite evident from these definitions that there is a vast difference between "reasonably" and "necessarily." If it must necessarily appear from the acts, or words coupled with the acts, of the party killed, that it was his purpose to commit one of the offenses named, before a person can be justified in killing his adversary, then appearances, whether reasonable or not, would have nothing whatever to do with the case. *Stevenson v. State*, 17 Tex. App. 618, 634.

#### REASONABLY ACCESSIBLE.

In Laws 1881, c. 649, amending the general railroad act by limiting the right to condemn land for earth and gravel to lands that are contiguous to its railroad and reasonably accessible to the place where the same are to be used, "reasonably accessible" is utterly meaningless, as applied to the piece of real estate which is to be used as such. *In re Long Island R. Co.*, 21 N. Y. Supp. 489, 490, 66 Hun, 631.

#### REASONABLY ACCURATE DESCRIPTION.

Under Rev. St. c. 24, art. 9, § 5, providing that a petition in condemnation proceedings shall contain a "reasonably accurate description" of the property to be taken or damaged, a petition to condemn a railroad's "lands, right of way, and tracks," for the purpose of extending a certain street, 66 feet wide, across defendant's right of way, contains a reasonably accurate description, though the land sought to be condemned was used for a railroad yard. *Chicago & A. R. Co. v. City of Pontiac*, 48 N. E. 485, 486, 169 Ill. 155.

#### REASONABLY CERTAIN.

"Reasonably certain," as used in an instruction that damages for future consequences of an injury cannot be assessed, unless it be "reasonably certain" that such consequences will ensue, "means that the jury should be satisfied of their occurrence beyond a reasonable doubt." *Gulf, C. & S. F. Ry. Co. v. Harriett*, 15 S. W. 556, 558, 80 Tex. 73.

"Reasonably certain," as used with regard to degree of proof, is equivalent to "beyond reasonable doubt." *St. Louis, A. & T. Ry. Co. v. Burns*, 9 S. W. 467, 468, 71 Tex. 479.

#### REASONABLY CONVINCED.

Where a court instructed that, the moment the jury were reasonably convinced that the evidence was sufficient to overcome the presumption of innocence, the same should thereafter cease to influence their minds,

the phrase "reasonably convinced" conveyed the same meaning as "moderately convinced," "fairly convinced," or "convinced in a moderate degree," and hence the instruction was erroneous. *Horn v. Territory*, 56 Pac. 846, 847, 848, 8 Okl. 52.

#### REASONABLY FORESEEN.

A consequence which cannot have been reasonably foreseen is one which cannot have been foreseen by a man of ordinary prudence. *Burns v. Merchants' & Planters' Oil Co.*, 63 S. W. 1061, 1062, 26 Tex. Civ. App. 223.

#### REASONABLY NECESSARY.

"Reasonably necessary," as used in a ruling of the court stating that expenditures reasonably necessary for a widow and her child in relation to land left them by a deceased husband and father would be justified, should be construed to include the expense of furnishing the hands and to feed the mules on the farm, which was carried on by the mother after the father died. *Berry v. Turner*, 77 Ga. 58, 60.

#### REASONABLY PRUDENT PERSON.

The use of the expression "reasonably prudent person," instead of "ordinarily prudent person," is not erroneous; the words having not infrequently been used interchangeably. *St. Louis S. W. R. Co. v. Brown*, 69 S. W. 1010, 1011, 30 Tex. Civ. App. 57.

"Reasonably prudent man" may mean the same as "ordinarily prudent man," but a different signification may be attached to "reasonable man." A man may possess ordinary reasoning powers, and yet he may have less caution than a man of ordinary prudence. The conduct of a man of ordinary prudence, under all the circumstances of the case, is the standard by which the law tests the question of ordinary negligence. *Missouri, K. & T. Ry. Co. v. Hannig*, 43 S. W. 508, 509, 91 Tex. 347.

#### REASONABLY SAFE.

Whatever is according to the general and ordinary course adopted by those in the same business is "reasonably safe," within the meaning of the law. The test is the general use. *Reed v. Missouri, K. & T. R. Co.*, 68 S. W. 364, 365, 94 Mo. App. 371; *Cunningham v. Journal Co.*, 68 S. W. 592, 593, 95 Mo. App. 47.

"Reasonably safe," as used in reference to the duty of an employer to furnish appliances of ordinary character and reasonably safe, means safe according to the ordinary risks of the business. *Geno v. Fall Mountain Paper Co.*, 35 Atl. 475, 476, 68 Vt. 568.

It is the duty of a railroad company to construct and maintain a crossing and approach thereto, and to maintain the crossing and approach in a condition reasonably safe and convenient for public travel. It is not sufficient that the crossing is so constructed that it is possible to safely pass over it, but it should be so constructed and maintained in such condition as to be reasonably safe for public travel for persons exercising ordinary care. *Brown v. Hannibal & St. J. R. Co.*, 12 S. W. 655, 99 Mo. 310, 42 Am. & Eng. R. Cas. 87.

The term "reasonably safe and convenient for travelers," as used in *St. 1896, c. 540*, providing that no city shall be liable for any injury or damage to person or property suffered in a highway, by reason of snow or ice thereon, if the place at which the injury was received was, at the time of the accident, reasonably safe and convenient for travelers, means that a way shall not be deemed unsafe by reason of snow or ice thereon, if it would be reasonably safe and convenient for travelers but for the presence of snow and ice thereon. *Newton v. City of Worcester*, 48 N. E. 274, 275, 169 Mass. 516.

A master is required to furnish for his servants reasonably safe appliances and instruments for the work for which they are employed and to keep the same in a reasonably safe condition of repair. For a failure to do so the master is liable if he knew, or by the exercise of ordinary care he might have known, that the appliances were defective or unsafe. *O'Mellia v. Kansas City, St. J. & C. B. R. Co.*, 21 S. W. 503, 506, 115 Mo. 205.

The phrase "reasonably safe," as used in enunciating the principle of law that a master is obliged to furnish "reasonably safe" appliances for his servants, means safe according to the usages, habits, and ordinary risks of the business. Absolute safety is unattainable, and employers are not insurers. They are only liable for the consequences of negligence, and the unbending test of negligence in methods, machinery, and appliances is the ordinary usage of the business. *Titus v. Bradford, B. & K. R. Co.*, 20 Atl. 517, 518, 136 Pa. 618, 20 Am. St. Rep. 944; *Schotte v. Meredith*, 47 Atl. 844, 846, 197 Pa. 496.

The elements that enter into the question of the reasonably safe condition of a highway or bridge are numerous and difficult to be described, and whether or not a highway or bridge is in a reasonably safe condition is usually determined by the opinions of those who are not experts, but who have personal knowledge of the places in question in connection with the facts stated by them. *Taylor v. Town of Monroe*, 43 Conn. 36, 45.

**REASONABLY SATISFIED.**

"Reasonably satisfied," as used in an instruction requiring the jury to be reasonably satisfied of the prisoner's guilt before a conviction could be had, means satisfied beyond a reasonable doubt. *People v. Kernaghan*, 14 Pac. 566, 567, 72 Cal. 609.

To satisfy is to free from doubt and uncertainty, to set at rest. The qualifying word "reasonably" means to a reasonable extent or degree, fairly or moderately, and, as used in an instruction requiring plaintiff to reasonably satisfy the jury, it requires him to fairly set at rest the truth of every material fact necessary to prove his cause of action. *Ball v. Marquis (Iowa)* 92 N. W. 691, 692.

**REASSESSED TAX.**

A reassessed tax is not, speaking strictly, a new tax. It is a part of the tax of the year in which it is first assessed. It must be based upon the valuation of that year, and must be laid under the original votes of the town and the warrants of the state and county fixing the tax for that year. *Market Nat. Bank v. Inhabitants of Belmont*, 137 Mass. 407, 408.

**REASSIGNMENT.**

The word "reassignment," as used in *Laws 1897*, p. 404, c. 378, § 1117, means something more than the simple transfer of a teacher from one school to another, without affecting the grade. It indicates a reassignment to a lower position after an appointment to the higher, and was doubtless used with a special meaning, to cover cases of removal and reappointment. *People v. Board of Education*, 66 N. E. 674, 676, 174 N. Y. 169.

**REBATE.**

"Rebate," says Webster, "is to abate or deduct from; to make a discount from for prompt payment." *State v. Schwarzschild*, 22 Atl. 164, 165, 83 Me. 261.

**In insurance.**

In insurance rebates are deductions from stipulated premiums allowed in pursuance of antecedent contract. *State v. Hibernia Ins. Co.*, 38 La. Ann. 465, 467.

**Of interest.**

Rebate of interest is defined to be a discount or abatement of interest on sums of money not yet due and payable. It is not a payment back of interest due and which has been paid. *Hamor v. Eastern R. Co.*, 133 Mass. 315, 320.

**Of legacy.**

Where a will provided that the executor should pay the legacies within one year after the decease of the testator, "without any rebate or reduction whatever," the legatee was not entitled to receive his legacy free from the transfer tax, where the will was made before that tax existed; the tax not being, strictly speaking, a rebate or reduction from the legacy. *Jackson v. Tailer*, 83 N. Y. Supp. 567, 568, 41 Misc. Rep. 36.

**REBELLION.**

Rebellion "means such an insurrection against lawful authority as is void of all appearance of justice." *Hubbard v. Harnden Express Co.*, 10 R. I. 244, 247.

"Rebellion," as used in a statute making it a capital offense for any free person to aid or assist in any insurrection or rebellion, or intended insurrection or rebellion, of slaves, is synonymous with the term "insurrection" as there used. *State v. McDonald (Ala.)* 4 Port. 449, 455.

The word "rebellion," as used in a publication alleging that a British subject in Brazil participated in a rebellion there, does not necessarily have the signification which would be attributed to it if that word were applied in connection with acts done in the United States, or in a place in which the person accused of participating in the rebellion would be brought within the peril of the English law, so that such statement is not libelous, as charging a crime. *Crashley v. Press Pub. Co.*, 77 N. Y. Supp. 711, 713, 74 App. Div. 118.

**Civil war distinguished.**

See "Civil War."

**REBELLIOUS MOB.**

The difference between a rebellious mob and a common mob is that the first is in treason and the latter a riot. The mob wants the universality of purpose to make it a rebellious mob or treason. *Harris v. York Mut. Ins. Co.*, 50 Pa. (14 Wright) 341, 350 (citing *Angell*, Ins. § 136).

**REBUILD.**

The phrase "rebuilt" on another site, used in reference to a bridge, is not strictly accurate; for a new bridge in another place cannot strictly be said to be the old one rebuilt. But the meaning is clear, and "replaced by," or any equivalent phrase, would express it correctly. *Seabolt v. Northumberland County*, 41 Atl. 22, 23, 187 Pa. 318.

"Rebuild," as used in a contract to remove a school building from where it stood,

and reconstruct and rebuild it on a new site, so that it should be in suitable and proper condition for school purposes, means to build up again, to build or construct after having been demolished. Cent. Dict. The meaning of the term is not restricted to the erection of a new building on the site of the old one, so that, notwithstanding the school house was blown down by a storm, it remained possible to reconstruct and rebuild it on the new school site, and thus perform the contract, not only substantially, but strictly and exactly. *Bath Tp. v. Townsend*, 59 N. E. 223, 224, 63 Ohio St. 514, 52 L. R. A. 868.

#### Repair distinguished.

In a lease "effectually rebuilding" means something more than "effectually repairing." The second might be understood to signify repairing those parts which merely needed repair, so that they might stand the remainder of the term, and rebuilding those which were not otherwise re-repairable. The other might imply merely putting the whole into the best state which its then condition allowed of. Therefore, where testator devised premises to his son for life, with the power to demise for 61 years for the purpose of new building or "effectually rebuilding and repairing," a lease by the son for that term in which the tenant covenanted for "effectually repairing" was not a good execution of the power. *Dymoke v. Withers*, 2 Barn. & Adol. 896, 901.

Gen. Laws, c. 72, § 4, providing for an apportionment of the expense of rebuilding or repairing a highway in one town to other towns benefited thereby, fairly means keeping a highway in repair, in view of its continuing interests and the continuing duty of the town benefited by it, and therefore rebuilding or repairing is not to be construed as limited to one point of time, but as including the future as well as the present. *Town of Campton v. Town of Plymouth*, 8 Atl. 824, 825, 64 N. H. 304.

#### REBUTTAL

Rebutting testimony is addressed to evidence produced by the opposite party, and not to his pleading, and where the answer avers the new matter, which it is for the defendant to prove, evidence on the part of the plaintiff to meet the evidence given by the defendant in support of his affirmative plea is not given in rebuttal. *Lux v. Haggin*, 10 Pac. 674, 767, 69 Cal. 255.

#### REBUTTING EVIDENCE.

The word "rebutting" has a twofold signification, both in common and legal parlance. It sometimes means contradictory evidence only. At other times conclusive or overcoming testimony. It may be employed

as contravening, or opposing, as well as overcoming, proof. *Fain v. Cornett*, 25 Ga. 184, 186.

"Rebutting evidence means not merely evidence which contradicts the evidence on the opposite side, but evidence in denial of some affirmative fact which the answering party is endeavoring to prove." *State v. Fourchy*, 25 South. 109, 114, 51 La. Ann. 228 (quoting Rice, Ev.).

Rebuttal evidence is that which is given to explain, repel, counteract, or disprove facts given in evidence by the adverse party. Anything may be given as rebuttal evidence which is a direct reply to that produced by the other side. *People v. Page*, 1 Idaho, 189, 195.

Bouvier says that rebutting evidence is that evidence which is given by a party in a case to counteract or disprove facts which have been given in evidence by the other party. *Toledo & O. C. Ry. Co. v. Wales* (Ohio) 5 O. C. D. 168, 170.

Rebutting evidence is that which repels or counteracts the effect of evidence which has preceded it. Evidence which shows that the evidence of the opposite party was not entitled to the force and effect which the law imputes to it *prima facie* must in its strictest sense be rebutting. *Davis v. Hamblin*, 51 Md. 525, 539.

#### RECAPTION.

Recaption is a species of remedy by the mere act of the party injured. This happens when any one hath deprived another of his property in goods or chattels personal, or wrongfully detains one's wife, child, or servant, in which case the owner of the goods, and the husband, parent, or master, may lawfully claim and retake them wherever he may find them, so it be not in a riotous manner or attended with a breach of the peace. *Prigg v. Pennsylvania*, 41 U. S. (16 Pet.) 539, 612, 10 L. Ed. 1060 (citing 3 Bl. Comm. 4).

#### RECEIPT.

See "Accountable Receipt"; "Ship Receipt"; "Warehouse Receipt"; "Wharfinger's Receipt."

A receipt is an acknowledgment of the fact of payment or other settlement between debtor and creditor. *Dobbin v. Perry* (S. C.) 1 Rich. Law, 32, 33.

A receipt is an acknowledgment of payment or delivery, and may contain a contract to perform something in reference to the thing delivered. *The Missouri v. Webb*, 9 Mo. 193, 195.

A receipt is not a contract. It is a mere declaration or admission in writing. A re-

celpt for a specified sum of money contains a declaration that so much has been paid upon account or for a particular purpose. *Ryan v. Ward*, 48 N. Y. 204-208, 8 Am. Rep. 539; *Serat v. Smith*, 15 N. Y. Supp. 330, 335, 61 Hun, 36; *Sargeant v. National Life Ins. Co.*, 41 Atl. 351, 352, 189 Pa. 341.

**Conclusiveness.**

A receipt is not usually conclusive as between the immediate parties, and is not within the rule which excludes parol evidence to vary the terms of a written instrument; and where the purposes of a receipt are expressed in short and seemingly incomplete terms, parol evidence is admissible to explain the nature of the transaction. *D. M. Osborne & Co. v. Stringham*, 57 N. W. 776, 4 S. D. 593.

"A receipt is an admission only, and the general rule is that an admission, though evidence against the person who made it and those claiming under him, is not conclusive, except as to the person who may have been induced by it to alter his condition." *State ex rel. Hospes v. Branch*, 20 S. W. 693, 694, 112 Mo. 661.

A receipt may be a mere acknowledgment of payment of a certain sum of money, or it may also contain a contract; and of course the rule is very familiar that, so far as it goes to acknowledge payment, it may be contradicted by contradictory evidence that the payment was not made; but in so far as it contains a contract, it stands upon the footing of other written contracts, and cannot be varied or contradicted by parol. *Cummings v. Baars*, 36 Minn. 350, 353, 31 N. W. 449, 450.

A receipt, in law, must be construed in connection with the facts connected with its origin, and in the light of the circumstances it may mean an acknowledgment of absolute payment of the debt or the conditional payment of the debt. A collector of taxes gave a receipt on receiving a check for the taxes due on a certain lot. The receipt was exhibited to a purchaser to show its discharge from the taxes at the time of the sale. The check being unpaid, the municipality enforced the tax against the property in the hands of the purchaser, and it was held that the purchaser could not maintain a suit for the loss sustained by him against the collector. *Kahl v. Love*, 37 N. J. Law (8 Vroom) 5, 11.

It has been repeatedly held that a receipt is an exception to the general rule that a writing cannot be explained or contradicted by parol. The grossest abuses and fraud would be practiced upon the ignorant and unwary, if receipts were conclusive, and not open to examination. So, where the receipt purported to be in full for two quarters' rent, it was competent to show that it was founded partly on a note given by a third person

by the procurement of the tenant, and which the landlord was induced to accept, but which was never paid, because the maker became insolvent before the note became due. The taking of the note was no extinguishment of the debt due for the rent. It is a rule well-settled and repeatedly recognized that taking a note either of the debtor or of a third person for a pre-existing debt is no payment, unless it be expressly agreed to take the note as payment and to run the risk of its being paid, or unless the creditor parts with the note or is guilty of laches in not presenting it for payment in due time. He is not obliged to sue upon it. He may return it, when dishonored, and resort to his original demand. *Toby v. Barber* (N. Y.) 5 Johns. 68, 72, 4 Am. Dec. 326.

A "receipt" is not a contract, but merely evidence of the performance of a contract, and is always open to explanation; and an instrument reading: "Sold to O. B. one chestnut colt for \$145. Received payment by note on three months, payable at Hopkinton Bank. [Signed] H."—was held, so far as the receipt part thereof was concerned, to be open to the explanation that the sale was conditional, with an express stipulation that the horse was not to become the defendant's property until he should deliver in payment a promissory note which would be discounted at such bank without plaintiff's indorsement. *Hildreth v. O'Brien*, 92 Mass. (10 Allen) 104.

The following instrument: "Vincennes, July, 1873. Received from Mr. Irah H. Pauley \$542.16 in levee orders taken at eighty cents, say eighty cents per dollar, in full. \$542.16. [Signed] Edward Weisart"—is not a contract in the ordinary sense of the term, but purely and simply a receipt, a written acknowledgment of the receipt of a certain amount in levee orders. Such a receipt may be explained, controlled, qualified, or even contradicted by parol evidence. *Pauley v. Weisart*, 59 Ind. 241, 244, 245.

A "receipt" is not conclusive against the party giving it, but a mistake may be shown by parol. *Elwell v. Lesley*, 7 N. J. Law (2 Halst.) 349.

A receipt is not like a written contract, but may always be explained by parol. *Lacrabere v. Wise* (Cal.) 71 Pac. 175, 176.

Receipts, whether for money paid or for other matter or thing, are regarded as informal, nondispositive writings, open to explanation, modification, or contradiction by parol evidence. *Gravlee v. Lamkin*, 24 South. 756, 759, 120 Ala. 210.

A receipt, even if absolute on its face, is not a written contract in the sense that it cannot be varied by parol evidence. It is not conclusive evidence of payment, but is open to explanation or contradiction by oral evidence. *Joslin v. Giese*, 36 Atl. 680, 681 59

N. J. Law, 130 (citing Snyder v. Findley, 1 N. J. Law [Coxe] 48; Cole v. Taylor, 22 N. J. Law [2 Zab.] 59; Crane v. Alling, 15 N. J. Law [3 J. S. Green] 423; Wildrick's Adm'r v. Swain, 34 N. J. Eq. [7 Stew.] 171; Dorman v. Wilson, 39 N. J. Law [10 Vroom] 474).

Receipts are the acknowledgments of one party only, and differ from contracts, in that receipts may be varied by parol evidence, which is not permitted in respect to contracts. Batdorf v. Albert, 59 Pa. (9 P. F. Smith) 59, 61; Comptoir D'Escompte de Paris v. Dresbach, 20 Pac. 28, 34, 78 Cal. 15; Wolf v. City of Philadelphia, 105 Pa. 25, 30; Kenny v. Kane, 14 Atl. 597, 598, 50 N. J. Law (21 Vroom) 562; Pendexter v. Carleton, 16 N. H. 482, 489.

A mere receipt is always open to explanation, and may be varied by parol, because simply an admission or declaration in writing, save where it embodies the elements of a contract. Milos v. Covacevich, 66 Pac. 914, 916, 40 Or. 239.

A mere receipt may be explained and controlled in its operation by parol evidence, while a contract as a general rule cannot be; and where a written instrument is made to include a receipt and contract, it cannot, so far as it operates as a contract, be controlled by parol evidence, any further than ordinary contracts may be. Henry v. Henry, 11 Ind. 236, 237, 71 Am. Dec. 354.

"In general a receipt is not a contract. It is usually but the evidence of a fact, as, for instance, the payment of money, the delivery of property, the settlement of accounts, etc., in all of which cases the receipt may be extended and the facts shown to be otherwise." Stewart v. Phoenix Ins. Co., 77 Tenn. (9 Lea) 104, 108.

In 1 Greenl. Ev. § 305, it is said that receipts may be either mere acknowledgments of payment or delivery, or they may also contain a contract to do something in relation to the thing delivered. In the former case, and so far as the receipt goes only to acknowledge payment or delivery, it is merely prima facie evidence of the fact, and not conclusive, and therefore the fact which it recites may be contradicted by oral testimony. But, in so far as it is evidence of a contract between the parties, it stands on the footing of all other contracts in writing, and cannot be contradicted or varied by parol. Thompson v. Williams, 1 Pac. 47, 48, 30 Kan. 114; Cass v. Brown, 44 Atl. 86, 87, 68 N. H. 85.

A receipt is the written acknowledgment of the receipt of money or a thing of value, without containing any affirmative obligation upon either party to it—a mere admission of a fact in writing; but, when a receipt contains stipulations which amount to a contract, it becomes a contract, and must

be governed by the law of contracts, and can be avoided only by fraud, mistake, failure of consideration, rescission, or some way known to the law. Krutz v. Craig, 53 Ind. 561, 574 (citing Jones v. Clark, 9 Ind. 341; Barickman v. Kuykendall [Ind.] 6 Blackf. 21; Sherry v. Picken, 10 Ind. 375; Pribble v. Kent, 10 Ind. 325, 71 Am. Dec. 327).

#### Consignee's receipt.

The term "receipt," in the rule that parol evidence is admissible to vary a receipt, includes an instrument given to a carrier, on receipt of goods, which states that the goods are in good condition; and therefore parol evidence is admissible to show that they were not in good condition, and that the person receiving the goods wished to sign for them in bad order, but was not allowed so to do. Tierney v. New York Cent. & H. R. R. Co. (N. Y.) 10 Hun, 569, 570

#### Indorsement on note.

A receipt may be defined to be such a written acknowledgment by one person of his having received money by another as will be prima facie evidence of that fact in a court of law, and an indorsement on a note of a partial payment in the handwriting of the maker, without any signature, but made in the presence, with the concurrence, and by the direction of the payee, is a receipt. Kegg v. State, 10 Ohio, 75, 79.

#### Memorandum.

"Receipt," as used in Burns' Rev. St. 1894, § 2354 (Horner's Rev. St. 1897, § 2206), providing that whoever falsely alters, forges, counterfeits, or causes to be so altered, forged, or counterfeited, any acquittance or receipt, with intent to defraud, shall be imprisoned, etc., should be construed to include all that which, when connected together, constitutes such written receipt or instrument; and unless a memorandum or writing indorsed or attached thereto is designed by the parties to import something into such receipt or instrument by which the legal effect of its terms or provisions is in some manner varied or affected, such memorandum cannot be said to be connected with the receipt or instrument so as to form a part thereof, and any change or alteration in the memorandum, indorsed thereon or attached thereto, would not constitute an alteration or change of the legal effect of the receipt or instrument. State v. Hendry, 59 N. E. 1041, 1043, 156 Ind. 392, 54 L. R. A. 794.

#### Release distinguished.

A receipt is mere evidence of a fact, and differs from a release, which extinguishes a pre-existing right. Equitable Securities Co. v. Talbert, 22 South. 762, 767, 49 La. Ann. 1393.

A receipt in full may be explained and disputed, but a release under seal estops and concludes forever. *Crane v. Alling*, 15 N. J. Law (3 J. S. Green) 423, 425.

**Writing imported.**

See, also, "Written Instrument."

A receipt is a written admission of the fact of payment and receipt of money. *Thompson v. Layman*, 42 N. W. 1061, 41 Minn. 295.

"Receipt," as used in an indictment charging the forgery of a receipt, imports a written instrument, obviating the necessity of alleging that it was written. In *State v. Feenly*, 18 Mo. 445, it was said: "There is no such thing as a verbal receipt. It is a solecism." *State v. Bibb*, 68 Mo. 286, 289.

A receipt for money on deposit is a contract in writing for payment of money. *Noble School Furniture Co. v. Washington School Tp. of Davless County*, 29 N. E. 935, 937, 4 Ind. App. 270 (citing *Long v. Straus*, 107 Ind. 94, 6 N. E. 123, 7 N. E. 763, 57 Am. Rep. 120).

Rev. St. § 66, provides that, if property stolen consists of any receipt or other evidence of debt, the money due thereon or secured thereby and remaining unsatisfied, or which in any event might be collected thereon, or the value of the property transferred, shall be deemed the value of the article stolen. Held, that the word "receipt" does not mean a written acknowledgment of payment by the debtor of the one making the acknowledgment, but means an actionable receipt, or receipt of money to be accounted for, receipt of property in store, etc. *People v. Bradley* (N. Y.) 4 Parker Cr. R. 245, 247.

**RECEIPT IN FULL.**

A receipt in full contains a declaration that a certain sum has been paid in full of all claims of a certain kind or of all demands. *Ryan v. Ward*, 48 N. Y. 204, 208, 8 Am. Rep. 539. It does not embody any contract, and furnishes only prima facie evidence of the facts therein stated. *Serat v. Smith*, 61 Hun, 36, 45, 15 N. Y. Supp. 330.

Adding the words "in full" to the receipt does not make it conclusive. *Bard v. Wood*, 44 Mass. (3 Metc.) 74, 75.

**RECEIPTS.**

See "Gross Receipts"; "Net Receipts."

The term "receipts," in Code, § 1825, relating to the compensation of executors and administrators, and speaking of the receipts and disbursements of the estate, means pecuniary assets, and does not embrace assets which are not money or currency. *Wright's Adm'rs v. Wilkerson*, 41 Ala. 267, 272.

Receipts and disbursements, within the rule that executors are to receive compensation based upon receipts and disbursements, means receipts and disbursements having an actual, and not merely constructive, existence. *Hill v. Nelson* (N. Y.) 1 Dem. Sur. 357, 361.

**RECEIVE.**

See "Accept and Receive"; "Actually Receive."

To receive means to get by a transfer as to receive a gift, to receive a letter, or to receive money, and involves an actual receipt. *Hallenbeck v. Getz*, 28 Atl. 519, 520, 63 Conn. 385.

Ky. St. § 1740, providing for a commission to the master commissioner or receiver for receiving and paying out money, contemplates an actual receiving and paying out, and does not entitle a receiver or commissioner to a commission on bonds which are made payable to him, but payment of which he does not actually receive. *Wathen v. England*, 44 S. W. 92, 93, 102 Ky. 537.

**As accept.**

"Received," as used in an acceptance by a board of supervisors of the plans of an architect, on condition that a bid by a reliable party was received on the basis of such plan, is not synonymous with the word "accepted," and was not intended to include the acceptance of a bid. *Hall v. Los Angeles County*, 16 Pac. 313, 315, 74 Cal. 502.

"Receives or agrees to receive a bribe," as used in Pen. Code, § 72, providing that any officer who receives or agrees to receive a bribe shall be guilty of a felony, is equivalent to the phrase "shall accept a gift or promise with the agreement or understanding that his vote or action shall be influenced thereby," as used in the consolidation act, providing that every officer enumerated therein who shall accept a gift or promise with the agreement or understanding that his vote or action shall be influenced thereby shall be guilty of felony. *People v. Jaehue*, 8 N. E. 374, 378, 103 N. Y. 182.

In a statute forbidding any person to buy or receive from any slave any article or commodity without the consent of the owner of such slave, the word "receive" was inserted to obviate the difficulty in proving in many cases an actual sale. It is much more comprehensive than the word "sale." Its meaning in this connection is to take, as a thing offered; to accept. *Shuttleworth v. State*, 35 Ala. 415, 417.

**As acquire.**

In construing a statute providing that an action of account may be maintained by one tenant in common against another for



receiving more than comes to his just share or proportion, the court said: "What, then, is the meaning of the words in our statute, 'for receiving more than comes to his just share or proportion'? What did the Legislature intend by those words? Did they only intend to make a tenant in common accountable to his co-tenants for receiving from a stranger, on account of rents and profits of the property, more than the just share or proportion of such tenant, or did they intend to make him accountable for receiving more than his just share or proportion of the rents and profits, whether paid by a stranger or derived from his own occupation and enjoyment of the property? I think they intended the latter. The former construction may be a reasonable one in England, where the ordinary mode of deriving profit from real estate is by renting it out, but not in this state, where real estate is commonly occupied and used by the owner. With all deference to the Court of Exchequer Chamber, I think the construction they put upon the word 'receiving' is too technical for our country, and, if it be a just one in England, it is because of circumstances existing there which do not exist here. I think the word 'receiving' in the statute literally means a receiving of profits, as well by use and occupation as by renting out the property." *Early v. Friend* (Va.) 16 Grat. 21, 47, 78 Am. Dec. 649; *West v. Weyer*, 18 N. E. 537, 538, 46 Ohio St. 66, 15 Am. St. Rep. 552.

#### As approve.

Where it is ordered by a board of supervisors that an assessment roll be received, the word "received" may be construed to mean approved, if it be apparent from the entire order that such was the sense in which it was used. *Mills v. Scott*, 62 Miss. 525, 529.

An order of a board of supervisors that a tax roll "be received, and the clerk will certify copies thereof to a debtor as the law directs," sufficiently indicates an approval of the roll by the board, since the context shows that the word "receive" does not indicate merely that the board has accepted the custody of the roll, but that the board adopts it as corrected by them as a completed, approved roll. *Grayson v. Richardson*, 3 South. 579, 580, 65 Miss. 222.

Within Act 1878, § 29, declaring that, when an assessment shall be made, the board of supervisors shall receive and examine the same, "receive" means nothing more than that they should determine whether the assessor appointed by them had performed the duties devolved on him; and it is a matter with which the taxpayer has no individual interest, and the failure of the board to meet for that purpose, or the fact that the meeting was not lawfully held, gives him no more right to attack the assessment than he

would have had, had it been legally filed by the assessor, and the board had failed to hold its term as required by the statute. *Wolfe v. Murphy*, 60 Miss. 1, 15.

#### Authority to sue implied.

A corporation created by a special act of the Legislature, and "capable of receiving, holding, and managing" a certain donation "as a corporation for that purpose only," is thereby impliedly vested with authority, not only to receive and hold such donation, but to sue for and collect the money. *Proprietors of White Schoolhouse v. Post*, 31 Conn. 240, 257.

#### As bought.

"Received," as used in an instrument stating that the party who signed the same "had received" certain trees, grape roots, etc., specifying the number and kind of each and the total value, means and is of the same effect as the word "bought," and is a sufficient memorandum of the sale within the statute of frauds. *Schultz v. Coon*, 8 N. W. 285, 286, 51 Wis. 416, 37 Am. Rep. 839.

#### Consent implied.

Receiving necessarily implies consenting to receive, and an indictment charging that the defendant, a public officer, "did receive and consent to receive remuneration for the performance of his duties," is sufficient, within Code N. C. § 991, making it a felony for a public officer to receive or consent to receive remuneration for the performance of his duties. *State v. Wynne*, 24 S. E. 216, 217, 118 N. C. 1206 (citing *State v. Van Doran*, 109 N. C. 864, 14 S. E. 32).

#### Delivery not implied.

Rev. St. 1889, § 2725, requiring telegraph companies to receive messages and to transmit the same promptly, does not render such companies liable for negligent failure to deliver the message to a person in another state, but only for failure to receive and transmit it. *Connell v. Western Union Tel. Co.*, 18 S. W. 883, 108 Mo. 459.

#### As have.

"Receive," as used in Code Proc. Wash. § 519, providing that the purchaser of lands sold under execution shall be entitled to receive from the tenant of the land the rents or the value of the use or occupation thereof during the period of redemption, will be held to mean the same as "have"; in other words, the parties shall be entitled to have the rents and profits. *Knipe v. Austin*, 43 Pac. 25, 26, 13 Wash. 189.

"Receiving," as used in a bequest "in trust for the benefit of L. during her life, receiving her annual interest and income therefrom, the said share to be securely invested as soon as declared, and after her

death to be equally divided between her children," means "taking" or "having." *Baker v. Keiser*, 23 Atl. 735, 736, 75 Md. 332.

**As receive from another.**

"Received," as used in Rev. St. § 3407 [U. S. Comp. St. 1901, p. 2246], providing that a place "where stocks, bonds, bullion, bills of exchange, or promissory notes are received for discount or for sale," shall be regarded as a bank, means that stocks and bonds or bills or notes of others are received for discount or sale, and does not mean those belonging to the banker himself, since one cannot be said to receive his own notes. *Selden v. Equitable Trust Co.*, 94 U. S. 419, 422, 24 L. Ed. 249.

**As receivable in evidence.**

"Received," as used in Gen. St. 1866, c. 73, § 8, providing that, where all the original parties to a joint or joint and several contract on the same side are dead, the other parties cannot testify to the contract in their favor, unless such transaction was had and performed on behalf of such deceased parties, by an agent whose testimony is received, etc., does not mean received in fact, but received in law, or, in other words, receivable under the law of evidence. *Bigelow v. Ames*, 18 Minn. 527, 529 (Gil. 471, 473).

**As received and paid out.**

Act March 21, 1867 (Revision, p. 1084, § 84), gives the township collector three-fourths of 1 per cent. on all schools funds received and paid out by him for school purposes during the year, to be paid out by the township committee from the funds of the township. Held, that the three-fourths of 1 per cent. are allowable on the funds received by the collector for school purposes, and again also on the funds paid out by him for such purposes, for the reason that the words "funds received and paid out" would, on the opposite construction, be the same as if the word "received" had been omitted, inasmuch as the collector would not pay out funds not received. *Demarest v. Inhabitants of New Barbadoes Tp.*, 40 N. J. Law (11 Vroom) 604, 606.

**As vesting share of estate.**

"Receiving," as used in a will providing that, in case any of testator's children should die before receiving their share, leaving issue, such issue should take the share the parent would have taken, if living, should be construed in the sense of vesting in right, rather than in the sense of being had in actual possession. *Cook v. McDowell*, 30 Atl. 24, 52 N. J. Eq. 351.

In the common understanding, as well as in the contemplation of the law, the devisee of an estate in fee-simple absolute received that estate at the moment when she became entitled to receive it. *Thompson v. Marshall*,

46 Atl. 825, 827, 73 Conn. 89 (citing *Johnes v. Beers*, 57 Conn. 296, 18 Atl. 100, 14 Am. St. Rep. 101; *Harrison v. Moore*, 64 Conn. 348, 30 Atl. 55; *Morris v. Bolles*, 65 Conn. 46, 31 Atl. 538; *Chase v. Benedict*, 72 Conn. 322, 44 Atl. 507).

**As transfer of possession.**

In *Swafford v. Spratt*, 67 S. W. 701, 702, 93 Mo. App. 631, the court construes the provision of Rev. St. 1899, § 3419, that parol contracts for sale of goods, etc., shall be void, unless the buyer actually receives some part of the goods, and holds that, to constitute the receipt required by the statute, there must be shown a transfer of the possession of the goods by and from the seller to the buyer, either actually by manual delivery, symbolically by some substituted delivery, or constructively by a change in the nature of the seller's subsequent holding.

The words "receive the same" in the statute of frauds, requiring the sale of goods to be evidenced by writing unless the buyer accepts part of the goods and actually receives the same, does not always require an actual delivery of the goods, but a virtual or constructive delivery may be sufficient; but the circumstances in such cases must be so strong and unequivocal as to leave no doubt of the intention of the parties. An agreement with a vendor about the storage of goods, and the delivery by him of the export entry to the agent of the vendee, was held not to be sufficiently certain to amount to a constructive delivery. *Bailey v. Ogden*, 3 Johns. 399, 414, 3 Am. Dec. 509.

"Receive," in reference to the sale of goods, means receiving the possession of them. *Ford v. Friedman*, 20 S. E. 930, 932, 40 W. Va. 177.

"Receive," as used in Code 1876, § 4369, making it a misdemeanor to "buy, sell, receive, barter, or dispose of any cotton, corn, wheat, oats, peas, or potatoes after the hour of sunset and before the hour of sunrise of the next succeeding day," means a change of possession, when one parts with the control of a product and another takes and accepts it. *Reese v. State*, 73 Ala. 18, 20.

**Will.**

"Received," as used in the Civil Code, requiring a nuncupative testament by public act to be received by a notary public, etc., does not mean that the notary must in the presence of the requisite number of witnesses complete the entire testament, including the signing by testator, notary, and witnesses, but merely the dictation of the will in the presence of the witnesses, and the reading of the same to the testator and the witnesses in the presence of each other. *Succession of Saux*, 16 South. 364, 365, 46 La. Ann. 1423.

**RECEIVE, HEAR, AND DETERMINE.**

The words "receive, hear, and determine," in Act March 3, 1803, c. 93, § 2, authorizing appeals from the District Courts of the United States to the Circuit Court, and requiring the Circuit Court to receive, hear, and determine such appeals, does not authorize a retrial by jury of a cause which has been tried by jury in the District Court. *United States v. Wouson* (U. S.) 28 Fed. Cas. 745, 746.

**RECEIVED.**

Plaintiff wrote to defendant as follows: "We are doing business with B. & Co., and require a guaranty, and they refer us to you." Defendant replied: "I hereby engage to guaranty the sum of £200 for iron received for B. & Co." Held, that "for iron received" meant for goods already supplied, or for goods that might thereafter be supplied; that it was a continuing guaranty, involving a liability in respect of both past and future supplies. *Colbourn v. Dawson*, 10 C. B. 765, 774.

"Received," as used in a special verdict, reciting that, "about the time the defendant received" a certain amount of money on the order, the plaintiff demanded an accounting, denotes a past occurrence, and refers to what took place before the demand was made. *Woodard v. Davis*, 26 N. E. 687, 127 Ind. 172.

**RECEIVED INTO RECORD.**

"Received into record," indorsed on process by the town clerk when it was returned to him, did not constitute the process a record. The object of a record is not only to give the instrument perpetuity, but publicity, and it is now well understood that that is to be done by transcribing the paper into a book kept for that purpose. *Town of Pawlet v. Town of Sandgate*, 17 Vt. 619, 621.

**RECEIVING STOLEN GOODS.**

See "Receiver of Stolen Property."

In order to render one guilty of receiving stolen goods, he must know at the minute of receiving it that it has been stolen. *State v. Caveness*, 78 N. C. 484, 491.

To constitute the offense of receiving stolen goods, it must appear that the person so charged knew at the time of receiving them that they had been stolen, and they must have been received feloniously, or with the intent to secrete them from the owner, or in some other way to defraud him of them. *Jester v. Lipman*, 67 Pac. 102, 103, 40 Or. 408; *State v. Sweeten*, 75 Mo. App. 127, 134.

The term "receiving stolen property" is, for brevity of expression, often used to

denote the crime that goes by that name; but it is not always so used, nor, when used, does it necessarily express this intent. According to the proper use of the terms, the phrase "receiving stolen property" would mean simply what it says. Used in a verdict finding accused guilty of "receiving stolen property," the expression denotes the receiving of the property under circumstances that render the receiving culpable, and will be equally appropriate, whether the culpability intended was criminal, or illegal without being criminal, or merely immoral; and the expression, as so used, is insufficient to constitute a verdict of conviction for knowingly receiving stolen property, because not containing a finding that it was done knowingly. *People v. Tilley*, 67 Pac. 42, 43, 135 Cal. 61.

**RECEIVER.**

See "Auxiliary Receiver"; "General Receiver"; "Statutory Receiver"; "Temporary Receiver."

A receiver is one who receiveth the money of another to render an account. *Baker v. Biddle* (U. S.) 2 Fed. Cas. 439, 453 (citing Co. Litt. 172a).

The term "receiver" means one who receives, and implies a transfer of possession of the thing received. *Keeney v. Home Ins. Co. of Columbus* (N. Y.) 3 Thomp. & C. 478, 480.

A receiver is an officer of the court, holding property under its orders and for the benefit of parties entitled to it. *Mauran v. Crown Carpet Lining Co.*, 50 Atl. 387, 388, 23 R. I. 344; *Castleman v. Templeman*, 40 Atl. 275, 278, 87 Md. 546, 41 L. R. A. 367, 67 Am. St. Rep. 363; *Merritt v. Merritt* (N. Y.) 16 Wend. 405, 421.

A receiver is an arm of the court, by which it administers the trust for the benefit of the creditors. *American Trust & Savings Bank v. McGettigan*, 52 N. E. 793, 795, 152 Ind. 582, 71 Am. St. Rep. 345. He is an officer of the law. *Standard Oil Co. v. Hawkins* (U. S.) 74 Fed. 395, 398, 20 C. C. A. 468, 33 L. R. A. 739.

A receiver is an officer of the court, appointed to settle and wind up the affairs of an insolvent concern. *Davis v. Industrial Mfg. Co.*, 19 S. E. 371, 114 N. C. 321, 23 L. R. A. 322; *Marshall v. Wendell*, 45 App. Div. 120, 122, 61 N. Y. Supp. 13.

A receiver is an indifferent person, standing between the parties to a case, appointed by the court to receive and preserve the property or funds in litigation pendente lite, when it does not seem reasonable to the court that either party shall hold it. A receiver is not the agent of either party. He is the right hand of the court. *Hay v. McDaniel*, 60 N. E. 729, 730, 26 Ind. App. 683;

**Hale v. Hardon** (U. S.) 95 Fed. 747, 773, 37 C. C. A. 240; **Danbe v. Philadelphia & R. Coal & Iron Co.** (U. S.) 77 Fed. 713, 716, 23 C. C. A. 420; **Shainwald v. Lewis** (U. S.) 8 Fed. 878, 879 (citing High, Rec. 1); **Baltimore Building & Loan Ass'n v. Alderson** (U. S.) 99 Fed. 489, 494, 39 C. C. A. 609; **Gaither v. Stockbridge**, 9 Atl. 632, 633, 67 Md. 222; **Flynn v. Furth**, 64 Pac. 904, 905, 25 Wash. 105; **Kreling v. Kreling**, 50 Pac. 549, 550, 118 Cal. 421; **Rumsey v. People's Ry. Co.**, 55 S. W. 615, 625, 154 Mo. 215. The appointment is not the ultimate end and object of the suit, but is merely a provisional remedy or auxiliary proceeding. **State ex rel. Merriam v. Ross**, 25 S. W. 947, 951, 122 Mo. 435, 23 L. R. A. 534. And neither party is responsible for his malfeasance or misfeasance. **Texas & St. L. R. Co. v. Rust** (U. S.) 17 Fed. 275, 282; **Dow v. Memphis & L. R. Co.** (U. S.) 20 Fed. 260, 269. The necessary implication from this is that a suit between parties is necessary to the appointment of a receiver, and that he whose property is to be taken from him and placed in the power of a receiver must be a party to the pending suit. **Baker v. Backus' Adm'r**, 32 Ill. 79, 96; **Wilkinson v. Lehman-Durr Co.**, 34 South. 216, 136 Ala. 463; **McLean v. Lafayette Bank** (U. S.) 16 Fed. Cas. 262, 263; **Ex parte Williams**, 17 S. C. 396, 403.

A receiver is generally regarded as an officer of the court. The property or money which comes into his hands is regarded as in the custody of the court. **State v. Hubbard**, 51 Pac. 290, 292, 58 Kan. 797, 39 L. R. A. 860; **Farmers' Loan & Trust Co. v. Oregon Pac. R. Co.**, 48 Pac. 706, 31 Or. 237, 38 L. R. A. 424, 65 Am. St. Rep. 822; **Rothschild v. Hasbrouck** (U. S.) 65 Fed. 283, 285.

A receiver is a person appointed by a court or judicial officer to take charge of property during the pendency of a civil action, suit, or proceeding, or upon a judgment, decree, or order therein, and to manage and dispose of it as the court or officer may direct. **Ann. Codes & St. Or. 1901, § 1080**; **Ballinger's Ann. Codes & St. Wash. 1897, § 5455**; **Martin v. Martin**, 12 Pac. 234, 235, 14 Or. 165; **Oleson v. Bank of Tacoma**, 45 Pac. 734, 735, 15 Wash. 148; **Denny v. Cole**, 61 Pac. 38, 39, 22 Wash. 372, 79 Am. St. Rep. 940.

A receiver is merely the creature of the court, and he has no powers save such as are conferred on him in the course and practice of the court. A receiver has very little discretion. **Blair v. Core**, 20 W. Va. 265, 268.

A receiver is an officer or creature of the court appointing him. His acts are those of the court, whose jurisdiction may be aided, but in no wise enlarged or extended, by his appointment. His power is only coextensive with that of the court which gives him his character. **Gray v. Covert**, 58 N. E. 731, 732,

25 Ind. App. 561, 81 Am. St. Rep. 117; **Kirwan Mfg. Co. v. Truxton** (Del.) 44 Atl. 427, 429, 2 Pennewill, 48; **Stockbridge v. Beckwith**, 33 Atl. 620, 6 Del. Ch. 72.

The office and duty of a receiver is to hold and preserve the property in controversy during the time that it may remain in the custody of the court. A receiver should in a large sense be indifferent as between the various interests involved. He should have no such personal interest as would interfere with an unbiased and impartial exercise of his duties as receiver. **Farmers' Loan & Trust Co. v. Northern Pac. R. Co.** (U. S.) 61 Fed. 546, 549.

A receiver is a person appointed by the court, as an officer of the court, whose function it is to hold possession and control of property which is the subject-matter of litigation, and to dispose of the same or deliver it to such person or persons as may be directed by the court. **Wiswall v. Kunz**, 50 N. E. 184, 185, 173 Ill. 110.

A receiver is merely a ministerial officer of the court. The title to the property does not change, and, if he is required to take property into his custody, such custody is that of the court. **Harrison v. J. J. Warren Co.**, 66 N. E. 589, 590, 183 Mass. 123 (citing **Ellis v. Boston, H. & E. R. Co.**, 107 Mass. 1).

A receiver, in England, is described as a person, indifferent between the parties, appointed by the court to receive rents, issues, or profits of lands, or thing in question in a court of chancery, pending the suit, when it does not seem reasonable to the court that either party should do it. **Wyatt, Prac. Reg. 108**. He is considered as an officer of the court. **Newl. Ch. Prac. 206**. It is no part of the official duty of the clerk and master of a chancery court in this state to act as receiver. **Waters v. Carroll**, 17 Tenn. (9 Yerg.) 102, 107.

A receiver is a mere servant or agent of the court to do its bidding, and he cannot be heard to question by appeal the regularity or propriety of the orders of the court in the action, unless the court first authorizes him to do so. **McKinnon v. Wolfenden**, 78 Wis. 237, 239, 47 N. W. 436, 437.

A receiver is an officer of the court, invested with the custody of the property that comes to his hands for the benefit of the party who may ultimately appear to be entitled to it. **Lansing v. Manton** (U. S.) 14 Fed. Cas. 1129.

A receiver is an officer of the court from which he holds his appointment. He is selected by the court in the exercise of its sound judicial discretion, regard being had to the nature of the services required in each case, the competency of the person to be appointed, and the responsibilities he must as-

sume. A receiver is entitled to reasonable compensation, which is a matter exclusively for the determination of the court. *Lichtenstein v. Dial*, 68 Miss. 54, 58, 8 South. 272.

A receiver is a ministerial officer of the court appointing him. His possession is not adverse to either party, but is for the benefit of all the parties to a suit according to their respective rights; and it is his duty to prevent the destruction of the corporate assets. *Chicago & S. E. R. Co. v. Kenney*, 68 N. E. 20, 29 Ind. App. 506.

A receiver is an officer of the court, and his possession of property is the possession of the court. A receiver cannot commence any action for the recovery of property without an order of the court. *Battle v. Davis*, 66 N. C. 252, 255.

A receiver is appointed upon principles of justice for the benefit of all concerned. He is virtually a representative of the court, and of all parties interested in the litigation wherein he is appointed. He is required to take possession of property as directed, because it is deemed more for the interests of justice that he should do so than that the property should be in the possession of either of the parties to the litigation. Money or property in his hands is in custodia legis. He has only such power and authority as are given him by the court, and must not exceed the prescribed limits. *Fallon v. Egberts Woolen Mill Co.*, 64 N. Y. Supp. 466, 468, 31 Misc. Rep. 523.

The office of receiver had its origin in equity practice, and to that practice we must look to ascertain the rights and duties of receivers, when not prescribed by statute. The order appointing a receiver does not affect the title to property. He is but an officer of the court, and subject to its orders. He holds the property merely as a custodian, and cannot sue to recover any of it in possession of a third party who claims to be the owner, or on any chose in action without an order of the court authorizing such suit, and then only in the name of the legal owners. *State ex rel. Fichtenkamm v. Gambs*, 68 Mo. 289, 297; *Wilder v. City of New Orleans* (U. S.) 87 Fed. 843, 848, 31 C. C. A. 249.

The very name of receiver implies a person deriving his authority from the court of chancery; for a receiver is one of the well-known agents of that tribunal, with his powers, immunities, and responsibilities entirely defined. He is answerable to the court for each of his acts, and is completely under its supervision and control. *Delaware Bay & C. M. R. Co. v. Markley*, 16 Atl. 436, 437, 45 N. J. Eq. (18 Stew.) 139.

A receiver is an officer or agent of the court, essential to its own efficiency for the protection of things in its charge, to keep

them under its control until the expenses and allowances for execution are paid or secured to be paid. *Makeel v. Hotchkiss*, 60 N. E. 524, 526, 190 Ill. 311, 83 Am. St. Rep. 131.

A receiver is the hand of the court, of which he is an officer. His appointment determines no rights, does not affect the title of the property in any way, and his holding is the holding of the court. A party on whose application a receiver is appointed has, therefore, no greater interest in the proceedings of such receivership than he would have had if the receiver had been appointed on the application of any one of the other litigants in the action. *Jackson v. King*, 58 Pac. 1013, 9 Kan. App. 160.

The receiver is the officer of the court, appointed by it, to convert the property for the benefit of the persons ultimately entitled; and, for the purposes of paying out in the suit, the money in the receiver's hands must be treated as money in court. *Boice v. Conover*, 35 Atl. 402, 407, 54 N. J. Eq. 531.

A receiver is a person, standing indifferent between the parties, appointed by the court to receive and preserve the property or funds in litigation pending suit. He is an officer of the court, appointed for temporary purposes, and has no powers except those conferred on him by the order by which he is appointed, and such as are derived from the established practices of courts of equity. Property in his possession is in custodia legis; his possession being that of the court which appointed him. *Nevitt v. Woodburn*, 60 N. E. 500, 503, 190 Ill. 283; *Stockbridge v. Beckwith*, 33 Atl. 620, 6 Del. Ch. 72; *Wilder v. New Orleans* (U. S.) 87 Fed. 843, 848, 31 C. C. A. 249; *Galtner v. Stockbridge*, 9 Atl. 632, 633, 67 Md. 222.

A receiver is an officer of the court, authorized to take possession of property or money under orders of the court, and represents the court and must act under its authority, and no suit can be prosecuted against a receiver in any other forum without leave of the court under whose order he is acting. A receiver is not appointed for the benefit of either of the parties, but of all concerned, and all money or property in his hands is in custodia legis. *Kennedy v. Indianapolis, C. & L. R. Co.* (U. S.) 3 Fed. 97, 103.

A receiver derives his authority from the act of the court appointing him, and not from an act of the parties at whose suggestion he is appointed; and the utmost effect of his appointment is to put the property from that time into his custody as an officer of the court, for the benefit of the party ultimately proved to be entitled, but not to change the title or even the right of possession in the property. *Union Bank of Chicago v. Kansas City Bank*, 136 U. S. 223,

10 Sup. Ct. 1013, 34 L. Ed. 341. By the appointment of a receiver title to the property is not disturbed, and where a receiver takes possession of a party's property as that of another, the remedy is by intervention on petition in the federal court. *Southern Granite Co. v. Wadsworth*, 22 South. 157, 158, 115 Ala. 570.

A receiver is an officer of the court, appointed for the benefit of all parties who may establish rights in the property; the funds in his hands being in custodia legis for all who can make out title to it. Though the bond of a receiver is conditioned on his paying certain named creditors, the funds in his possession are in the custody of the law for the benefit of all who had title to it, and he will be required to account for any surplus after paying the named creditors. *Ross v. Williams*, 58 Tenn. (11 Heisk.) 410, 412.

The office of receiver is "purely ministerial and temporary in its nature." 2 Bouv. Law Dict. 419. The receiver appointed is the officer and representative of the court, subject to its orders, accountable in such manner and to such persons as the court may direct; and, having in his character of receiver no personal interest but that arising out of his responsibility for the correct and faithful discharge of his duties, it is of no consequence to him how, when, or to whom the court may dispose of the funds in his hands, provided the order or decree of the court furnishes to him a sufficient protection. *Beverly v. Brooke* (Va.) 4 Grat. 208. "He is an indifferent person between the parties, appointed by the court to receive the rents, issues, or profits of land or other things in question in the court pending the suit. \* \* \* His appointment is provisional only. It is the court itself which has the care of the property in dispute. The receiver is but the creature of such court. \* \* \* Courts of equity have the same power to remove as to appoint. The decision of a court removing a receiver, being a matter of sound discretion, is not ordinarily reviewable in an appellate court." The purpose of their temporary appointment having been answered, and the necessity for the continuation of their offices as receivers in the cause no longer existing, in the judgment of the court who appointed them, they become functus officio. Their mission ended, they cease to exist. "When necessity for the office ceases to exist, the office itself must terminate, and the receiver be discharged; and when a court of equity has temporarily taken possession of property by the hands of its receiver, until the proper person can be determined who is entitled to take it, the courts will not continue such possession after the necessity ceases." *Bayly v. Gaines* (Va.) 2 S. E. 739, 741, 742 (quoting *Edw. Rec. 2, 3; Kerr, Rec. 2; High, Rec. 824, 825, 832*).

A receiver has been often termed the arm or hand of the court, by which it seizes property in controversy and preserves it for the benefit of whosoever shall become entitled thereto. The primary object is the preservation of the property, and every person undertaking the duties of a receivership must be assumed to appreciate the main and controlling purpose to be subserved in his selection. The property, though temporarily in the keeping of the court, is sheltered by the same rights of ownership as before seized. It does not sit as a bandit dividing booty, as was remarked by the Court of Appeals of New York, in *Attorney General v. North America Life Ins. Co.*, 91 N. Y. 57. *State Cent. Sav. Bank v. Fanning Ball-Bearing Chain Co.*, 92 N. W. 712, 713, 118 Iowa, 698.

As agent, see "Agent."

#### As legal or personal representative.

See "Legal Representative"; "Personal Representative."

As officer, see "Officer."

#### As owner or proprietor.

See "Owner"; "Proprietor."

#### As representative of creditors.

A receiver is the embodiment of the creditors. He stands as agent for them, and when he challenges the validity of a mortgage given by the debtor he does so in the character of a creditor, having in virtue of his receivership debts fastened upon the mortgaged property. *Wimpfheimer v. Perrine* (N. J.) 50 Atl. 356, 357.

A receiver of a corporation is to be regarded as the representative, not only of the corporation having power of asserting its rights, taking its title and subject to its liabilities, but occupies a still broader position; for he represents, not only the corporation, but its creditors also, and under his duties as the representative of the latter class he is invested with powers and may do acts that could not be done by a mere representative of the corporation. *Peabody v. New England Waterworks Co.*, 56 N. E. 957, 958, 184 Ill. 625, 75 Am. St. Rep. 185.

A receiver of an insolvent corporation is a representative both of the creditors of the corporation and of the shareholders. He is uniformly regarded as an officer of the court, exercising his function in the interest of neither plaintiff nor defendant, but for the common benefit of the parties in interest. *Patrick v. Eells*, 2 Pac. 116, 121, 30 Kan. 680.

#### As representative of property.

A receiver is merely the legal representative of the property placed in his hands as such. In determining his liability the court will only determine the liability of the prop-

erty. Nor is it material whether the liability existed before or has accrued since his appointment. A pre-existing debt against the owner of the property is as much a liability against the receiver as is a debt contracted by him for the benefit of the property. Nor does it make any difference in what court the question of liability arises. *Peoples v. Yoakum*, 25 S. W. 1001, 1002, 7 Tex. Civ. App. 85.

#### **As trustee.**

See "Trustee."

As trustee of an express trust, see "Express Trust."

#### **Assignee.**

The word "receiver," as used in Act March 8, 1897, p. 284, § 10, authorizing receivers of insolvent foreign building and loan associations to bring all suits necessary to wind up their affairs, applies to and authorizes assignees of such corporations to exercise the same powers. *Columbia Finance & Trust Co. v. Tharp*, 56 N. E. 265, 266, 24 Ind. App. 82.

#### **Pledgee.**

Under Ky. St. § 2487, giving to employes and materialmen a lien upon the property or effects of any owner or operator of any rolling mill, foundry, or other manufacturing establishment, when such property or effects shall be assigned for the benefit of creditors or come into the hands of a receiver of a court, one to whom lumber was pledged to secure advances made under an agreement that he might sell the lumber and account for the proceeds was not a receiver of court. *Bogard v. Tyler's Adm'r* (Ky.) 55 S. W. 709, 710.

#### **Receiver by contract.**

A receiver provided for in a mortgage or trust deed is not a technical receiver to be appointed by a court. *Rice v. St. Paul & P. R. Co.*, 24 Minn. 464, 478.

#### **Receiver in bankruptcy.**

"Receiver appointed by the court," as used in Code Civ. Proc. § 791, entitling to a preference on the calendar an action by a receiver appointed by the court or trustees in bankruptcy, does not include a receiver in bankruptcy, and therefore an action by him is not entitled to a place on the preferred calendar. *Hough v. Canfield*, 66 N. Y. Supp. 961, 962, 54 App. Div. 510.

#### **Receiver of railroad.**

A receiver of a railroad is appointed, not only for the preservation of the property in his hands, but to operate the railroad for the benefit of the public. The operation of the road is not only required in the discharge of the duty owing to the public, but is neces-

sary for the preservation of the property itself, and the receiver may fulfill the contracts of the corporation so far as they serve these purposes, but may not pay its debts or fulfill its contracts, which are burdensome or tend to diminish the value of the property as incumbrances upon the property. He has no power, by the adoption of a contract by which the company agreed to retain in its employ one injured in its service in settlement of a claim for damages for the injury, to bind himself or the property for the payment of damages for a breach of the contract on the discharge of the employé; the contract being merely an unsecured obligation of the company, which he has no authority to make a preferred claim. *Whightsel v. Felton* (U. S.) 95 Fed. 923, 925.

#### **RECEIVER PENDENTE LITE.**

A receiver pendente lite is a person appointed to take charge of the fund or property to which the receivership extends while the case remains undecided. The title to the property is not changed by the appointment, but only the right of possession. The title remains in those in whom it was vested when the appointment was made. *Keeney v. Home Ins. Co.*, 71 N. Y. 396, 401, 27 Am. Rep. 60. The object of the appointment is to secure the property pending the litigation, so that it may be appropriated in accordance with the rights of the parties as they may be determined by the judgment of the action. *Heffron v. Gage*, 36 N. E. 569, 572, 149 Ill. 182; *Stokes v. Hoffman House*, 60 N. E. 667, 669, 167 N. Y. 554, 53 L. R. A. 870 (citing *United States Trust Co. v. New York, W. S. & B. R. Co.*, 101 N. Y. 483, 5 N. E. 316; *Decker v. Gardner*, 124 N. Y. 334, 26 N. E. 814, 11 L. R. A. 480).

#### **RECEIVER OF PUBLIC MONEY.**

The term "receiver of public money," in Gen. St. c. 257, § 7, providing for the punishment of any public officer, being a receiver of public money, may include a selectman. *State v. Boody*, 53 N. H. 610, 611.

#### **RECEIVER OF STOLEN PROPERTY.**

A receiver of stolen property is defined to be one who receives into his possession or under his control, with felonious intent, any stolen goods or chattels, with knowledge that they have been stolen. *Watts v. People*, 68 N. E. 563, 565, 204 Ill. 233.

#### **RECEIVER OF TAXES.**

The words "receiver of taxes and county treasurer," in Rev. Code, p. 89, relating to the office and powers of the receiver of taxes and county treasurer, do not describe two dis-

tinct officers, but constitute the proper legal title of the person occupying one office. *State v. Lynn* (Del.) 51 Atl. 878, 884, 3 Penne-will, 316.

### RECEIVER'S SALE.

As judicial sale, see "Judicial Sale."

### RECENT.

In reference to the presumption arising from recent possession of stolen goods after a larceny has been committed, "recent" is a relative term, and a time which might be construed recent under one state of facts would not be so under another and different state of facts. *Jenkins v. State*, 21 N. W. 232, 238, 62 Wis. 49.

"Recent," as used in connection with a presumption arising from the possession of stolen goods, is a term not capable of exact or precise definition, and varies within a certain range with the conditions of each particular case, and is a question of fact usually for the jury. *White v. State*, 72 Ala. 195, 200.

Possession of property alleged to have been stolen three months after the theft will not be deemed a recent possession. *Rex v. Adams*, 3 Car. & P. 600.

### RECENTLY.

"Recently," is a relative term, and, as used in an application for a continuance, stating that an absent witness had only recently removed to another county, conveys no definite meaning. *Crawford v. Lozano* (Tex.) 48 S. W. 538.

### RECESS.

Adjournment distinguished, see "Adjourn—Adjournment."

"Recesses," as used in Cr. Code, § 74, providing that adjournments from day to day or from time to time "are to be construed as recesses in the sessions, and shall not prevent the court from sitting at any time," mean the times in which the court is not actually engaged in business. In *re Gannon*, 11 Pac. 240, 242, 69 Cal. 541.

The word "recess," when applied to a legislative body, means a temporary dismissal, and not an adjournment *sine die*, and means only the intermission between sittings of the same body at its regular or adjourned session, and not to the interval between the final adjournment of one body and the convening of another at the next regular session. *Tipton v. Parker*, 74 S. W. 298, 71 Ark. 193.

### RECITE.

Reciting a statute, in pleadings, "is quoting or stating its contents." *Hart v. Baltimore & O. R. Co.*, 6 W. Va. 336, 348.

The names of the parties to an execution must be given in a sheriff's deed for property sold on execution; 1 Wag. St. p. 612, declaring that the officer selling any real estate shall make to the purchaser a deed "reciting the names of the parties to the execution." *Willhite v. Wilhite*, 53 Mo. 71, 73.

#### As requiring copy.

"Recite," as used in Comp. Laws, p. 199, § 450, requiring that a sheriff's deed "recite the execution, or the substance thereof, and the names of the parties, and the amounts and date of term of rendition of the judgment," does not mean to copy or to repeat verbatim, but only to state the substance of the execution. *Ogden v. Walters*, 12 Kan. 282, 290.

*Hurd's Rev. St.* p. 270, art. 9, § 22, requiring a petition by a city for assessment of the stock of a street improvement to recite the ordinance for the proposed improvements, is complied with by alleging that on a certain day the city council passed an ordinance, a certified copy of which was thereto annexed; the word "recite" not meaning that it was necessary that a copy of the ordinance set out in such petition should have attached a certificate of the clerk that such ordinance was passed. *Gage v. City of Chicago*, 44 N. E. 729, 730, 162 Ill. 313.

### RECITAL.

See "Particular Recital."

A recital is the setting down or report of something done before. *Shep. Touch. c. 5*, "Exposition of Deeds," p. 76, § 3. In *Bath & Mountague's Case*, Ch. Cas. pt. 3, p. 101, it is said: "The reciting part of a deed is not at all a necessary part, either in law or equity. It may be made use of to explain a doubt of the intention and meaning of the parties, but it hath no effect or operation." *Clark v. Post*, 113 N. Y. 17, 25, 20 N. E. 573, 575.

#### In deed.

A recital in a deed is a notice to a purchaser of the fact recited. *Jennings v. Bloomfield*, 49 Atl. 135, 136, 199 Pa. 638.

A recital in a deed does not necessarily imply a covenant, and whether it is so or not depends in such case upon what is to be collected as the intention of the parties from the whole instrument. A recital is but introductory, and will not be drawn down into the agreement when it appears from the other portions of the contract that such



was not the intention of the parties. *Monks v. Provident Inst. for Sav. in Jersey City*, 44 Atl. 968, 969, 64 N. J. Law, 86.

#### In estoppel.

The term "recital," as used in the law of estoppel, applies to all material statements of fact contained in the instrument. A particular recital states some fact definitely. Particular and definite recitals are conclusive evidence of the material facts stated. *Kellogg v. Dennis*, 77 N. Y. Supp. 172, 175, 38 Misc. Rep. 82.

### RECIPROCAL DEMAND.

Code, § 95, providing that, in an action brought to recover a balance due on a mutual and current account, where there have been "reciprocal demands" between the parties, the cause of action shall be deemed to have accrued from the time of the last item proved in the account on either side, means no more than is meant by the phrase "mutual accounts." It is used in the Code simply to settle definitely that there must be an account of mutual dealings, not an account of items only on one side, or an account of items on one side on which there had been simple payments within six years. It may be admitted that, to constitute a mutual account of reciprocal demands, the defendant, when sued, must have an account against the plaintiff which he can interpose as a set-off to the extent thereof. It is not needful, however, that each party should have an independent cause of action against the other. The cause of action on such an account is really in law for the balance due, and that party is only debtor against whom the balance is found. *Green v. Disbrow*, 79 N. Y. 1, 7, 35 Am. Rep. 496; *Millet v. Bradbury*, 41 Pac. 865, 866, 109 Cal. 170.

### RECIPROCAL WILL.

The term "reciprocal will" is used to designate wills made by two or more persons, in which they make reciprocal testamentary provisions in favor of each other, whether they unite in one will or each executes a separate one. Their validity does not seem to be doubted after the death of the respective testators; but the extent of the power of revocation in the survivor after the death of one or more of the testators is a question still in controversy and upon which different conclusions have been reached. In *re Cawley's Estate*, 20 Atl. 567, 568, 136 Pa. 628, 10 L. R. A. 93.

### RECKLESS — RECKLESSLY—RECKLESSNESS.

See "Careless."

"Recklessness" is synonymous with "heedlessness" and "indifference," as, for example,

an engineer who drives his locomotive across the streets of a large city, with indifference as to whether a party may be injured or not, is acting recklessly. *Lake Shore & M. S. R. Co. v. Bodemer*, 29 N. E. 692, 697, 139 Ill. 596, 32 Am. St. Rep. 218.

The word "reckless," as applied to the case of a person injuring another, is somewhat indefinite in its meaning. It may apply to a case in which the defendant sees the danger of the plaintiff in time to prevent his injury and takes no steps to prevent it. *McDonald v. International & G. N. Ry. Co.*, 22 S. W. 939, 945, 86 Tex. 1, 40 Am. St. Rep. 803.

"Recklessness," in a moral sense, means a certain state of consciousness with reference to the consequences of one's acts. No matter whether defined as indifference to what those consequences may be, or as a failure to consider their nature or probability as fully as the party might and ought to have done, it is understood to depend on the actual condition of the individual's mind with regard to consequences, as distinguished from mere knowledge of present or past facts or circumstances from which some one, or everybody else, might be led to anticipate or apprehend them if the supposed act were done. *Commonwealth v. Pierce*, 138 Mass. 165, 175, 52 Am. Rep. 264.

#### As intentional.

The word "reckless" has a wide range of meaning. In its milder sense it may imply mere inattention to duty, thoughtlessness, indifference, carelessness, or negligence; or it may import a heedless disregard of obvious consequences. (Webst. Dict.) The word "reckless" does not necessarily import that the act to which it refers is done intentionally or purposely. In charging that an act was done recklessly, no more is necessarily implied than such mere negligence, thoughtlessness, or inadvertence as could not be regarded as the equivalent of intentional wrong. *Kansas City, M. & B. R. Co. v. Crocker*, 11 South. 262, 269, 95 Ala. 412.

"Reckless" is not equivalent to "intentional." *Richmond & D. R. Co. v. Farmer*, 12 South. 86, 88, 97 Ala. 141; *Johnson v. State*, 9 South. 539, 540, 92 Ala. 82; *Harrison v. State*, 37 Ala. 154, 156; *Cleveland, C., C. & St. L. R. Co. v. Tartt* (U. S.) 64 Fed. 823, 825, 12 C. C. A. 618.

#### Negligence distinguished.

"Recklessness" is an indifference whether wrong is done or not; an indifference to the rights of others. In popular use "recklessness" is a stronger term than mere or ordinary negligence. *Kansas Pac. Ry. Co. v. Whipple*, 18 Pac. 730, 735, 39 Kan. 531.

The use of the word "reckless," in connection with averments of facts to which it refers and explains, may imply more than

mere heedlessness or negligence. *Louisville & N. R. Co. v. Anchors*, 22 South. 279, 281, 114 Ala. 492, 62 Am. St. Rep. 116.

"Reckless carelessness," as used in connection with an action for negligence, means reckless indifference, not mere negligence or inadvertence. *Louisville & N. R. Co. v. Orr*, 26 South. 35, 41, 121 Ala. 489.

The word "recklessly," when used conjunctively with "wantonly," means something more than "negligently," and assignments of demurrer on the idea that the word "recklessly," used conjunctively with "wantonly," in a complaint for personal injuries, means "negligently," are without merit. *Highland Ave. & B. R. Co. v. Robinsor*, 28 South. 28, 30, 125 Ala. 483.

#### **As negligence.**

Reckless means nothing more than negligent. *Cleveland, C., C. & St. L. R. Co. v. Tartt* (U. S.) 64 Fed. 823, 825, 12 C. C. A. 618.

The word "reckless," when applied to negligence, per se has no legal significance which imports other than simple negligence or a want of due care. *Stringer v. Alabama Mineral R. Co.*, 13 South. 75, 80, 99 Ala. 397; *Alabama G. S. R. Co. v. Hall*, 17 South. 176, 179, 105 Ala. 599.

The use of the word "reckless," in connection with averments of facts to which it refers and explains, may imply more than mere heedlessness or negligence. *Louisville & N. R. Co. v. Anchors*, 22 South. 279, 281, 114 Ala. 492, 62 Am. St. Rep. 116.

"Reckless," as used in a complaint in an action against a railroad company for the reckless killing of live stock, should be construed to mean no more than a want of that degree of care which the law required of the railroad's employes in the operation of the train which collided with the cattle. *Louisville & N. R. Co. v. Barker*, 11 South. 453, 454, 96 Ala. 435.

"Reckless conduct," as used in an instruction in an action for personal injuries that plaintiff must prove, by a preponderance of the evidence, that the conductor or brakeman of the train injuring plaintiff were guilty of reckless conduct, means more than mere negligence, and hence is not erroneous, as authorizing a recovery for mere negligence in removing a trespasser. *Union Pac. Ry. Co. v. Mitchell*, 43 Pac. 244, 246, 56 Kan. 324.

"Recklessly," as used in a complaint in an action for personal injuries, alleging that the act causing the injuries was recklessly done, means no more than negligently. *Highland Ave. & B. R. Co. v. Sampson*, 20 South. 566, 569, 112 Ala. 425.

Recklessly is a word having a wide range of meaning. In its milder sense, it

may imply mere inattention to duty, thoughtlessness, indifference, carelessness, or negligence; or it imports a heedless disregard of obvious consequences. A charge that a certain act was recklessly and negligently done charges no more than simple negligence, so that, in an action for personal injuries, where recklessness is charged in general terms, a plea of contributory negligence is not regarded as presenting no defense, unless it appears from other averments that the recklessness charged amounted to more than mere negligence. *Southern Ry. Co. v. Bush*, 26 South. 168, 170, 122 Ala. 470.

"Recklessness" is sometimes used as a synonym for "carelessness" or "negligence," as where the court in a damage suit instructed that, if plaintiff was injured through defendant's negligence, defendant was liable, unless plaintiff's conduct in the premises amounted to an obvious act of recklessness. Held that, as other portions of the instruction showed that the word "recklessness" was used as a synonym for "carelessness," the word "recklessness," as used, was not error. *Eddy v. Powell* (U. S.) 49 Fed. 814, 817, 1 C. C. A. 448.

The words "reckless" and "careless" do not impute willfulness or intention. They mean nothing more than simple negligence, and hence it is held that where a complaint in an action for injuries averred that the injuries occurred through the reckless, careless, and negligent acts of defendant in striking plaintiff with a pistol, which was discharged, and there was no allegation that the shooting was intentional, instructions authorizing a recovery on proof showing a willful and intentional shooting were erroneous. *Greathouse v. Croan* (Ind. T.) 76 S. W. 273-275.

Where a complaint charged that defendant recklessly and negligently ran his cars over a street intersection, the word "recklessly," as qualifying the act of defendant, meant negligence, and no more. *Highland Ave. & B. R. Co. v. Sampson*, 20 South. 566, 569, 112 Ala. 425.

#### **As wantonness.**

"Reckless" imports mere carelessness, heedlessness, or unmindfulness, and not wantonness or intention. *Richmond & D. R. Co. v. Farmer*, 12 South. 86, 88, 97 Ala. 141.

"Recklessly" signifies with a wanton disregard of all consequences, and hence of the violation of all rights. *Times Pub. Co. v. Carlisle* (U. S.) 94 Fed. 762, 773, 36 C. C. A. 475 (citing Cent. Dict.).

#### **As willfulness.**

"Reckless," as used in a complaint alleging that a deceased was killed by reason of defendant's "reckless" negligence, does not amount to a charge that the killing was will-

ful or intentional. *Cleveland, C. C. & St. L. R. Co. v. Tartt* (U. S.) 64 Fed. 823, 825, 12 C. C. A. 618.

The word "reckless," as used in characterizing the degree or kind of negligence, does not imply the same thing as willful or intentional, but means something less than willfulness and nothing more than negligence. *Cleveland, C. C. & St. L. R. Co. v. Tartt* (U. S.) 64 Fed. 823, 825, 12 C. C. A. 618.

"In *Harrison v. State*, 37 Ala. 154, we drew a distinction between the words 'willful' and 'reckless,' and held that recklessness did not necessarily imply willfulness. A grossly careless act may be characterized as reckless, and serious consequences may result from it, yet such consequences would not necessarily be willfully brought about. We simply asserted that the word 'reckless' is not the synonym of the statutory word 'willful,' and therefore, in a prosecution under Code 1886, § 1433, making it criminal to willfully interrupt religious meetings, etc., it is error to instruct that a conviction may be had if the disturbance was willfully or recklessly made." *Johnson v. State*, 9 South. 539, 540, 92 Ala. 82.

"Recklessly," when used conjunctively with "wantonly," always means more than "negligently." The two words, used together, never import less than such conscious disregard of and indifference to the probable consequences of the act to which they refer as is the legal equivalent of willful misconduct and intentional wrong. *Highland Ave. & B. R. Co. v. Robinson*, 28 South. 28, 30, 125 Ala. 483.

Recklessness does not necessarily imply willfulness. A grossly careless act may be characterized as reckless, and serious consequences may result therefrom, and yet such consequences would not necessarily be willfully brought about. *Dull v. Cleveland, C. C. & St. L. Ry. Co.*, 52 N. E. 1013, 1015, 21 Ind. App. 571.

The word "reckless" means heedless, careless, rash, or indifferent to consequences. One may be heedless, rash, or indifferent to results, without contemplating or intending those consequences. As a general rule there is a wide difference between intentional acts and those results which are the consequence of carelessness, and therefore it is erroneous, in an action under a statute making it criminal for any person to willfully disturb an assemblage of people, etc., to charge that defendant may be convicted if he disturbed such assemblage, either willfully or recklessly. *Harrison v. State*, 37 Ala. 154, 156.

Recklessness sometimes includes carelessness, but it is much more than carelessness, for it implies willfulness, and, when ap-

plied to characterize an act done to another person, is wantonness. To be reckless is to be utterly regardless of consequences. Recklessness, instead of being the want of ordinary care, is more nearly the want of any care. An instruction informing the jury that, unless plaintiff acted recklessly or heedlessly in walking on the defective sidewalk—that is, not with care and prudence that would be exercised by an ordinarily prudent person—then the jury could not find a verdict on ground of plaintiff's recklessness, was erroneous. *Plummer v. Kansas City*, 48 Mo. App. 482, 484.

## RECLUSION.

Reclusion means incarceration under a sentence to undergo an infamous punishment, including civil degradation. *Jurgens v. Ittmann*, 16 South. 952, 955, 47 La. Ann. 367.

The words "reclusion" and "seclusion" have quite different meaning. The former signifies an involuntary, the latter a voluntary, confinement. "Reclusion" is a legal word, a technical expression, to which a legal signification or meaning attaches. Legislation, jurisprudence, and commentators accord in expounding it as being a temporary, afflictive, and infamous punishment, consisting in being confined in a hard labor institution, and carrying civil degradation. *Phelps v. Reinach*, 38 La. Ann. 547, 551 (citing 2 Rep. Jour. du Palais, p. 83, verbo "Reclusion").

## RECOGNIZANCE.

See "Defective Recognizances."

A "recognizance" is an obligation of record. *United States v. Insley* (U. S.) 49 Fed. 776, 778; *Erwin v. United States* (U. S.) 37 Fed. 470, 489, 2 L. R. A. 229; *McMicken v. Commonwealth*, 58 Pa. (8 P. F. Smith) 213, 218; *Republica v. Le Caze* (Pa.) 1 Yeates, 55, 68.

An obligation of record, entered into before a court or officer duly authorized for that purpose, with condition to do some act required by law, is a recognizance. *Pace v. State*, 25 Miss. (3 Cushm.) 54; *State v. Walker*, 56 N. H. 176, 178; *State v. Dowd*, 43 N. H. 454, 455; *Gay v. State*, 7 Kan. 394, 402; *Commonwealth v. Emery* (Pa.) 2 Bin. 431, 435; *Irwin v. State*, 6 N. W. 370, 10 Neb. 325; *Banta v. People*, 53 Ill. 434, 436; *Lawton v. State*, 5 Tex. 270, 271; *Fahey v. People*, 46 Pac. 836, 838, 8 Colo. App. 553; *Comfort v. Kittle*, 46 N. W. 988, 989, 81 Iowa, 179. Its object is to secure the presence of defendant to perform or suffer the judgment of the court. *Crawford v. Vinton*, 62 N. W. 988, 989, 102 Mich. 83; *Warner v. Howard*, 121 Mass. 82, 84; *Vierling v. State*, 33 Ind. 218, 219; *State v. Grant*, 10 Minn. 39, 48

(Gil. 22, 30); *Wesley v. Scharpe*, 19 Pa. Super. Ct. 600, 604.

"A recognizance is an obligation of record, founded upon an acknowledgment of an existing indebtedness by the person to be bound." *State v. Wetherwax*, 12 Kan. 463, 465.

A recognizance is an undertaking entered into before a court of record, in session, by the defendant in a criminal action and his sureties, by which they bind themselves, respectively, in a sum fixed by the court, that the defendant will appear for trial before such court upon the accusation preferred against him. The undertaking of the parties in such case is not signed, but is made a matter of record in the court where the same is entered into. *Code Cr. Proc. Tex.* 1895, art. 304.

A recognizance is an obligation of record, and, when forfeiture is declared and entered by the court, it becomes an ordinary judgment. *Schultze v. State*, 43 Md. 295, 306.

A recognizance in a criminal case is a part of the proceedings in the exercise of a criminal jurisdiction, and is a matter of record. *State v. Murmann*, 28 S. W. 2, 3, 124 Mo. 502.

A recognizance is an undertaking, entered into before a court of record, in session, by the defendant to a criminal action and his sureties, by which they bind themselves, respectively, in a sum fixed by the court, that the defendant will appear for trial before such court upon the accusation preferred against him. *Wright v. State*, 3 S. W. 346, 22 Tex. App. 670.

A recognizance is an acknowledgment of a debt of record. It has many of the attributes of a judgment. It binds the lands of the cognizor, and an execution may be issued upon it as on a judgment. *People v. Van Eps* (N. Y.) 4 Wend. 387, 390.

The taking of a recognizance consists in making and attesting a memorandum of the acknowledgment of a debt due the state and of the conditions on which it is to be defeated. *State v. Houston*, 74 N. C. 549, 550.

A recognizance does not create a new debt, like a bond, but is an acknowledgment of a precedent debt. 2 Bl. Comm. 341. At common law recognizances were taken by the court or magistrate, stating to the bail the obligation entered into and its condition, to which they assent. *Gay v. State*, 7 Kan. 394, 402.

A recognizance is the voluntary act of the obligors, and when given in a criminal case assumes the existence of a valid commitment. *State v. Birchim*, 9 Nev. 95, 100.

A recognizance is an obligation of record, and, when entered into to secure a stay

of execution, it is a new and distinct agreement to pay on failure of the former debtor. *Jones v. Bomberger*, 97 Pa. 432, 436.

A recognizance is a statutory obligation, and its requisites are prescribed by the statute. In order to constitute it a legal obligation, it must be made in conformity with the law authorizing it to be entered into, at least in a substantial manner. A recognizance which fails to state which of the obligors is the principal and which are sureties, as required by *Code Cr. Proc.* art. 287, subd. 1, is insufficient. *Smith v. State*, 35 Tex. Cr. R. 9, 10, 29 S. W. 158.

Recognizances are of different descriptions, and they are entered into for different purposes. They are by our law entered into before courts of record, and constitute a part of their proceedings to be recorded, and before justices of the same courts, acting ministerially by virtue of authority conferred upon them by statute for that purpose. They are entered into before justices of the peace, when there are proceedings between parties pending before them; and when there are no such proceedings, in criminal cases a recognizance may be entered into before a justice of the peace, conditioned to keep the peace, or to appear before some court to answer to such matters as may be alleged against him, or to testify as a witness, or to enter and prosecute an appeal. They may also in such cases be entered into before courts of record, conditioned to appear before the same court from day to day, or at a day fixed by an adjournment of the same term, or at the next term. If the recognizances last named are not matters of record in the courts in which they are taken, they cannot become matters of record in any court. In civil proceedings, recognizances are entered into before justices of the peace, when they constitute a part of the proceedings before them, conditioned to enter and prosecute an appeal made to the district court, and, when no such proceedings are before them, conditioned to enter and prosecute an appeal made from the district court to this court. *Rev. St. c. 97, § 14*, as amended by Acts 1841, c. 171. They may be entered into before the district court, conditioned to enter and prosecute an appeal made to this court. *Longley v. Vose*, 27 Me. (14 Shep.) 179, 186, 187.

A recognizance is a substitute for the custody of the principal. A recognizance is an acknowledgment of a debt, and, when filed in a court of record, is a matter of record. *Gildersleeve v. People*, 9 N. Y. Leg. Obs. 18, 22.

A recognizance is not a judgment, but a contract of record, and when sanctioned, in its creation, by both magistrate and court having competent jurisdiction, it cannot be impeached. *State v. Dally*, 14 Ohio, 91, 97.

A recognizance is incident and attendant on a suit or prosecution taken to secure some duty previously existing. The duty must have existed by law, and, if the recognizance requires more than the law required, it is void. *State Treasurer v. Seaver*, 7 Vt. 480, 485.

A recognizance, taken by an examining magistrate and signed by all the obligors, is sufficient, and will bind all, whether their names are entered in the body of the bond or not, provided it complies with the law in other respects. *Holmes v. State*, 22 N. W. 232, 234, 17 Neb. 73.

In *Town of New Haven v. Rogers*, 32 Conn. 221, a recognizance is defined to be an obligation of record. In this it is not intended to assert that it is a record in the highest sense, as when we say of a record that it imports absolute verity. It is not the record of a judgment, not being the result or conclusion of a judicial proceeding. *Gregory v. Sherman*, 44 Conn. 466, 471.

The manner of taking a recognizance is that the magistrate repeats to the recognizers the obligation into which they are to enter and the condition of it, at large, and asks them if they are content. He makes a short memorandum, which it is not necessary that they should sign, although a custom has lately taken place for the recognizers to sign their names. From this short memorandum the magistrate may afterwards draw up the recognizance in full form and certify it to the court. This is the most regular and proper proceeding, but the general and almost universal practice is to certify the original, or a copy of the short memorandum. It is sufficient if these entries contain substance capable of being worked into form; and a memorandum which contained the sum in which the recognizers were bound, the nature of the condition, the title of the action, and the crime with which defendant was charged, was sufficient. *Commonwealth v. Emery* (Pa.) 2 Blin. 431, 434, 435.

In almost all cases of recognizance in criminal prosecutions, the most important matter has been the securing of the appearance of the party to answer at the term of the higher court which has jurisdiction of the offense complained of. But it is equally true that the recognizance to keep the peace has also been long known. *State v. Walker*, 66 N. H. 176, 178.

To make a good recognizance or obligation the form prescribed must be pursued. Therefore they may not be acknowledged before any other person besides the person appointed by the statute, and the substantial forms in the statute are to be observed. This is apparent from the significance of the words; it being an obligation of record entered into before a court or officer duly

authorized for that purpose. Hence, where a statute requires that a recognizance of special bail may be taken before any justice of the Supreme Court, or any circuit court, circuit court commissioner, or clerk of any court of record, a recognizance taken before a notary public is a mere nullity. *Clink v. Muskegon Circuit Judge*, 25 N. W. 175, 176, 58 Mich. 242.

#### Acknowledgment and enrollment.

Although enrollment is necessary to the validity of a recognizance, yet it binds the lands at common law from the time of the caption; for it is the acknowledgment that gives a recognizance its force as a record, and the enrollment is for the safe custody and the notifying of it to others. *State v. Dowd*, 43 N. H. 454, 455.

A recognizance is defined in Pasch. Dig. art. 2727, as "an undertaking entered into before the supreme or district court by the defendant to a criminal action and his sureties, by which they bind themselves respectively in a sum fixed by the court that the defendant will appear for trial before the proper court upon the accusation preferred against him." An instrument in the form prescribed for a recognizance, but which, instead of being taken in open court and made matter of record, was signed by the obligors, approved by the judge, and filed by the clerk, is not a recognizance. *Jones v. State*, 1 Tex. App. 485, 486.

A recognizance, which Bouvier defines as "an obligation of record entered into before a court or officer duly authorized for that purpose, with a condition to do some act required by law, which is therein specified," to be valid and binding, must be taken before a court or officer duly authorized, and if taken before one justice of the peace, where the statute requires two, it is void. *People v. Cook*, 68 Ill. App. 202, 203, 204.

#### As bond.

"Recognizance" is synonymous with "bond." *Cuddleback v. Parks* (Iowa) 2 G. Greene, 148, 150.

A recognizance is a bond, in the strict sense of the word, and therefore a corporation authorized by statute to become a surety on bonds may become a surety on a recognizance. *Lovejoy v. Isbell*, 40 Atl. 531, 532, 70 Conn. 557.

A recognizance issued on an application for an injunction is an obligation of record, acknowledged before some court or person duly authorized to take such acknowledgment, conditioned to do some particular act, and such recognizance is a bond. *Miller v. Cross*, 48 Atl. 213, 214, 73 Conn. 538.

Wherever the word "bail" is used with reference to the security given by the defendant in a criminal proceeding; it is intended to apply as well to recognizances as to bail bonds. Code Cr. Proc. Tex. 1895, art. 307.

Under Gen. St. 1902, § 821, providing that the authority signing a writ of error shall before its issue take good and sufficient bond, with surety, that the plaintiff in error shall prosecute his suit to effect, the certificate of the giving of the security is not defective because denominating such security a "recognizance," instead of a "bond"; it being held that a recognizance is a bond within the meaning of the statute. *Vincent v. Mutual Reserve Fund Life Ass'n*, 55 Atl. 177, 178, 75 Conn. 650.

#### **Bond distinguished.**

The only material respect in which a recognizance differs from a bond is that an ordinary bond is the creation of an original debt or an obligation *de novo*, while a recognizance is the acknowledgment of a former debt of record. *Lawton v. State*, 5 Tex. 270, 271; *Irwin v. State*, 6 N. W. 370, 10 Neb. 325.

A recognizance differs from a bond in this: that while the latter, which is attested by the signature and seal of the obligor, creates a fresh or new obligation, the former is an acknowledgment or record of an already existing debt. But the principal difference lies in the fact that a recognizance is a matter of record in the nature of a conditional judgment, and is proceeded upon by *scire facias* or summons. *Fahey v. People*, 46 Pac. 836, 838, 8 Colo. App. 553; *State v. Crippen*, 1 Ohio St. 399, 401; *People v. Barrett*, 67 N. E. 23, 27, 202 Ill. 287, 63 L. R. A. 82, 95 Am. St. Rep. 230.

A recognizance is more than an ordinary bond. It can be treated and enforced as a judgment, and its name, "recognizance," that is to say, acknowledgment, shows the importance of the acknowledgment before a proper officer. *Heyward v. United States* (U. S.) 37 Fed. 764, 765.

There is a difference between a recognizance and a bond. Webster says: "A recognizance differs from a bond, being witnessed by the record only, and not by the party's seal." He defines a bond to be, in law, a writing under seal, by which a person binds himself, his heirs, executors, and administrators. It is questionable whether authority to require a recognizance confers power to require a bond. *Comfort v. Kittle*, 46 N. W. 988, 989, 81 Iowa, 179.

The principal difference between a bail bond and a recognizance lies in the fact that a recognizance is a matter of record in the nature of a conditional judgment, and is proceeded upon by *scire facias*, while a

bond is but an evidence of debt, for the recovery of which an action must be brought. A bail bond is taken out of court in vacation, and a recognizance is taken in open court, in which the cognizors confessed judgment, to be levied on their property in case the principal makes default in his appearance. *Cole v. Warner*, 23 S. W. 110, 111, 93 Tenn. (9 Pickle) 155.

There are two methods of taking bail, by recognizance and by bond. In some respects a recognizance is very similar to a bond. It is defined to be an obligation of record, which a man enters into before some court of record, or magistrate duly authorized, binding himself under penalty to do some particular act. A bond, or, as it is commonly called, a bail bond, is also an obligation, but under seal, signed by the party giving the same, with one or more sureties, under a penalty conditioned to do some particular act. The chief distinction between the two methods of bailing it that the former is an acknowledgment on record of a debt already due, while the latter is a creation of a new debt not of record. A law providing for a bail bond in criminal cases is different from a law providing for a recognizance in such cases, but is neither repugnant to nor inconsistent with it, but is merely cumulative. *Swan v. United States*, 9 Pac. 931, 935, 936, 3 Wyo. 151.

#### **As a conditional judgment.**

A recognizance is a debt of record, and is of the nature of a conditional judgment, which the recorded default makes absolute, subject only to such matters of legal avoidance as may be shown by plea, or such matters of relief as may induce the court to remit or mitigate the forfeiture. *State v. Warren*, 17 Tex. 283, 288.

At common law it was essential to the validity of a recognizance that it be entered into before the court or officer authorized to take the same. It was not signed, but was simply spread upon the record; and the parties sought to be charged thereby were informed as to its terms and conditions, to which they orally assented, and the record was in like manner made of that fact. This constituted it an obligation of record, and it amounted in reality to a conditional judgment. *Kansas City v. Fagan*, 46 Pac. 1009, 1010, 4 Kan. App. 796.

A debt of record in the nature of a conditional judgment, with the recorded default, renders it an absolute judgment, subject only to such matters of legal avoidance as may be shown by plea, or such matters of relief as may induce the court to remit or mitigate the forfeiture. *United States v. Winstead* (U. S.) 12 Fed. 50, 51.

A recognizance is a matter of record. It is in the nature of a judgment, and the

process upon it, whether *scire facias* or summons, is for the purpose of carrying it into execution, and is rather judicial than original. It is no further to be reckoned an original suit than that the defendant has a right to plead to it. It is founded in a recognizance, and must be considered as flowing from it and partaking of its nature, and when final judgment shall be given the whole is to be taken as one record. Under Act Cong. Sept. 24, 1789, § 12, providing that if a suit be commenced in any state court against an alien, etc., and the matter in dispute exceed the sum or value of \$500, exclusive of costs, on a petition of defendant and a tender of bail to appear in the Circuit Court, etc., it shall be the duty of the state court to accept the surety and proceed no further in the case, etc., an action on a recognizance for good behavior is not removable to a Circuit Court on the ground that the defendant is an alien, as the jurisdiction of the Circuit Court is confined to actions of a civil nature against aliens, and does not extend to those of a criminal nature. The recognizance was taken to prevent criminal action against the defendant for violation of the peace, order, and tranquillity of society, and it is evidently of a criminal nature. *Respublica v. Cobbet*, 3 U. S. (3 Dall.) 467, 475, 1 L. Ed. 683.

**As contract or obligation.**

See "Contract"; "Obligation."

**As a debt.**

See "Debt."

**Judgment nisi distinguished.**

A recognizance duly entered into is a debt of record, and the object of a *scire facias* is to notify the cognizor to show cause why the cognizee should not have execution. It is in the nature of a conditional judgment, and a recorded default makes it absolute, subject only to such matters of legal avoidance as may be shown by plea, or such matters of relief as may induce the court to remit or mitigate the forfeiture. On the other hand, a judgment nisi is one that is to be valid unless something else should be done within a given time to defeat it. When a witness is duly summoned to appear at court, and fails to do so, a judgment nisi may be entered for the penalty imposed by law for such failure, and upon being served with a *scire facias* he may show cause at a future day why the judgment nisi should not be made absolute. Therefore the entry of a judgment nisi upon a forfeited recognizance is irregular. *United States v. Winstead* (U. S.) 12 Fed. 50, 51.

**As existing till judgment.**

The recognizance for a prisoner's appearance is an inseparable part of the proceedings

against him, and is a means in the hands of the court to bring him in. It cannot cease to be a part of the case until there is a final judgment in the county court. Before that time the judgment of forfeiture may be stricken off by the production of the accused by the surety, or the court may cancel the bonds if the circumstances of the case should require such action. *State v. Dwyer*, 39 Atl. 629, 630, 70 Vt. 96.

**Memorandum for costs.**

"Recognizance," as used in Rev. St. § 2590, providing that no attorney practicing in the state shall be taken as bail or security on an "undertaking, bond or recognizance," does not include a memorandum on a justice's docket, required by Rev. St. §§ 3782, 3783, to be signed by sureties for costs in an action. *Stark v. Small*, 39 N. W. 359, 72 Wis. 215.

**As process or record.**

See "Process"; "Record."

**RECOGNIZE.**

The word "recognize," according to the best lexicographers, signifies to admit; to acknowledge something existing before. *Leak v. Bear*, 80 N. C. 271, 273.

**RECOGNITION OF BELLIGERENCY.**

Recognition of belligerency is an accordance by a foreign government of belligerent rights to another mass or body of people engaged in civil war, by which such people are granted the rights of civilized warfare and assume the burdens thereof. The recognition of belligerency may be express, as by proclamation; or implied, by acts of war, such as blockade; or tacit, by acquiescence in the exercise of belligerent rights. A refusal to acquiesce in the decree of a foreign state closing its own ports to commerce by a municipal decree, such ports being in possession of armed rebels, unless such decree were also supported by an effective blockade, is a recognition by implication of a state of war and of mutual belligerent rights sufficient to prevent subsequent condemnation of a rebel vessel as a prize. *United States v. The Ambrose Light* (U. S.) 25 Fed. 408, 412.

**RECOGNIZING.**

The act of recognizing, in order to give to a party an appeal from the judgment of a justice of the peace in a civil action, is performed by assenting to the words of the magistrate to the effect that the sureties acknowledge themselves to be indebted to the other party in a specified sum, to be paid if the party appealing fails to enter and prosecute his appeal. A brief minute of the

transaction is entered on the record, in order that a more full memorandum may be prepared when it is wanted. This memorandum is not itself the recognizance, although it is not infrequently so called. *Martin v. Campbell*, 120 Mass. 126, 128.

## RECOLLECT.

An affirmation in an answer that the defendant does not recollect having done an act means that he does not remember having done it, and is not tantamount to a direct and unequivocal denial, nor to a declaration that he does not believe he did it. *Talbot v. Seabee's Heirs*, 31 Ky. (1 Dana) 56.

## RECOLLECTION.

Discovery distinguished, see "Discovery."

## RECOMMENCE.

"Recommend," as used in an agreement to surrender a note without payment if a person should within a certain time recommence the baking or selling of bread at a certain place, in the best lexicography as well as in common conversation, is considered as synonymous with the expression "begin anew"; and, preserving the order of the ideas specified, the word is of the same signification as the term "again begin." *Lines v. Flag*, 4 Conn. 581, 587.

## RECOMMEND.

"Recommended," as used in a city charter providing that the board of docks, after receiving notice of an application for land under water by a riparian owner, shall determine whether the granting of the same will conflict with the rights of the city, or be otherwise injurious to the public interest of the city, and report its conclusions to the commissioners of the land office, who shall insert such terms and conditions in the grant "recommended" by the board of docks as will protect the public interests of the city in respect to navigation and commerce, does not require absolutely that such terms and conditions be inserted in the grant. Webster says: "To recommend is to commend to the favorable notice of another; to commit to another's care, confidence, or acceptance with favoring representations; to put in a favorable light before any one; to bestow commendation on." *People v. Woodruff*, 60 N. E. 28, 30, 166 N. Y. 453.

"Recommend," as used in a verdict declaring that the jury find defendant guilty and recommend his sentence to imprisonment for 20 years, etc., should be construed as a sufficient declaration of the exercise of

discretion by the jury, in fixing the period of imprisonment, to authorize judgment on the verdict. *Lewis v. State*, 51 Ala. 1, 4.

## In will.

"Recommend," as used in a will, where testator makes an absolute gift of property, recommending it to be used in a certain way, is sufficient to raise a trust, where the subject and object of the trust are sufficiently certain. *Major v. Herndon*, 78 Ky. 123, 129; *Malim v. Keighley*, 2 Ves. Jr. 333, 335.

"Recommend," as used in a will giving property to testator's nephew and reciting that I "recommend my nephew to leave the property, after his own death and the death of his wife, to his son and his children or descendants, and in default of such to Harvard College," should be construed only as advice, and not as obligatory. In re *Whitcomb's Estate*, 24 Pac. 1028, 86 Cal. 265. See, also, *Eberhardt v. Perolin*, 48 N. J. Eq. (3 Dick.) 592, 23 Atl. 501.

## RECOMMENDATION.

See "Letter of Recommendation."

"Recommendation," as used in Act March 6, 1877, as amended by Act March 5, 1879, prohibiting the sale of vinous or alcoholic liquors, except for medical, chemical, or sacramental purposes, on a prescription or recommendation of a graduated physician, or a regular practitioner of medicine, who has taken the oath prescribed, is substantially the same as prescription. *Thompson v. State*, 37 Ark. 408, 410.

## RECOMMIT.

The words "recommit" and "imprison," as used in Rev. St. c. 158, § 32, providing that any person recommitting or imprisoning any person who shall have been discharged on habeas corpus shall be guilty of a misdemeanor, refer to courts and magistrates, and imply some judicial or ministerial act on their part, and do not extend to proceedings between parents for the custody of an infant child. *Beyer v. Vanderkublen*, 4 N. W. 354, 355, 48 Wis. 320.

## RECONCILE.

Harmonize distinguished, see "Harmonize."

## RECONSIDER.

"Reconsider," as used in 2 Gen. St. p. 2143, § 107, providing that, upon the return by the mayor of a vetoed ordinance with his objections, the aldermen shall at their regular meeting order the objection entered on the journal, after which they shall proceed



to reconsider the same, means the taking up of the matter and discussing it. The word "reconsider" is not given the artificial meaning which it may have acquired in strict parliamentary proceedings, but only the ordinary meaning, which is to think or consider the matter over again, for the purpose of passing upon the matter on such second consideration. *Oakley v. Atlantic City*, 44 Atl. 651, 652, 63 N. J. Law, 127; *Lake v. Ocean City*, 41 Atl. 427, 428, 62 N. J. Law, 160.

#### As a repeal.

A resolution adopted by the city council that a certain ordinance theretofore enacted "be reconsidered" does not amount to a repeal of such ordinance. *Ashton v. City of Rochester*, 14 N. Y. Supp. 855, 858, 60 Hun, 372.

#### RECONSIDERATION.

Reconsideration, in parliamentary law, is defined to be taking up for renewed consideration that which has been passed or acted on previously. *People v. Delaware County Sup'rs*, 63 N. Y. Supp. 317, 319, 48 App. Div. 428.

#### RECONSTRUCT—RECONSTRUCTION.

"Reconstruct" means to construct again; to rebuild; to form again or renew. *Contas v. City of Bradford*, 55 Atl. 989, 990, 206 Pa. 291; *Farragher v. Keokuk*, 111 Iowa, 310, 313, 82 N. W. 773.

To reconstruct means to construct again, or to rebuild; and where an ordinance granting to a street railway the right to use the streets on condition that it should "reconstruct the said streets with the same kind of material used by the borough on the remaining portions of the streets," the company complied with the ordinance by reconstructing the street, which was then macadamized, with the same material used on the remaining portion, and was not liable to part of the expense of a pavement with Belgian blocks, subsequently made by the borough. *Norristown v. Norristown Pass. Ry. Co.*, 9 Pa. Co. Ct. R. 98, 100.

A building is properly said to be reconstructed when it is rebuilt or restored to its original condition after having been wholly or partially demolished. *Vincent v. Frellich*, 23 South. 373, 375, 50 La. Ann. 378, 69 Am. St. Rep. 436.

Reconstruction is the act of constructing again, and it has such meaning in the rule that a purchaser may repair, but not reconstruct or reproduce, a patented device or machine. *Goodyear Shoe Machinery Co. v. Jackson* (U. S.) 112 Fed. 146, 150, 50 C. C. A. 159, 55 L. R. A. 692.

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"Reconstruction" is but a form of construction, a construction again of what had first been constructed; and hence a statute authorizing aid for the construction of railroads will be construed to provide also for aid in the reconstruction of railroads. *Bell v. Maish*, 36 N. E. 358, 359, 137 Ind. 226.

#### As construct on new site.

"Reconstruct," as used in a contract to remove a school building from where it stood and to reconstruct and rebuild it on a new site, so that it should be in suitable and proper condition for school purposes, means to rebuild, and rebuild means to build up again, to build or construct after having been demolished. Cent. Dict. The meaning of the term is not restricted to the erection of a new building on the site of an old one, so that, notwithstanding the schoolhouse was blown down by a storm, it remained possible to reconstruct and rebuild it on the new school site, and thus perform the contract, not only substantially, but strictly and exactly. *Board of Education of Bath Tp. v. Townsend*, 59 N. E. 223, 224, 63 Ohio St. 514, 52 L. R. A. 868.

#### Repair distinguished.

"Reconstruct" is not equivalent to "repair." *Contas v. City of Bradford*, 55 Atl. 989, 990, 206 Pa. 291.

To reconstruct is to construct or build again; so that under an obligation to repair one cannot be compelled to reconstruct. *Western Paving & Supply Co. v. Citizens' St. Ry. Co.*, 26 N. E. 188, 191, 128 Ind. 525, 10 L. R. A. 770, 25 Am. St. Rep. 462 (citing *State ex rel. Kansas City v. Corrigan Consol. St. Ry. Co.*, 85 Mo. 263, 55 Am. Rep. 361); *Farragher v. City of Keokuk*, 82 N. W. 773, 774, 111 Iowa, 310.

While the grounds for a distinction between reconstruction and repair of a patented article would probably differ in a case relating to an article embodying an inventive conception and in a case relating to the same article after the expiration of the patent, when it has become a mere article of manufacture, this would not alter the conclusion that one who buys burned-out electric lamps and filaments, and repairs them, inserting new filaments, reconstructs, and not merely repairs, such lamps. *General Electric Co. v. Re-New Lamp Co.* (U. S.) 121 Fed. 164, 165.

Where a pavement was taken up, the grade changed, and new sand was used, and part of the bricks used in relaying were new ones, there was a reconstruction, and not a repair, of the pavement, within Ky. St. § 2835, providing that the cost of reconstruction of sidewalks shall be apportioned to the front foot of the adjoining property. Webster defines "repair," as follows: "To restore

to a sound or good state after decay, injury, dilapidation, or partial destruction, as to repair a house, a wall, or a ship." He defines "reconstruction" as follows: "To construct again; to rebuild." In the use of "reconstruction," the Legislature meant to rebuild, to construct again. The mere fact that some of the old material was used does not deprive the work of its proper designation. If a brick house was entirely torn down, and no brick was used in its rebuilding except those that had formerly been in the walls, we should say that it was reconstructed or rebuilt. *Levi v. Coyne* (Ky.) 57 S. W. 790, 791.

## RECONVENTION.

A plea in reconvention is in effect a suit against the plaintiff, and the county court has no jurisdiction over a claim so pleaded, when in excess of the amount over which that court has jurisdiction. *Gimbel v. Gomprecht*, 35 S. W. 470, 89 Tex. 497; *Howard Iron Works v. Buffalo Elevating Co.*, 81 N. Y. Supp. 452, 459, 81 App. Div. 386.

A plea in reconvention is treated as a suit by the defendant against the plaintiff upon the cause of action set up in the answer. *Jefferson Lumber Co. v. Williams*, 5 S. W. 672, 673, 68 Tex. 659.

"Reconvention," as the term is used in practice in Texas, means a cross-demand which is more extensive in its nature than set-off or recoupment. *Pacific Exp. Co. v. Mallin*, 10 Sup. Ct. 166, 167, 132 U. S. 531, 33 L. Ed. 450.

In order to sustain a plea in reconvention, the damages must arise out of the same transaction which affords the ground of suit. *Hansen v. Yturria* (Tex.) 48 S. W. 797.

A reconventional demand is one that a defendant in a suit is permitted by a courtesy of the law to ingraft on the main action, though it is requisite, when the parties reside within the same jurisdiction, that the demand in reconvention should be necessarily connected with and incidental to the principal demand. *Suberville v. Adams*, 16 South. 652, 653, 47 La. Ann. 68.

## RECORD.

See "Actual Record"; "Bilateral Record"; "Books of Record"; "Court of Record"; "Court Not of Record"; "Debt of Record"; "Duly Recorded"; "Final Record"; "Judicial Record"; "Matter of Record"; "Mortgagee of Record"; "Obligation of Record"; "Of Record"; "Public Record"; "Tax Record"; "Title of Record."

At common law a record signifies a roll of parchment on which the proceedings and

transactions of the court are entered or drawn up by its officers, and which is then deposited in its treasury "in perpetuum rei memoriam." *Hahn v. Kelly*, 34 Cal. 391, 422, 94 Am. Dec. 742 (citing 3 Steph. Comm. 583; 3 Bl. Comm. 24). But in the United States paper has universally supplanted parchment as the material for the record. *Nugent v. Powell* (Wyo.) 33 Pac. 23, 25.

In the language of Lord Coke, "records" are memorials or remembrances in rolls or parchments of the proceedings and acts of a court of justice, which hath power to hold plea according to the course of the common law, and are of such incontrollable credit and verity that they admit no averment, plea, or proof to the contrary. *O'Connell v. Hotchkiss*, 44 Conn. 51, 53; *Planters' & Mechanics' Bank v. Chipley*, Ga. Dec. 50, 51, pt. 1; *Davidson v. Murphy*, 13 Conn. 213, 217; *Evans v. Tatem* (Pa.) 9 Serg. & R. 252, 261, 11 Am. Dec. 717; *Field v. Gibbs* (U. S.) 15 Fed. Cas. 15, 16. The principle on which the law regards records as of such absolute verity that they cannot be contradicted is obvious. They are memorials of the end of strife, when a dispute has been settled by the judgment of the court. If it were otherwise it would be difficult to see where litigation would end. *Davies v. Pettit*, 11 Ark. 349, 355.

At common law a record signified a roll of parchment on which the proceedings and transactions of a court were entered or drawn up by its officers, and which was then deposited in its treasury "in perpetuum rei memoriam." Such rolls were termed the "records of the court," and were of such high and supereminent authority that their truth could not be called in question. *St. Croix Lumber Co. v. Pennington*, 11 N. W. 497, 498, 2 Dak. 467; *Planters' & Mechanics' Bank of Columbus v. Chipley*, Ga. Dec. 50, 51, pt. 1; *Murrah v. State*, 51 Miss. 652, 656; *Bellas v. McCarty* (Pa.) 10 Watts, 13, 24; *Adair's Adm'r v. Roger's Adm'r* (Ohio) Wright, 428, 429.

A record is substantially a written history of the proceedings from the beginning to the end of the case. A matter of record can be made so merely by inserting it in the record. The best definition of the common-law record in a criminal case under the American practice is found in *McKinney v. People*, 7 Ill. (2 Gilman) 552, where it is said that in a criminal case, after the caption, stating the time and place of holding the court, the record should consist of the indictment, properly indorsed, as found by the grand jury, the arraignment of the accused, his plea, the impaneling of the jury, verdict and judgment of the court. *United States v. Taylor*, 13 Sup. Ct. 479, 480, 147 U. S. 695, 37 L. Ed. 335.

Records are intended to serve as evidence of something written, said, or done,

and are not kept to gratify the curious or suspicious. *Owens v. Woolridge*, 22 Pa. Co. Ct. Rep. 237, 240.

The term "records," as used in a provision of the Code providing for the admission in evidence of transcribed copies of records of any of the counties of the state, shall be construed to mean any records of county, common-law, circuit, criminal, or chancery court, the register's books, the surveyor's and entry taker's books, and all other public records required by law to be kept in the several courts of this state. *Shannon's Code Tenn.* 1896, § 3793.

A record is a memorial of a court of justice, which the law deems authentic above all contradiction. *Austin v. Rodman*, 8 N. C. 71, 75.

The word "record" shall, in the chapter relating to the public records, mean any written or printed book, paper, map, or plan. *Rev. Laws Mass.* 1902, p. 441, c. 35, § 5.

A record is constituted of the pleadings, the acts of the parties in court, and the acts and doings of the jury and court thereon. If advantage is sought of any extrinsic matter which occurs at the trial of an action, or in the course of proceeding, it must be put into the record as a fact or be stated in an exception, and not left to be collected by the court on appeal from the evidence. *State v. Godwin*, 27 N. C. 401, 403, 44 Am. Dec. 42.

A record states the matters of fact which occur in court. Only that court in which they occur can know what they are. If the clerk makes a slip in drawing it up defectively, or does it falsely, as by inserting a different sum, that the court, the whole record being still with them, may have it properly enrolled by reference to the first note of it, is a proposition which is proved by the stating of it. *State v. Cherry*, 13 N. C. 550, 554.

Records are the memorials or proceedings of the Legislature and of the king's courts of justice. *Lusher v. Scites*, 4 W. Va. 11, 15 (citing *Phillips on Evidence*, col. 1, p. 316).

A record is said to be a history of the most material proceedings in a cause, containing the pleadings, continuances, and whatever further proceedings have been had. *Superintendents of Poor of Tompkins County v. Smith* (N. Y.) 11 Wend. 181, 182 (citing 3 Bl. Comm. 317).

The record proper ordinarily embraces the original writ, the pleadings, and the entry of verdict and judgment. *Bell v. Eddy*, 51 S. W. 959, 960, 2 Ind. T. 312 (citing *Thomp. Trials*).

The "record of a judgment," at common law, was known as the "judgment roll," and

this included as well the pleadings, process, etc., as "signing the judgment." *Steph. Pl.* 24 et seq. Under our practice, while the pleadings, process, etc., are not, as at common law, required to be copied on a parchment roll, or on the record book in which final judgment is entered, they are required to be filed in the office of the clerk; and when a copy of the record of a judgment is required for the purpose of bringing the case by appeal or writ of error into this court, or bring suit upon it in another state, or as evidence in an issue of nul tiel record, or to establish a former adjudication of the same subject-matter between the same parties, and, indeed, in all cases where it is essential to have a complete record of the judgment, the pleadings and process are an indispensable part of it, and the general rule is that, where the copy of the record of a judgment is required, it must be of the whole record, so that the court may determine the legal effect of the whole of it, which may be quite different from that of a part. *Vail v. Iglehart*, 69 Ill. 332, 334.

A record, in judicial proceedings, is a precise history of the suit from its commencement to its termination, including the conclusion of law thereon, drawn up by the proper officer for the purpose of perpetuating the exact state of facts. *State v. Anders*, 68 Pac. 668, 64 Kan. 742; *Davidson v. Murphy*, 13 Conn. 213, 217; *Smith v. Jewell*, 42 Atl. 657, 659, 71 Conn. 473.

The record of a suit embraces the successive judicial steps which have been taken and are necessary to show jurisdiction and regularity of procedure—the process, writ, or summons, with proof of service; the pleadings, minutes of trial, verdict, and judgment; and also ancillary and interlocutory proceedings, entering into and supporting the action. *Wilkinson v. Delaware, L. & W. Ry. Co.* (U. S.) 23 Fed. 562, 564 (citing 2 Abb. Law Dict. 388).

The record of a court contains only those things which are essential to a valid proceeding, such as the nature of the issue, the presence of a judge, and, in respect to a jury, that it was of the proper number of proper men, properly qualified and returned by the proper officer. *Clifford v. Hudson County Court of Oyer and Terminer*, 39 Atl. 909, 61 N. J. Law, 493.

A record is an entire thing. It is composed generally of an orderly and methodical history of what has transpired in a cause in the court whose acts it is designed to perpetuate. It is an engrossment, rather than a copy, of those documents which properly constitute a record, eschewing all foreign and superfluous matter. *Kirby v. Cannon*, 9 Ind. 371, 374.

A record of a court has a fixed judicial meaning, and certain requisites are essen-

tial to give to it a character which the term implies, and it is in such a sense that the word is used in Rev. St. c. 98, § 52, providing that the records of any court of any state shall be admissible in evidence in all cases when duly authenticated. *Ordway v. Conroe*, 4 Wis. 45, 50.

A record is the history of the cause from its commencement, or issuing of the writ, until final judgment is rendered. *Prac. Act*, § 101, defines a record as follows: "That the clerk of each court shall in vacation make a complete record of the writ, recognizance of bail, pleadings, orders and judgments or decrees in each cause finally determined at the preceding term." Indorsement of security for costs made after suit brought, no order of court requiring such indorsement appearing in the minutes of the proceedings, is not a part of the record. *Noble v. Shearer*, 6 Ohio (7 Ham.) 426, 427, pt. 1.

A record is something which is proved by its mere production and inspection, whether of the original or of a copy, and nothing can be construed to be a part of it which does not appear on the face of it to be such, without the aid of oral evidence, explanatory of clerical errors which may have crept into such judicial proceedings, whether errors of omission or errors of commission. This principle applies with peculiar force to bills of exceptions, around the execution of which the law has seen fit to place so many exacting safeguards. *Pearce v. Clements*, 73 Ala. 256, 258.

A record has been defined to be "a memorial or remembrance in rolls of parchment of the proceedings and acts of a court of justice which has power to hold plea, according to the course of the common law, of real and mixed actions," etc. *Co. Litt.* 260a. In course of time rolls of parchment fell into disuse, and the usage sprang up of keeping the memorial or remembrance of the proceedings in a book, which was finally designated as the "minute book." In it the clerk of the court keeps a brief account of the proceedings of the court, but such account is never verified or attested by the signature of the judge. It is not, however, the only form of preserving a memorial or remembrance of the proceedings and acts of a court, nor is it the most satisfactory and trustworthy, because it rests entirely on the intelligence and fidelity of the clerk. An order bearing the signature or the initials of the presiding judge must necessarily be at all times more trustworthy. *In re Christern*, 43 N. Y. Super. Ct. (11 Jones & S.) 523, 531.

A record is a memorial or history of judicial proceedings in a case commencing with the writ or complaint and terminating with the judgment. A record, therefore, must be precise and clear, containing proof within itself of every important fact on which the

judgment rests, and it cannot exist partly in writing and partly in parol. Its allegations and facts are not the subject of contradiction. *Sayles v. Briggs*, 45 Mass. (4 Metc.) 421, 423.

#### **Books of corporation.**

Under Gen. St. c. 86, § 78 (Rev. Laws, § 3269), giving a stockholder an action against the clerk or recording officer of a corporation for willfully neglecting or refusing to exhibit certain records to such stockholder, the stock ledger and transfer books of a corporation, kept in the usual manner, are such records; for they contain a record of the name of each owner of the capital stock, and the number and description of the shares of such owner, in accordance with the provisions of Gen. St. c. 86, § 9, requiring every corporation to make and keep a record of its corporate doings, etc.—*Lewis v. Brainerd*, 53 Vt. 510, 515.

#### **Bond.**

In Kentucky a bond is not a record. *Commonwealth v. Rodes*, 31 Ky. (1 Dana) 595, 599.

#### **Clerk's certificate.**

A certificate of a clerk of court upon a recognizance, showing it to have been filed before the suit was commenced thereon, is a sufficient record. The recognizance itself, being put upon the files of the court, was a record, within the meaning of the law, though not extended on the book of records, and shows upon its face the cause, the caption, and the jurisdiction of the justice; and where the appellant had neglected to furnish copies of the papers necessary to make up an extended record, the clerk's docket, showing an entry of the amount of the debt and costs recovered, may be admitted as a record of the judgment, although the time has elapsed within which the papers can be filed, to authorize the clerk to extend and complete the record, as of the term when judgment was recovered. *Leathers v. Cooley*, 49 Me. 337, 342.

#### **Deposition.**

"Record," as used in Judiciary Act 1875, § 3 (18 Stat. 471), providing that the party applying for the removal of a cause from a state to a federal court must give a bond conditioned that he will enter in the Circuit Court on the first day of its next session a copy of the record in such suit, and in section 7, providing that further time is given in a certain contingency for so filing the copy of record, must be construed as including the process, pleadings, etc., and depositions on file in the cause at the time of filing the petition and bond for removal. Though, technically speaking, a deposition may not be a part of the record, even in a suit in eq-

ity, it is a part of the cause, upon which its direct determination may depend, and for this purpose ought to be considered a part of the record. What has been duly or regularly done in the cause up to the time of removal is a part of it, and ought not to be separated from it on removal for trial in the Circuit Court. At common law the term "record" does not include depositions or other evidence used in the trial of a case, unless they are made a part of the record by a bill of exceptions. *Miller v. Tobin* (U. S.) 18 Fed. 609, 611.

#### **Docket entries.**

Where docket entries stand in the place of any other court record, and are recorded by the court, which treats them as the record, they constitute a record within the meaning of the naturalization laws, requiring the proceedings to be recorded by the clerk of the court. *In re Coleman* (U. S.) 6 Fed. Cas. 49, 57.

The docket is deemed to be a record of a case until a more extended one is made, and the same rules of imported verity apply to the docket entries as to the completed record; and when the record in the case has not been fully extended the docket entries may be read to the jury in support of the allegation of a former conviction. *State v. Simpson*, 39 Atl. 286, 91 Me. 77.

An execution docket is a part of the record. The discharge of a debt by levy and sale appears on that docket, and, if money is paid on execution and without a sale, that appears generally, if not always, on the execution docket, and on that docket the plaintiff or his attorney writes the satisfaction. *Appeal of Fricker* (Pa.) 1 Watts, 393, 395.

#### **Entry of judgment under power.**

The record of the entry of a judgment by the prothonotary under a power contained in the instrument is a record of the court, and has all the qualities of a judgment on a verdict. It imports absolute verity. *Kostenbader v. Kuebler*, 48 Atl. 972, 199 Pa. 246, 85 Am. St. Rep. 783.

#### **Exceptions.**

A record proper, by law, is a petition and summons and all subsequent pleadings, including the verdict and judgment. Exceptions are strictly no part of the record, unless made so by being incorporated in a bill of exceptions. *Bateson v. Clark*, 37 Mo. 31, 34.

A bill of exceptions, prepared, authenticated, and filed in accordance with Cr. Prac. Act, §§ 433-438, becomes and constitutes a portion of the record of the action in criminal cases. *People v. Trim*, 37 Cal. 274, 275. See, also, *Glaser v. Hackett*, 20 South. 820, 821, 38 Fla. 84; *State v. Clifford*, 16 N. W. 25, 27, 58 Wis. 113.

"The record proper ordinarily embraces the original writ, the pleadings, and the entry of verdict and judgment. If error is established on the face of the record proper, it may be corrected in a court of error, unless there are statutes changing the common-law rule, without the necessity of a bill of exceptions. Whenever it is desired to present for review in an appellate court a ruling of the trial court which does not appear upon the face of the record proper, an exception must be taken to the ruling at the time when it was made, and a bill of exceptions must be drawn up, embodying a statement of the ruling, and showing that an exception thereto was reserved at the time when the ruling was made." *Severs v. Northern Trust Co.*, 35 S. W. 232, 233, 1 Ind. T. 1 (quoting 2 *Thomp. Trials*, § 2771); *Bell v. Eddy*, 51 S. W. 959, 960, 2 Ind. T. 312.

#### **Execution and recognizance.**

An execution, when returned, is a record; and a recognizance, indorsed on the execution and returned, is a record also. *Ingram v. Allen*, 2 Ind. (2 Cart.) 166, 167.

#### **Fraudulent record.**

Where a town clerk copies a deed delivered to him to be recorded in a book which has ceased to be a book for recording for a number of years, and does not insert the names in the alphabet, for the purpose of concealment and fraud, such deed is not recorded, within the meaning of the recording act, and is therefore no notice to subsequent purchasers or attaching creditors. *Sawyer v. Adams*, 8 Vt. 172, 175, 30 Am. Dec. 459.

#### **Index.**

Under Gen. St. c. 132, § 2, requiring a mortgage of chattels to be recorded when possession of the property is not delivered to the mortgagee, and section 12, providing that such mortgage shall not be valid against any person except the mortgagor, etc., unless so recorded, and section 17, requiring the town clerk to keep a book of records for personal mortgages, and to keep an alphabetical index of the mortgagors and mortgagees, which records and index shall be open to public inspection, the index constitutes no part of the record essential to the title, and the record of a chattel mortgage is not invalidated by the failure of the town clerk to index it. *Chase v. Bennett*, 58 N. H. 428, 429; *Id.*, 59 N. H. 394.

#### **Judge's private memorandum.**

"Record," as used in Rev. St. p. 208, c. 22, § 69, providing that every person who shall falsely make, alter, forge, or counterfeit any record, shall be deemed guilty of forgery, means a written memorial made by a public officer authorized by law to perform

that function, and intended to serve as evidence of something written, said, or done; and hence a probate judge's memorandum book, not required by law to be kept, but which was merely a convenient book of reference in which entries were made generally by the probate judge, who was acting as trustee for the occupants of lots, containing memoranda purporting to give the names of certain persons who had made applications for lots, the dates such applications were made, whether a deed for the lot or lots applied for had been executed, and in some cases where adverse filings had been made on the same lots, and various other minutes, which could only be made intelligible by oral testimony, is not a record within the meaning of the statute. *Downing v. Brown*, 3 Colo. 571, 590.

#### **Judgment.**

The provision of the federal Constitution that full faith and credit shall be given in each state to the "records and judicial proceedings of every other state," should not be construed to embrace every judgment in fact. On the other hand, the words may rationally be satisfied by limitation to such judgments only as are duly rendered by a court of competent jurisdiction against those who appear and defend, or who were legally notified to appear; and hence a judgment obtained in another state against a person who had no legal notice to appear, and who did not in fact appear, is of no validity and impeachable. *Aldrich v. Kinney*, 4 Conn. 380, 386, 10 Am. Dec. 151.

#### **Justice's docket.**

The docket of a justice is not technically a record, and, though great latitude has been applied in some cases in explaining it, it is not liable as a whole to be contradicted by parol evidence. *Niles v. Totman* (N. Y.) 3 Barb. 594, 597.

The word "record," as used in *Mills' Ann. St. § 2794*, requiring justices of the peace to keep a record of their proceedings, is used in the sense of "docket," and therefore the statute does not constitute a court of a justice of the peace a court of record, importing absolute verity to the entries in the docket, but such record may be impeached by parol. *Hamill v. Ferrier*, 45 Pac. 522, 523, 8 Colo. App. 266.

#### **Justices' judgments.**

Justices' judgments are not records, and do not prove themselves. They resemble records in that their merits are not examinable in an original suit, but they must be established, nevertheless, by parol evidence. *Hamilton v. Wright*, 11 N. O. 283, 286.

#### **Land office books.**

The words "enrollment, registry, or record," in a statute making it criminal to de-

face any registry or record, are not confined to records of courts of justice. Every registry or enrollment directed by law and preserved for the use of the public is embraced by this act of assembly. It extends without doubt to the public books in the land office. *Ream v. Commonwealth* (Pa.) 3 Serg. & R. 207-209.

#### **Marriage license.**

In Kentucky a marriage license or bond is not a record. *Commonwealth v. Rodes*, 31 Ky. (1 Dana) 595, 599.

#### **Mittimus.**

Under R. L. § 828, requiring justices of the peace to keep a record of their judicial proceedings, proceedings down to and including the final judgment are included. The section does not, however, include a mittimus. *State v. Malloy*, 54 Vt. 96, 99.

#### **Orders and rules.**

A record is an entire thing. It is composed generally of an orderly and methodical history of what has transpired in the cause in the court whose acts it is intended to perpetuate. In *Wall v. State*, 23 Ind. 150, it was held to be an immemorial usage of the state to depend upon the statement of the clerk for many things in a transcript, such as the identity of papers, the chronological order of proceedings, and like matters which give the transcript approved form as a connected history of the cause from its inception until the end. Entry by the clerk of orders or rules of the court are legitimate parts of the record. *Crystal Ice Co. v. Morris* (Ind.) 61 N. E. 966, 969.

#### **As papers in former suit.**

Where by an agreed statement of facts the record of another suit is made a part thereof, the word "record" means the papers in the original action. *Glidden v. Whipple*, 49 Atl. 997, 999, 23 R. I. 304.

#### **Papers on appeal to Circuit Court of Appeals.**

The document required by C. C. A. Rule 14 (31 C. C. A. civ. 90 Fed. civ.), on appeal thereto, consisting of a true copy of the record in the trial court, bill of exceptions, assignments, and all proceedings in the cause, including the opinion of the court below, all under the hand and seal of the clerk, called by said rule, in case of writ of error, a "return" thereto, is a record, within Rev. St. § 828, allowing to the clerk for "making any record, certificate, return, or report, for each folio, 15 cents." Preparation thereof is not a mere copying of a paper, fee for which is 10 cents per folio. *McIlwaine v. Ellington* (U. S.) 99 Fed. 133.

#### **Plat book.**

A plat book, compiled by a county auditor, is not a copy of "records or entries or

papers belonging to any public office," within the meaning of Code Iowa, § 3702, providing that such copies, when certified, shall be evidence of equal credibility with the original records, etc. *Heinrichs v. Terrell*, 21 N. W. 171, 173, 65 Iowa, 25.

#### **As both pleas and docket.**

It is said that the writ, new pleas, and executions are the record, and it is also said that the docket is the record. Both assertions are partially true. They are both together the whole record. Pleas are not found, except on the docket, in most cases; the judgment is found only on the docket; satisfaction is generally only found there; and every rule in the progress of the cause is found on some of the dockets. *Appeal of Fricker (Pa.)* 1 Watts, 393, 395.

#### **Preliminary proofs of naturalization.**

The preliminary proofs in naturalization proceedings, having thereon the initials of the presiding judge, on being filed in the clerk's office with the oath of allegiance, constitute a record or roll of the judgment admitting to citizenship. *In re Christern*, 43 N. Y. Super. Ct. (11 Jones & S.) 523, 531.

#### **Private act.**

The word "records" in the federal Constitution, declaring that "full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state," includes a private act or statute; and, if proof of it is necessary, it is proven to the court, and must be as records. The only difference is that in the state in which they are passed public acts require no proof, for they are presumed to be within the knowledge of the court, while private acts are to be proven, but they are to be proven as records and authenticated under the seal of the state in which they are passed. *Bennington Iron Co. v. Rutherford*, 18 N. J. Law (3 Har.) 467, 478.

#### **Proofs of will.**

Under Laws 1850, p. 143, providing that the exemplification of any record for any last will and testament proved before the surrogate of any county in a state, etc., shall be received in evidence, etc., the record included the proofs as well as the will, and unless the exemplification in like manner extended to both the will was inadmissible. *Hill v. Crockford*, 24 N. Y. 128, 129.

#### **Recorded mortgage.**

Under the statute of the state of New York entitled "Of the proof and recording of conveyances, and the cancellation of mortgages" (1 Rev. St. N. Y. c. 8, p. 756), which expressly classes mortgages on real estate as "conveyances of real estate," and includes them within that term, and which provides, also, that, when duly acknowledged and prov-

ed, they may be read in evidence without any further proof thereof, when duly recorded, in accordance with the statutes of that state, in the office of the clerk or register of the county wherein the lands lie, or a transcript thereof, duly certified, may be read in evidence with like force and effect as the original, the record of a mortgage on real estate is a record, within the scope and meaning of the term "records," as used in article 4, § 1, of the Constitution of the United States; and it can be exemplified under Act Cong. March 27, 1804, and read and used in evidence in the courts of this state with the same faith and credit, and with such force and effect, as is given the record by the statute of the state of New York. *Chase v. Caryl*, 31 Atl. 1024, 1030, 57 N. J. Law (23 Vroom) 545.

#### **Reporter's notes.**

In California it is held that the record on appeal does not include the reporter's notes. *Hanna v. De Garmo*, 73 Pac. 830, 831, 140 Cal. 172.

#### **Satisfaction of judgment.**

"A record is a memorial of what has been done; authentic written evidence, considered as either public or private, but usually public." *And. Law Dict.* p. 860. "A writing by which some act, or event, or a number of acts or events, is recorded." *Webst. Int. Dict.* p. 1200. The word "record," in *Burns' Rev. St.* 1901, § 2016, making it an offense to alter any court record, includes an indorsement of payment and satisfaction on the record of a judgment by one authorized to make it. *State v. Henning*, 63 N. E. 207, 208, 158 Ind. 196.

A satisfaction piece is not a record, and until entered on the roll it does not partake of the nature of a record; nor does the statutory provision on the subject, directing the mode of its acknowledgment, give it that character or effect. *Lownds v. Remsen* (N. Y.) 7 Wend. 35, 40.

#### **Testimony.**

The word "record," as used in the judicial act of 1875, relating to the removal of actions from state to federal courts, includes the testimony taken and on file in a cause at the time of filing a petition and bond for its removal from a state court. *Miller v. Tobin* (U. S.) 18 Fed. 609, 611.

#### **Trade-mark record.**

The legal record of a trade-mark in another state is a record in the office of the Secretary of State, as required by Pol. Code, § 3197. *Whittier v. Dietz*, 4 Pac. 986, 66 Cal. 78.

#### **Unauthorized record.**

A record of a court has a fixed judicial meaning, and certain requisites are essen-

tial to give it the character which the term implies. The fixed characteristics of a record are that it must be of and concerning a proceeding in court or within the official powers of an officer, and it must be made under such conditions that the officer was authorized by law to act and to do the thing done, whereby it can alone become a record within the meaning of the law; and the transcribing of a deed upon the records of his office by a clerk of the county court was not an official act, and it did not constitute a record, because it was transcribed on a book in which the records should be kept by an officer alone authorized to make such entry, for the reason that the act was neither permitted nor required by law. *Heintz v. Thayer*, 50 S. W. 929, 930, 92 Tex. 658.

### RECORD (Verb).

"To record" means to recite, to repeat, to transcribe. *Montgomery Beer Bottling Works v. Gaston*, 126 Ala. 425, 446, 28 South. 497, 51 L. R. A. 396, 85 Am. St. Rep. 42.

The requirement of the statute as to the recording of liens on personal property sold conditionally is satisfied by the mere lodgment of the memorandum in the town clerk's office. *Fairbanks v. Davis*, 50 Vt. 251.

"Record," as used in Comp. St. c. 23, § 9, providing for the acceptance and record of the report of commissioners appointed to set off dower in the probate court, "is used in the sense of 'confirm,' that is, if the assignment of dower by the commissioners is satisfactory to the judge, then he should accept and record the same." *Serry v. Curry*, 42 N. W. 97, 100, 26 Neb. 353.

Rev. St. c. 132, § 2, provides for chattel mortgages, and requires that "possession must be delivered to and retained by the mortgagee, or the mortgage must be recorded in the office of the clerk of the town in which the mortgagor resides." A chattel mortgage was delivered to a town clerk, with directions not to record it until further notice. The mortgage was not, in fact, recorded. It could not be deemed as recorded until such notice was given, notwithstanding the fact that the clerk, on receiving it, entered on the instrument the day and hour of its reception. *Town v. Griffith*, 17 N. H. 165, 169.

A paper is recorded within a statute providing that it should be lodged with the clerk and be recorded when lodged in the office, whether ever in fact recorded or not. *Beverley v. Ellis (Va.)* 1 Rand. 102. The court said that the lodgment with the clerk was all that the law demanded, and that the words "recorded according to the direction of the act" imposed no further duty. *Horsley v. Garth (Va.)* 2 Grat. 471, 473, 44 Am.

Dec. 393, holds that it is enough to leave the paper with the clerk. It seems to be the general current of authority that, when the document is lodged in the proper office, the recordation exists—is done. *Troy Wagon Co. v. Hutton*, 44 S. E. 135, 53 W. Va. 154.

Though the statute does not expressly require that the doings of the selectmen in laying out a road shall be recorded, yet the language of the statute strongly implies that their doings must be recorded, and the court has no doubt that their acts should be recorded; yet, when the doings of the selectmen are returned to the town clerk and put on file, they are well enough recorded within the meaning of the statute. *Hardy v. Houston*, 2 N. H. 309, 310.

### As register.

The word "recorded," as used in St. 1888, c. 393, invalidating a mortgage of real estate recorded more than four months after its date, as against an assignee in insolvency relates to the record made in the registry of deeds, where a mortgage of real estate, in order to be effectual, is required by law to be recorded. *Harriman v. Woburn Electric Light Co.*, 39 N. E. 1004, 1005, 163 Mass. 85.

The word "record," as used in Pub. St. c. 126, § 18, giving a right of action against the grantor in a deed to an assignee of the grantee for breach of covenant against incumbrances, where the incumbrance appears of record, is to be construed as meaning the record in the registry of deeds, as it is the proper place for recording deeds or instruments conveying land or any other interest therein, and is the place where any person examining a title would look for such records. The term does not include records of a court or of a city or town, and therefore does not apply to a record of court showing a lien for unpaid taxes. *Carter v. Peak*, 138 Mass. 439, 441.

### As transcribe.

To record an abstract in a judgment record means to transcribe it upon the book required to be kept for that purpose, and when the abstract is transcribed the act of recording is complete. *Vidor v. Rawlins*, 54 S. W. 1026, 1027, 93 Tex. 259.

The word "recorded," in ordinary usage, signifies copied or transcribed in some permanent book. It is in this sense that the word "recorded" is used in Civ. Code, § 1213, declaring that every conveyance of real property, acknowledged or proved and certified and recorded, from the time it is filed with the recorder for record, is constructive notice of the contents thereof to subsequent purchasers and mortgagees. *Cady v. Purser*, 63 Pac. 844, 846, 131 Cal. 552, 82 Am. St. Rep. 391.



**RECORD OF SPANISH GOVERNMENT.**

As used in Rev. Code 1845, p. 469, § 13, prescribing that a copy of any "record of the French or Spanish governments" deposited in the office of the recorder of any county, being duly certified by him, shall be received in evidence with like effect as the original, should be construed to include instruments of conveyance executed in the presence of a Spanish lieutenant governor and deposited among the archives of the Spanish government. *Charleville v. Chouteau*, 18 Mo. 492, 590.

**RECORD TITLE.**

The words "record title," as used in St. 1893, c. 340, providing that, whenever the record title of real property is clouded, those interested therein may petition to compel the supposed claimant to bring action to try his claim, do not extend to deeds in which the grantor purports to convey the land of others, when no authority to make the conveyance appears of record in the registry of deeds or elsewhere. A deed executed by an attorney, if the power of attorney is not recorded, conveys no record title. The grantee in an administrator's deed, which purports to be given under an order of the probate court, the record of that court failing to show any authority in the administrator to make the conveyance, has no record title. *Arnold v. Reed*, 38 N. E. 1132, 162 Mass. 438.

A record title (St. 1893, c. 340, § 1) is given to a grantee in a conveyance by deed of quitclaim of real estate or land acquired by adverse possession, so as to entitle him to maintain proceedings to quiet title, as Pub. St. c. 120, § 2, provides that such a deed shall be sufficient to convey all the estate which could lawfully be conveyed by deed of bargain and sale. *Ex parte Connelley*, 46 N. E. 618, 619, 168 Mass. 201.

**RECORDER OF DEEDS.**

A recorder of deeds is defined in Mech. Pub. Off. § 733, to be "a ministerial officer whose duties are owing chiefly to those particular individuals who have occasion to employ him and to whom he usually looks for his compensation." *Luther v. Banks*, 36 S. E. 826, 828, 111 Ga. 374.

**RECORDARI.**

"A recordari is a substitute for an appeal from a judgment of a court not of record, where the appeal has been lost by fraud or accident." *Critchler v. McCadden*, 64 N. C. 262, 263.

**RECOUNT.**

The word "recount," in Laws 1896, c. 809, § 84, requiring a recount of votes in case

the total number shown by the tally sheet to have been canvassed does not conform to the poll books and ballot clerk's return, means a recount of the ballots which were canvassed and recorded on the tally sheet, on the theory that the mistake is due to the fact that the tally sheet has not set forth in its various columns all the ballots subject to canvass. The recount does not seem to refer to the reckoning made by the inspectors when they first open the ballot boxes, because the law does not deem that reckoning a count until it agrees or is made to agree with the poll books and the very ballot clerk's return which is declared by the statute to establish a mistake in a count. "I think the term 'recount' does not require that in the first instance there should be a recanvass, in the sense that the votes actually distributed to the various columns of the tally sheet by the canvass already made should be redistributed therein. For the sum that presents the mistake is that which is designed and required to account for all ballots." The statute does not require a recounting of the ballots purporting to have been canvassed and recorded on the tally sheets. *In re Stiles*, 75 N. Y. Supp. 278, 281, 69 App. Div. 589.

**RECOUPMENT.**

Recoupment is a right of defendant to have a deduction from the amount of plaintiff's damages for the reason that the plaintiff has not complied with the cross-obligations or independent covenants arising under the same contract. Civ. Code Ga. 1895, § 3756.

"If the defendant is made liable for the conversion or the price of a chattel which he has himself repaired or essentially enhanced the value of, at his own expense, under the belief that the title was in himself, he is not to be made liable for that portion of the value which he has himself contributed. This is called 'recoupment.'" *Barber v. Chapin*, 28 Vt. (2 Williams) 413.

Recoupment is not always a subsisting claim. If the disseisor erects permanent improvements, he may, when called upon to respond in damages, recoup what he has so expended. *Kneedler v. Sternberg* (N. Y.) 10 How. Prac. 67, 72 (citing *Coulter's Case*, 5 Coke, 131).

Recoupment implies that the plaintiff's claim was to be allowed, and that another cause of action was to be satisfied out of it. *Xenia Branch Bank v. Lee*, 15 N. Y. Super. Ct. (2 Bosw.) 694, 707.

**As growing out of contract in suit.**

Recoupment is defined as the right of the defendant in the same action to claim damages from the person either because he has not complied with some obligation of the contract on which he sues or because he has

violated some duty which the law imposes on him in the making or performance of the contract. *Lawton v. Ricketts*, 16 South. 59, 60, 104 Ala. 430; *Dillon Beebe's Son v. Eakle*, 27 S. E. 214, 217, 43 W. Va. 502; *Phillips v. Sun Dyeing, Bleaching & Calendering Co.*, 10 R. I. 458, 460; *Scatchard v. Memphis Towing, Barge & Derrick Co.*, 52 S. W. 153, 154, 102 Tenn. 282.

In speaking of matters to be shown in defense, the term "recoupment" is often used as synonymous with "reduction." The term is of French origin, and signifies "cutting again" or "cutting back," and as a defense means the cutting back on the plaintiff's claim by defendant. Like "reduction," it is of necessity limited to the amount of the plaintiff's claim. It is properly applicable to a case where the same contract imposes mutual duties and obligations on the two parties, and one seeks a remedy for the breach of duty by the second, and the second meets the demand by a claim for a breach of duty by the first. It is sometimes difficult to discriminate set-off from reduction or recoupment. The former bears so close analogy to both of the latter, and is so often mingled with them by the facts of a case as to render it difficult to determine in which form the opposing demand should be brought against the plaintiff's claim. *Davenport v. Hubbard*, 46 Vt. 200, 207, 14 Am. Rep. 620.

Recoupment springs out of the contract or transaction between the parties. A plea which sets up a breach of a contract, in support of a claim of set-off or recoupment, must be as distinct and unambiguous as if suing directly for a breach of a contract. *Anslay v. Bank of Piedmont*, 21 South. 59, 62, 113 Ala. 467, 59 Am. St. Rep. 122.

Recoupment or reduction of a demand is said to arise where there is an action on a contract, and there has been a breach of the contract, or some divisible part of it or obligation connected with it. *C. Aultman & Co. v. Torrey*, 57 N. W. 211, 55 Minn. 492 (citing *And. Law Dict.*).

Recoupment is favored in law to prevent circuity of action and multiplicity of suits, and arises where one party to a contract is permitted to set up as a defense any damage he may have received by reason of the failure of the other party to comply with his contract in all matters involved in the contract. *Penn Steel Casting & Machine Co. v. Wilmington Malleable Iron Co. (Del.)* 41 Atl. 236, 239, 1 Pennewill, 337.

In recoupment both the cause of action in the plaintiff and the right to recoup in the defendant grow out of the same subject-matter, and are correlative. *Dietrich v. Ely (U. S.)* 63 Fed. 413, 11 C. C. A. 266.

Recoupment signifies reduction, and originally a defendant could only secure a reduc-

tion of the amount of recovery by recoupment. It has been steadily held that recoupment is only proper in cases where the defendant's claim grows out of the same contract or transaction as that on which the plaintiff's cause of action is founded. *Jewett Car Co. v. Kirkpatrick Const. Co. (U. S.)* 107 Fed. 622, 625.

#### As counterclaim.

See, also, "Counterclaim."

The word "recoup," as used in the case of *Thomson-Houston Electric Co. v. Durant Land Imp. Co.*, 144 N. Y. 34, 39 N. E. 7, holding that "the tenant in a suit for rent can recoup any damages for a breach of the covenants to repair, and the landlord, if sued by the tenant for a breach of the covenants on his part, could counterclaim the rent reserved by the lease," was employed in the sense of "counterclaim." *Ely v. Spiero*, 51 N. Y. Supp. 124, 126, 28 App. Div. 485.

#### Recovery exceeding plaintiff's demand.

A defense by way of recoupment denies the validity of the plaintiff's cause of action to so large an amount as he claims. It is not an independent cross-claim, like a separate and distinct debt, or item of account due from the plaintiff, but is confined to matters arising out of, or connected with, the transaction or contract which forms the basis of plaintiff's action. It goes only in abatement or reduction of plaintiff's claim, and can be used as a substitute only to the extent of plaintiff's demand. No judgment can be obtained by the defendant for any balance in his favor. *McHardy v. Wadsworth*, 8 Mich. 349. The doctrine of recoupment is but a liberal and beneficial improvement on the old doctrine of failure of consideration. It looks through the whole contract, treating it as an entirety, and treating the things done and stipulated to be done on one side as the consideration for the things done or stipulated to be done on the other. *Grisham v. Bodman*, 20 South. 514, 515, 111 Ala. 194 (citing *Lufburrow v. Henderson*, 30 Ga. 482).

Recoupment implies that the plaintiff had a cause of action. The doctrine of recoupment was generally confined to damages for nonperformance of the same contract sued on. Since the Code of 1852, however, it seems that, if defendant's demand is sufficient, a defendant may not only defeat the plaintiff's claim by recoupment, but recover a balance, notwithstanding the former rule to the effect that, in cases of recoupment, a defendant could only use his claim to defeat that of the plaintiff. *Boston Silk & Woolen Mills v. Eull (N. Y.)* 37 How. Prac. 299, 301.

#### Analogous to failure of consideration.

Recoupment at common law was a claim for reduction of the amount due to the party. It was defined in Practice Act, § 129, in

these words: "In actions on contracts, whether under seal or not, defendant may set up as a defense in abatement of the damages to be recovered by plaintiff a defect in or partial failure of the consideration of the contract sued on. The defendant may also recoup all damages which he may have sustained by reason of any cause of action arising out of contracts or transactions set forth in plaintiff's declaration as the foundation of plaintiff's demand or connected with the subject of the action." The doctrine of recoupment had been adopted in courts of equity long before it was introduced by statute into the practice of courts of law. In substance and effect it may be likened to the reduction of the amount recoverable on a contract because of failure of consideration. *Norton v. Sinkhorn*, 50 Atl. 506, 508, 63 N. J. Eq. 313.

In *Barbour's Law of Set-Off* it is laid down that "there is a species of defense, somewhat analogous to set-off in character, which a defendant in some cases is allowed to make, and which is called 'recoupment.' This is where the defense is not presented as a matter of set-off arising on an independent contract, but for the purpose of reducing the plaintiff's damages, for the reason that he himself has not complied with the cross-obligations arising under the same contract." Recoupment in its origin was a mere right to deduct from the amount of the plaintiff's recovery, on the ground that his damages were not really as high as alleged. *Grand Lodge of Masons v. Knox*, 20 Mo. 433, 437.

Recoupment is a reduction of the plaintiff's claim by a counterclaim in favor of defendant, where the claim and counterclaim both grow out of the same contract or transaction. It is a proper defense where through the plaintiff's fault the defendant has failed to receive the full benefit of the contract on which plaintiff is suing him, or where defendant is entitled to damages from plaintiff for fraudulent representations made during the negotiations of the contract in regard to its subject-matter. *Phillips v. Sun Dyeing, Bleaching & Calendering Co.*, 10 R. I. 458, 460.

Recoupment is, as the word implies, the cutting out or reduction of a part of a creditor's demand, and is based upon some failure of the creditor to comply with the terms of the contract out of which the debt sued upon arises. See "Recoup," *And. Law Dict.* It goes directly to the amount due the plaintiff. The defendant, asserting such right, does not admit his indebtedness to plaintiff and seek to set off against it an indebtedness due from plaintiff to himself. He insists that plaintiff has in some material respect failed to perform his part of the contract on which the suit is based, and that by reason of such failure he has never become indebted to plaintiff to the full amount of

the agreed price. His counter demand goes directly to the amount due the plaintiff, and, while perhaps not strictly a defense, it has often been spoken of as such, or, at least, as a partial defense. *Medart Patent Pulley Co. v. Dubuque Turbine & Roller Mill Co.*, 96 N. W. 770, 771, 121 Iowa, 244.

Recoupment was the right which the defendant had in the early period of the common law of showing that the plaintiff had not sustained damages to the extent alleged, and thus to reduce or altogether defeat the plaintiff's recovery. It was of very limited application, and could only be resorted to when the defendant insisted upon a deduction from the plaintiff's demand arising from payment in part or in whole, or former recovery, or some analogous fact. "Recoupe," or "recoupment," in its original sense, was a mere right of deduction from the amount of the plaintiff's recovery, on the ground that his damages were not nearly as high as alleged. *Ward v. Fellers*, 3 Mich. 281, 286 (citing *Sedg. Dam.* [2d Ed.] c. 17, p. 431).

#### As an incomplete defense.

The word "recoupment" comes from the French "recouper"—to cut again; or to cut out, to keep back—and hence it is not proper to recoup under a plea in bar. *The Wells-ville v. Geissie*, 3 Ohio St. 333, 341.

Recoupment is a matter which is never pleaded in bar. It is in the nature of a cross-action. The right of the plaintiff to sue is admitted; but the defendant says he has been injured by the breach of another branch of the same contract on which the action is founded, and claims to stop, cut off, or keep back so much of the plaintiff's damages as will satisfy the damages which have been sustained by the defendant. If such a matter could be pleaded in bar of the action, it would be necessary to aver that the defendant's damages exceeded, or were at the least equal to, those due to the plaintiff; for otherwise the plea would not answer the whole action, and would be bad for that reason. But it is not a case for pleading in bar under any circumstances. *Nichols v. Dusenbury*, 2 N. Y. 283, 286.

"Recoupment cannot be exercised under a plea the office of which is to set up a complete bar; and hence, in an action of assumpsit based on a written contract, the defense to which is that the same was procured by fraud, going to the whole action, the doctrine of recoupment is not applicable." *Dillon Beebe's Son v. Eakle*, 27 S. E. 214, 217, 43 W. Va. 502.

Recoupment is applicable only to claims in favor of a defendant, arising in his favor out of the very contract or transaction in respect to which he is sued, and when plaintiff counts upon a contract which defendants deny altogether the doctrine of recoupment is

not applicable. *Morehouse v. Baker*, 48 Mich. 335, 339, 12 N. W. 170.

**Equivalent to new action.**

A plea in recoupment is in the nature of a new suit begun by defendant against the plaintiff, and a joinder in issue on such a plea, along with the general issue to the complaint, places on the defendant the burden of proving all the material allegations of the plea. *Moore v. Barber Asphalt Pav. Co.*, 23 South. 798, 801, 118 Ala. 563.

"Recoupment" is, in substance and effect, a cross-action, and, unless the party attempted to be subjected to it could be compelled to respond to damages by an independent action against him, he cannot be reached by recoupment. *Widrig v. Taggart*, 51 Mich. 103, 104, 16 N. W. 251.

**As a partial defense.**

"The meaning of recoupment is a reduction of damages claimed. In all the adjudicated cases in England and in this state in which recoupment has been allowed, it has been described as a partial defense, and for this reason it has been deemed necessary for the party claiming to recoup to give notice of that fact, not as a substitute for a plea, but for the purpose of preventing surprise to the opposite party. *McCullough v. Cox* (N. Y.) 6 Barb. 383, 391.

**Set-off distinguished.**

See, also, "Set-Off."

By Code, §§ 2909, 2910, recoupment and set-off are distinguished; recoupment being made to apply where both parties rely on the same contract, and set-off where they urge different contracts. *Fontaine v. Baxley*, 17 S. E. 1015, 1018, 90 Ga. 416.

Set-off differs from recoupment in that it is more properly applicable to demands independent in their nature and origin, while recoupment implies a cutting down of a demand by deductions arising out of the same transaction. *St. Louis Nat. Bank v. Gay*, 35 Pac. 876, 877, 101 Cal. 286.

Recoupment differs from set-off in several important particulars: First, it is confined to matters arising out of the same transaction; second, it has no regard to whether the claim be liquidated or unliquidated; third, if the defendant's claim exceeds the plaintiff's, he cannot in that action recover the balance due to him. *Baltimore & O. R. Co. v. Jameson*, 13 W. Va. 833, 838, 31 Am. Rep. 775.

Recoupment is contradistinguished from set-off in these three essential particulars: (1) In being confined to matters arising out of and connected with the transaction or contract on which the suit is brought; (2) in having no regard to whether such matter is

recorded or unrecorded; (3) that the judgment is not the subject of statutory regulations, but is controlled by the rules of the common law. *Myers v. Estell*, 47 Miss. 4, 23.

**Actions in tort.**

Recoupment is a species of common-law set-off for damages due the defendant growing out of the same transaction, and is allowed in Maryland in actions both *ex contractu* and *ex delicto*, in order to avoid circuity and multiplicity of actions. *Fidelity & Deposit Co. of Maryland v. Haines*, 28 Atl. 393, 394, 78 Md. 454, 23 L. R. A. 652.

Recoupment is a species of common-law set-off for damages due defendant growing out of transaction sued on. It has been allowed in Maryland in actions both *ex contractu* and *ex delicto*. Matter of defense or recoupment is raised under the general issue by way of defense. *Lee v. Rutledge*, 51 Md. 311, 318.

**Unliquidated demand.**

While recoupment "originally merely implied a deduction from the plaintiff's demand arising from payment in whole or in part, or from recovery, or some analogous fact, it is now understood to embrace counterclaims of the defendant, and to be, in short, a kind of regular and unliquidated set-off, which has crept in, notwithstanding the rigorous terms of the statute." "Recoup," it is said, "is synonymous with 'defalk' or 'discount.' It is now uniformly applied when a man brings an action for a breach of contract between himself and the defendant, and the latter can show that some stipulation in the same agreement is made by the plaintiff which he has violated. The defendant may, if he choose, instead of suing in his turn, recoup his damages arising from the breach committed by the plaintiff, whether liquidated or not." *Hatchett v. Gibson*, 13 Ala. 587, 594 (quoting *Sedg. Dam.* 461; *Ives v. Van Epps* [N. Y.] 22 Wend. 155, 156).

Recoupment arises out of matters connected with the transaction or contract on which plaintiff's cause of action is founded, and it matters not whether it be liquidated or unliquidated. It is not dependent on any statutory regulation, but is controlled by the principles of the common law. *Raymond v. State*, 54 Miss 562, 563, 28 Am. Rep. 382.

"Recoup" is synonymous with "defalk" or "discount." It is keeping back something which is due, because there is an equitable reason to withhold it, and is now uniformly applied where a man brings an action for breach of contract between him and the defendant, and the latter can show that some stipulation in the same contract was made by the plaintiff which he has violated. The defendant may, if he choose, instead of su-

ing in his turn, recoup his damages arising from the breach committed by the plaintiff, whether they be liquidated or not. The law will cut off so much of the plaintiff's claim as the cross-damages may come to. *Ives v. Van Eppes* (N. Y.) 22 Wend. 155. The force of the remedy by recoupment is spent in the discount or abatement of the plaintiff's claim, either partially or wholly, as the case may be. *Ward v. Fellers*, 3 Mich. 281, 290.

## RECOURSE.

See "With Recourse"; "Without Recourse."

Where a note provided, "if recourse is had to the collaterals, any excess of collaterals shall be applicable to any other note against the maker hereof," the word "recourse" signified a going back to or resort to them for the purpose of obtaining payment of the note, and hence the mere giving of a notice of intention to sell the collaterals did not amount to recourse thereto. *Winkler v. Magdeburg*, 76 N. W. 332, 334, 100 Wis. 421.

The word "recourse," in an act of sale excluding recourse as well as warranty, "carries but one idea, and that is that there shall be no reversion or coming back upon the seller in consequence of anything which might happen to the buyer because of his purchase of the property. No recourse means no access to; no return; no coming back upon; no assumption of any liability whatsoever; no looking to the party using the term for any reimbursement in case of loss or damage or failure of consideration in that which was the cause, the motive, the object, of the undertaking or contract." *Lyons v. Fitzpatrick*, 27 South. 110, 111, 52 La. Ann. 697.

## RECOVER—RECOVERY.

See "Action for the Recovery of Real Estate"; "Common Recovery"; "Final Recovery"; "Net Recovery."

To recover, in law, is to recover anything or the value thereof by judgment, as if a man sue for any land or other thing, movable or immovable, and have a verdict or judgment for same. *Norton v. Winter*, 1 Or. 47, 48 (citing 5 Jac. Law Dict. p. 401).

To recover means to obtain by course of law; to succeed in a trial. *Gawtry v. Adams*, 10 Mo. App. 29; *Hoover v. Clark's Adm'rs*, 7 N. C. 169, 171.

Webster's International Dictionary defines "recover" as "to get or obtain again; to get renewed possession of; to win back; to regain." *Kinney's Law Dictionary* says: "Recover means to obtain by course of law; to obtain by means of an action; to succeed

in an action." *Anderson's Law Dictionary* in substance defines "recover" as meaning to obtain by course of law. *Leslie v. York*, 68 S. W. 751, 112 Ky. 712.

Recovery is the obtaining of a thing by the judgment of court as the result of an action brought for the purpose. *Keiny v. Inghram* (N. Y.) 66 Barb. 250 (citing *Burrill*, Law Dict.).

"Recovery," as used in the Political Code, relating to fines, forfeitures, etc., and providing that they shall be paid out of the treasury for the use of the county where the person against whom the recovery is had resides, is employed in its ordinary sense, and means a recovery had by process and course of law. *People v. Reis*, 18 Pac. 309, 313, 76 Cal. 269.

Recovery of real property means nothing more than to obtain by judicial proceedings, and the term is so used in *Comp. Laws*, p. 67, § 263, providing that, in actions for the recovery of real property, the issues of fact arising therein shall be tried by a jury, unless a jury trial is waived. *Friend v. Oggschaw*, 3 Wyo. 59, 60, 31 Pac. 1047, 1048.

"Recovered" as used in Act Cong. 1779, c. 22, § 91, relating to the recovery of bounties for infringements of the revenue laws by the collector within whose district the seizure shall be made, etc., "Provided, nevertheless, that in all cases where such penalties, fines, and forfeitures shall be recovered in pursuance of information given to such collector by any person other than the naval officers or surveyor of the district, the one half of such moiety will be given to such informer and the other half to the officers of the revenue laws," means recovered by operation of law; that is, by a judicial decree in favor of the party suing for it. *Lapham v. Almy*, 95 Mass. (13 Allen) 301, 305.

The word "recover," as used in Code, c. 106, § 6, relating to attachment bonds, and declaring that such bonds shall provide "to pay any claimant of any property seized or sold under or by virtue of said attachment all damages which he may recover in consequence of such seizure or sale," does not show that actual recovery in an independent suit must precede suit on the bond, but the claimant may in the first instance recover damages in an action on the bond. *Totten v. Henry*, 33 S. E. 119, 120, 46 W. Va. 232.

### As acquire actual possession.

A client contracted with an attorney that he would pay the attorney for the prosecution of an action a fee of \$50 and a percentage of the damages which he might recover. Held, that the word "recover" means the actual possession of anything or its value by judgment of a legal tribunal, and the client was not liable for a percentage of the

judgment obtained, but only for a percentage of the damages received. *Fisher v. Mylius*, 26 S. E. 309, 310, 42 W. Va. 638.

A client who agreed to pay his attorney an amount equal to one-half of what they might recover was liable only for an amount equal to one-half of what he actually obtained by the judgment, and not one-half of the amount of the judgment, inasmuch as the word "recover" implies the actual obtaining of the thing sought. *Leslie v. York*, 66 S. W. 751, 112 Ky. 712.

#### **As affirmative finding.**

Under Code, § 3234, providing that where the complaint sets forth separately two or more causes of action, on which issues of fact are joined, if the plaintiff recovers on one or more of the issues, and the defendant on the other or others, each party is entitled to costs against the adverse party, etc., a defendant in an action wherein two causes of action are set up, the plaintiff being nonsuited as to one, and a general report in his favor as to the other for a sum of money being rendered by the referee, on which a judgment is entered, and there being no affirmative finding, verdict, or judgment in favor of defendant, he is entitled to costs as having recovered on one of the issues. Before the plaintiff is entitled to costs, there must, of course, be a recovery in his favor, and this means an affirmative finding, verdict, or judgment. The word, as used in the section, has the same meaning, whether applied to a plaintiff or defendant. *Reilly v. Lee*, 53 N. Y. Supp. 336, 338, 33 App. Div. 201.

The term "recover" has a well-defined meaning in the law, and this meaning had been adjudicated prior to the adoption of Ky. St. § 3314, providing that a city attorney shall be paid his salary and 10 per cent. on sums recovered by him for the city. For merely defending suits brought by banks against the city, it cannot be said that the city attorney recovered anything for the city, and that he is entitled to a percentage of the amount of taxes in controversy in the case, which he did not in any legal sense recover. *Atchison v. City of Owensboro* (Ky.) 71 S. W. 864, 865.

#### **Collection equivalent.**

See "Collect—Collection."

#### **As decision on issue of fact.**

A recovery, within Code Civ. Proc. § 3234, providing that in certain specified actions, if the plaintiff recovers on one or more of the issues and the defendant on the other or others, each party is entitled to costs, is a decision on an issue of fact; and defendant is not entitled to costs where there is a nonsuit as to two or three causes of action stated in a complaint, and a verdict

for plaintiff as to the other cause of action. *Burns v. Delaware, L. & W. R. Co.*, 17 N. Y. Supp. 415, 416, 63 Hun, 19.

#### **As final judgment.**

The word "recovery," as used in Rev. St. c. 32, § 30, providing that, in a suit by one town against another for the support of a pauper, a recovery shall bar the town against which it was had from disputing the settlement of the same pauper with the prevailing town in any future action brought for his support, means the obtaining of a final judgment in such suit. *Inhabitants of Oxford v. Inhabitants of Paris*, 33 Me. 179, 181.

#### **As recovery of damages not costs.**

The word "recover," as used in the statute declaring that if plaintiff shall not recover above the sum of \$50, besides costs, he shall not recover any costs, means the damages assessed by the jury, exclusive of the costs which they may arbitrarily find. *Van Horne v. Petrie* (N. Y.) 2 Caines, 214.

The word "recovery," as used in the statute regulating costs and fees, is the recovery for damages, and does not include interest on the verdict for damages. *Troy City Bank v. Grant* (N. Y.) 1 How. Prac. 135, 136.

#### **Previous possession not implied.**

In the Code of Civil Procedure, providing that actions for the recovery of any property, real or personal, or for the possession thereof, may be maintained by and against executors and administrators in all cases in which the same might have been maintained by or against their respective testators or intestates, the word "recovery" does not imply that the plaintiff had at some previous time owned or been in the possession of the property. So it is usual to speak of an action for the recovery of money under a contract when, as a matter of course, the plaintiff was never in possession of the money. *Monterey County v. Cushing*, 23 Pac. 700, 702, 83 Cal. 507.

#### **As recovery of fine.**

To recover is to obtain by course of law, within the meaning of Code, § 304, subd. 4, providing that plaintiff shall recover costs under certain circumstances. It matters not that a portion of the recovery is in the nature of a penalty or forfeiture. *Keiny v. Ingraham* (N. Y.) 66 Barb. 250.

"Recovered," as used in providing for interest on judgments recovered, implies that the judgment referred to is one attained by way of compensation and in return for an injury or debt, and hence will not include a judgment for a fine. *People v. Sutter* St. Ry. Co., 62 Pac. 104, 105, 129 Cal. 545, 79 Am. St. Rep. 137.

**RECOVERY OF MONEY.**

See "Action for Recovery of Money."

Rev. St. c. 110, § 74, provides that when appeals from judgments, orders, or decrees for the "recovery of money" are dismissed by the Supreme or Appellate Court for want of prosecution, or for failing to file authenticated copies of records, as required by law, the court shall enter judgment against the appellant for not less than 5 nor more than 10 per cent. damages on the amount recovered in the inferior court, for the collection of which the appellant shall be entitled to execution as on other judgments. Held, that a decree of foreclosure prosecuted by a defendant who is not personally liable for the debt is not a decree for the "recovery of money." *Hamburger Co. v. Glover*, 42 N. E. 46, 47, 157 Ill. 521.

**RECOVERY OF REAL ESTATE.**

See "Action for the Recovery of Real Estate."

**RECOVERABLE.**

Anything is recoverable when it is susceptible of being regained, gotten back. *Peterson v. Nash Bros.* (U. S.) 112 Fed. 311, 314, 50 C. C. A. 260, 55 L. R. A. 344 (citing *McKey v. Lee* [U. S.] 105 Fed. 923, 45 C. C. A. 127).

The plain, ordinary, and natural meaning of the word "recoverable" is that which is able to be, or is capable of being, recovered; "obtainable from a debtor or possessor, as by legal process." It means that which can be recovered as a matter of legal right. In *re Oliver* (U. S.) 109 Fed. 784, 788.

**RECREATION.**

"Recreation" is defined by Webster to be: (1) Refreshment of strength and spirits after toil; amusement; diversion. (2) Relief from toil or pain; amusement in sorrow or distress. Traveling on Sunday to make a social visit is not within the statute prohibiting any "recreation" on that day. *Corey v. Bath*, 35 N. H. 530, 538.

"Recreation," as used in Gen. St. § 1569, prohibiting engaging in any "recreation" on Sunday, should not be construed to include taking a ride for pleasure in a street car, though the term "recreation" might be used in a sense which would include taking such a ride. *Horton v. Norwalk Tramway Co.*, 33 Atl. 914, 915, 66 Conn. 272.

**RECRIMINATION.**

Recrimination is a showing by the defendant of any cause of divorce against the plaintiff in bar of the plaintiff's cause of di-

vorce. Rev. Codes N. D. 1899, § 2750; Civ. Code S. D. 1903, § 80; Civ. Code Mont. 1895, § 170; Civ. Code Idaho 1901, § 2031; *De Haley v. Haley*, 18 Pac. 248, 249, 74 Cal. 489, 5 Am. St. Rep. 460.

Recrimination is defined to be "a counter charge by the defendant of a cause of divorce against the complainant." Many authorities lay down the rule that, when each party has a cause of divorce, neither can obtain relief. The authorities differ as to whether, when the complainant alleges one cause as a ground of divorce, the defendant can set up another. Some authorities hold that any cause for divorce is generally a good defense against any other, even though they be cause for different kinds of divorce. But other authorities hold that the offense set up in defense must be of the same statutory kind as the offense charged in the bill. In the case at bar both parties were guilty of a like offense—cruelty—and the defense of recrimination was therefore sufficient. *Dubenstein v. Dubenstein*, 49 N. E. 316, 319, 171 Ill. 133.

The general doctrine of the law, that recrimination is a defense to a suit for divorce, has always been recognized and upheld by the courts, and, as has often been said, rests upon the soundest reason and the clearest principles of morality and justice. This doctrine is not, however, to be understood to mean that the defendant can defeat the plaintiff's right to a divorce by merely showing that plaintiff has been guilty of conduct which, if defendant's conduct had been faultless, would have entitled the defendant to a divorce. The misconduct of the plaintiff, in order to defeat the right to the divorce, while it need not be of equal degree with that of the defendant, must be of the same general character, and such as is reasonably calculated to have provoked the misconduct of the defendant. *Bohan v. Bohan* (Tex.) 56 S. W. 959, 960.

**RECRUITING EXPENSES.**

"Recruiting expenses," as used in a statute ratifying, confirming, and making valid the acts and doings of cities and towns in paying or agreeing to pay bounties and recruiting expenses for soldiers furnished by them, should be construed to mean only the costs and charges which had accrued in procuring or enlisting troops for future service, and could have no reference to expenditures for or on account of those who had previously enlisted and were already in the army. *Fowler v. Selectmen of Danvers*, 90 Mass. (8 Allen) 80, 84.

**RECTIFICATION.**

"It was ruled in *United States v. Tenbroek*, 15 U. S. (2 Wheat.) 248, 4 L. Ed. 231,

that rectified spirits were not dutiable as a product of distillation, because rectification, though strictly a process of secondary distillation, by which alcohol is produced in its highest state of concentration, is not distillation in the sense to which Congress had regard." *Schuykill Nav. Co. v. Moore (Pa.)* 2 Whart. 476, 491.

### RECTIFIER.

"Rectifier," as used in Internal Revenue Law July 13, 1866, means not merely a person who runs spirits through charcoal, but any one who rectifies or purifies spirits in any manner whatever, or who makes any mixture of spirits with anything else and sells it under any name. *Quantity of Distilled Spirits (U. S.)* 20 Fed. Cas. 107, 108.

A rectifier is one who changes liquors by adding to them, or compounding them, or rectifying them; and yet the courts have held that the mere addition of water to spirits would not make a person a rectifier, and the mixing of certain spirits of the same character, if they were under a certain age, would not be rectification. *United States v. Thirty-Two Barrels of Distilled Spirits (U. S.)* 5 Fed. 188, 190 (citing 10 Int. Rev. Rec. 121; *Bump's Int. Rev. Law* 217; *Int. Rev. Manual* 1879, p. 182).

### RECTIFY.

"Rectifying," means correcting; amending; refining by distillation; a sublimation; adjusting. Rectifying is not a process of manufacture. *Commonwealth v. Giltinan*, 64 Pa. (14 P. F. Smith) 100, 105; *State v. American Sugar Refining Co.*, 25 South. 447, 465, 51 La. Ann. 562.

### RECTOR.

In a case relating to the existence of a parish in the Episcopal Church, it was held that the suppression of a deposition by a bishop that a rector, as the word is understood by the canons of the church, is a duly ordained clergyman of the church, in priest's orders, who has been elected to the rectorship by the vestry of the parish, agreeably to the canons of the church, and in whose call or invitation or notification of election there is no limitation of time specified when the engagement or contract for such is to cease, was erroneous, on the ground that it was incompetent to prove by the bishop of the church the meaning of the word "rector," as understood by the canons of the church. *Bird v. St. Mark's Church of Waterloo*, 17 N. W. 747, 748, 62 Iowa, 567.

### RECTORY.

The word "rectory," in a conveyance of the rectory, will in many instances convey

land. *Gibson v. Brockway*, 8 N. H. 465, 470, 31 Am. Dec. 200.

A rectory or parsonage, as known in the Church of England, "consists of a glebe, tithes, and oblations established for the maintenance of a parson or rector, to have the cure of souls within the parish." *Town of Pawlet v. Clark*, 13 U. S. (9 Cranch) 292, 326, 3 L. Ed. 735 (quoting *Com. Dig. "Ecclesiastical Persons,"* C. 6).

### RECURRENT INSANITY.

"Recurrent insanity" is insanity which returns from time to time, and there is no presumption that such fitful and exceptional attacks of insanity are continuous. *Leache v. State*, 3 S. W. 539, 545, 22 Tex. App. 279, 58 Am. Rep. 638.

### RED TAPE.

"Red tape" is order carried to fastidious excess; system run out to trivial extremes. *Webster v. Thompson*, 55 Ga. 431, 434.

### REDEEM.

The word "redeem" means to purchase back. *Maxwell v. Foster*, 45 S. E. 927, 932, 67 S. C. 371.

"To redeem is to purchase back; to regain, as mortgaged property, by paying what is due; to receive back by paying the obligation." *Miller v. Ratterman*, 24 N. E. 496, 499, 47 Ohio St. 141.

The word "redeem" is thus defined by Webster: "To purchase back; to regain possession by payment of a stipulated price; to repurchase." According to the strict rules of the common law, unless the mortgagor or his heirs, by payment of the mortgage and interest at the time and place appointed, strictly complied with the conditions upon the fulfillment of which it was stipulated that he should re-enter upon his estate, it became the property of the mortgagee, even though it greatly exceeded in value the amount of the loan. Courts of equity, however, from an early period have held that the mortgagor, if he apply within reasonable time and offer to pay the amount due and costs, might redeem the forfeited estate. This right to redeem, as it could be enforced only in a court of equity, was called the equity of redemption. In *Howard v. Harris*, 1 Vern. 190, decided in 1683, it was held that no agreement in a mortgage could make it irredeemable, and that the right of redemption attached to every mortgage. *Swearingen v. Roberts*, 11 N. W. 325, 326, 12 Neb. 333.

The word "redeeming," in Gen. St. 1878, c. 81, § 15, relating to redemption sales on foreclosure, and providing that after the peri-



od for redemption has expired, no one redeeming, the court may grant a final decree, etc., refers to a redemption which annuls the sale. *Bovey De Laittre Lumber Co. v. Tucker*, 50 N. W. 1038, 1040, 48 Minn. 223.

#### Debt implied.

"Redeem," as used in an indorsement on a note which was given for a loan, the loan being secured by an absolute deed of real property, the indorsement being in the following form: "You can redeem it in a reasonable time by paying me my money and 10 per cent."—implies the existence of a debt and negatives the idea of an absolute sale. *Workman v. Greening*, 4 N. E. 385, 387, 115 Ill. 477.

Where a mortgagor in default executes to his mortgagee an instrument in the form of a warranty deed of the land, in consideration of the amount due on the mortgage, with a clause reciting that the deed is given in satisfaction of the mortgage, and that the grantor shall have the right to redeem or repurchase the premises at any time within one year by paying a specified sum, together with interest and all costs and taxes paid by the grantee, the grantor to have possession for the year, the instrument will be treated as a deed; it appearing that it was given to save the expenses and delay of foreclosure, and the word "redeem" not being sufficient to continue the debt in force. *Swarm v. Boggs*, 40 Pac. 941, 12 Wash. 246.

#### As repurchase.

The word "redeem," as used in statutory provisions authorizing a party to redeem, means "repurchase." *Robinson v. Cropsey* (N. Y.) 2 Edw. Ch. 138, 146.

The word "redeem" means repurchase. The words are synonyms, and the first has come into use with lawyers to describe the right of a mortgagor of lands by reason of the old practice, which prevailed in England, of making absolute conveyances of land by way of mortgage, with a covenant to reconvey upon the payment of the debt; an actual real conveyance being made. The form of conveyance by way of mortgage, now and for many years past in use in this country, dispenses with the necessity of a reconveyance; but the phrase "equity of redemption" is still used to describe the mortgagor's right. *Pace v. Bartles*, 20 Atl. 352, 359, 47 N. J. Eq. (2 Dick.) 170.

#### REDEEMABLE.

A stipulation in bonds that the principal sum should be redeemable in good and lawful money at the place and day therein designated must be deemed equivalent to an agreement that they shall be payable on that day. *United States v. North Carolina*, 10 Sup. Ct. 920, 924, 136 U. S. 211, 34 L. Ed. 336.

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#### REDEEMED IF DESIRED.

"Redeemed, if desired," as used in a bond providing that it will be "redeemed, if desired," a certain time after date, should be construed as giving the holder an option for its payment at that time. *Allentown School Dist. v. Derr's Adm'r*, 9 Atl. 55, 57, 115 Pa. 439.

#### REDEMPTION.

See "Equity of Redemption"; "Right of Redemption."

Where stock of a corporation has been pledged for the "redemption of certificates of debt," and the certificates bound the testator for the payment of the sum therein specified and the interest thereon, the stock is bound for the payment of the interest itself, and a foreclosure may therefore be decreed on default of payment of any installment of interest. *Swasey v. North Carolina R. Co.* (U. S.) 23 Fed. Cas. 518, 520.

"Redemption" is regarded as a buying back by the mortgagor of the legal estate after it has passed to the mortgagee. In *Pom. Eq. Jur.* § 1220, it is said: "No such redemption, however, is possible, unless the mortgage debt is due and payable, nor unless the mortgage is wholly redeemed by payment of the entire amount of the mortgage debt." In *Collins v. Riggs*, 81 U. S. (14 Wall.) 491, 20 L. Ed. 723, Mr. Justice Bradley, speaking for the court, says: "To redeem property which has been sold under a mortgage for less than the mortgage debt, it is not sufficient to tender the amount of the sale. The whole mortgage debt must be paid or tendered into court. The party offering to redeem proceeds upon the hypothesis that, as to him, the mortgage has never been foreclosed and is still in existence. Therefore he can only lift it by paying it. The money will be subject to distribution between the mortgagee and the purchaser in equitable proportions, so as to reimburse the latter his purchase money and pay the former the balance of his debt." *Evans v. Kahr*, 57 Pac. 950, 951, 60 Kan. 719 (citing *Ping. Chat. Mortg.* § 2184; *Jones, Mortg.* §§ 1072-1075; *Hosford v. Johnson*, 74 Ind. 479; *Martin v. Fridley*, 23 Minn. 13; *Bradley v. Snyder*, 14 Ill. [4 Peck] 263-266, 58 Am. Dec. 564; *Vroom v. Dittmas* [N. Y.] 4 Paige, 526; *Johnson v. Harmon*, 19 Iowa, 56).

"Redemption," as used in Const. art. 9, § 10, providing that no scrip or certificate or other evidence of indebtedness shall be issued, except for the redemption of stock, bonds, or other evidences of indebtedness previously issued, or for such debts as are expressly authorized in this Constitution, "means not merely that a new bond may be issued in exchange or as a substitute for an old one, but also that a new bond may be

issued for the purpose of obtaining the money necessary to pay or redeem the old bond." *Robertson v. Tillman*, 17 S. E. 678, 679, 39 S. C. 298.

A law of redemption is a statute which confers upon the party where land is sold for debt by execution, etc., the right to redeem or repurchase the land within a limited time after the sale. *Reynolds v. Baker*, 46 Tenn. (6 Cold.) 221, 228.

The terms "redemption" and "equity of redemption," which belonged to a system of law that gave the legal estate, defeasibly before default and absolutely afterward, to the mortgagee, while that system prevailed, were descriptive of the mortgagor's right to go into equity, on the condition of paying his debt, to redeem a forfeited estate and demand a reconveyance. These descriptive words yet survive and are in use, although the ideas they once represented have long since become obsolete. *Kortright v. Cady*, 21 N. Y. 343, 365, 78 Am. Dec. 145.

"Redemption," as used in a bill of lading by an express company undertaking to forward to a certain place for redemption a package of currency, should be construed to amount to an agreement to present the currency for redemption and return the funds to the sender if redeemed, or to return to him the notes with the evidence of the refusal to pay in the event of nonpayment. To deliver to a bank its own notes, and not requiring an equivalent, would be the reverse of a redemption. The essential idea of redemption of currency is that the party issuing it is a debtor, and is called on to pay his debt by redeeming the notes presented. *Reed v. United States Exp. Co.*, 48 N. Y. 462, 469, 8 Am. Rep. 561.

#### **As payment.**

There seems to be a wide difference between the payment of a tax by the owner of the land and the redemption of the land by him after it has been sold for nonpayment of the taxes assessed upon it. There is really no tax to be paid when land is thus redeemed. That has been canceled by the sale. The redemption is the payment to the holder of the certificate of an incumbrance which he thereby has upon the land, and does not seem to be the payment of a tax in any correct sense of that term. Under Laws 1844, p. 22, § 12, an action for the recovery of lands forfeited for taxes was required to be commenced within three years from the recording of the tax deed, except in cases where the taxes should actually have been paid. Held, that the exception did not include a case where the land was redeemed before the recording of the deed. *Lindsay v. Fay*, 28 Wis. 177, 182.

Where corporate stock was pledged for the redemption of a certificate of debt, and

the certificate bound the state for the payment of the sum therein mentioned, with interest thereon, the word "redemption" was equivalent to the word "payment." *Swasey v. North Carolina R. Co.* (U. S.) 23 Fed. Cas. 518, 520.

#### **REDEMPTIONER.**

By Code Civ. Proc. § 701, two classes of persons are given the right to redeem from judicial sales made subject to redemption: First, the judgment debtor or his successor in interest; and, second, creditors having subsequent liens by judgment or mortgage—the latter class being termed "redemptioners." A grantee by deed from the judgment debtor after foreclosure sale is a successor in interest, and not a redemptioner, and is entitled to all the rights of redemption given by the statute to his grantor, to be exercised in the same manner. *Phillips v. Hagart*, 45 Pac. 843, 844, 113 Cal. 552, 54 Am. St. Rep. 369.

Comp. Laws 1887, § 5151, authorizing a judgment debtor or redemptioner to redeem property sold on execution within one year after the sale, expressly limits the term "redemptioner" to a mortgagee or subsequent creditor having a lien subsequent to that on which the property was sold. *Stocker v. Puckett* (S. D.) 96 N. W. 91.

#### **REDELIVER.**

A covenant by a lessee to "redeliver or restore the property in the same condition or plight, usual wear and tear excepted," does not bind the covenantor to rebuild in case of casual destruction by fire, or impose the burden of the loss upon him. *Levy v. Dyess* (Miss.) 8 Cent. Law J. 221, 222.

#### **REDELIVERY.**

The redelivery of a grant of real property, or the cancellation of the grant, does not operate to retransfer the title. *Johnson v. Burnside*, 52 N. W. 1057, 3 S. D. 230.

#### **REDELIVERY BOND.**

A distinction is to be observed between the effect of a bail bond and a redelivery bond in attachment; the former being given as security for the payment of such judgment as may be recovered in the action, while the latter is an engagement to redeliver the attached property or pay the value thereof to the sheriff, to whom an execution upon a judgment obtained by the plaintiff in the action may be issued, and authorizes the sheriff to yield the actual possession of the attached property to the defendant or other person claiming it, but does not withdraw the property from the operation of the lien thereon. A redelivery bond

differs from a bail bond, in that it does not discharge the lien of the attachment, since the very object of the bond is to insure the safe-keeping and faithful return of the property to the officer, if its return should be required. *Drake v. Sworts*, 33 Pac. 563, 564, 24 Or. 198.

## REDHIBITION.

Redhibition is the avoidance of a sale on account of some vice or defect in the thing sold, which renders it absolutely useless, or its use so inconvenient and imperfect that it must be supposed that the buyer would not have purchased it, had he known of the vice. Civ. Code La. 1900, art. 2520.

## REDISCOUNTED NOTES.

Rediscounted notes are said to be notes held by a bank, which it indorses and procures another bank to discount; so that testimony that another bank had rediscounted implied that the notes had been indorsed. *Dorsey v. United States (U. S.)* 101 Fed. 746, 749, 41 C. C. A. 652.

## REDOUND.

"Redound" signifies to conduce; to contribute; to result. "Redound" is not equivalent to "require," within a statute providing that, upon a petition by a guardian for the sale of the real estate of the infant ward, the commissioners appointed must report whether the interest of the infant requires a sale to be made. A report that the sale would redound to the interest of the infant does not confer jurisdiction to make the sale. *Mattingly's Heirs v. Read (Ky.)* 8 Metc. 524, 526, 79 Am. Dec. 565.

## REDUCE.

"Reduced," as used in a codicil to a will, declaring that the shares of certain residuary legatees mentioned in the will should be reduced in certain specified amounts each, means that the legacies should be lessened, diminished, or lowered by the amounts specified. It does not mean that there should be taken from the respective shares the amounts named; that is, that there should be excepted out of the residuary legacies the aggregate sum of the respective reductions. While such might be said to be one, and perhaps the ordinary, meaning of the word "reduced," it is not the only one in common and ordinary use. Worcester's definitions include: "(2) To bring to a former state; to restore. (3) To bring into any state, but generally one of diminution, subordination, or order." Webster's: "(2) To bring to a state or condition specified, usually inferior

or weaker, sometimes indifferent. (3) To bring to inferior state with respect to rank, size, quality, value, or the like; to diminish; to lower; to degrade or impair." *Hayward v. Loper*, 35 N. E. 225, 226, 147 Ill. 41.

### In insurance.

The word "reduce" is a word which may have a purely technical or local use, different from the common use, and when used in a letter by the managers of a fire insurance company, instructing their local agents to reduce the amount insured by a policy issued by them, parol evidence may be given to show its use in insurance circles. There are but few words in our language that have so many technical meanings as the word "reduce." In the medical profession instructions to reduce a fracture would mean one thing; in the military world, to reduce a fort, quite another; to the mathematician, to reduce a problem, another; to the chemist, to reduce a substance, still another; and so on. But in each case it would be competent to show by parol evidence, if any exigency required it, just what the words "to reduce" meant in the connection in which they were used, and that they clearly implied to any one in the business or trade in which the instructions were given just what means should be used and steps taken to accomplish the purpose intended. *Halsey v. Adams*, 43 Atl. 708, 709, 63 N. J. Law, 330.

### REDUCE TO POSSESSION.

To "reduce to possession" is to change a right existing as an actionable claim into actual custody and enjoyment. *And. Law Dict.* 792.

A right to reduce to possession imports *ex vi termini* a right to the completeness and operative force of which something else is still indispensable. A right of immediate possession and a right to reduce to possession are obviously not identical propositions. Where goods of one in the possession of another are taken on attachment, the right of the owner to the possession of the goods as against that other is such a right to reduce to possession, under Code, § 1690, providing that replevin will not lie where at the time of seizure plaintiff had no right to reduce the property into his possession, as will sustain replevin against the sheriff. *Klee v. Grant (N. Y.)* 23 N. Y. Supp. 855.

### REDUCED REGIMENT.

A regiment broken up and consolidated is spoken of as "reduced." *Williams v. United States*, 11 Sup. Ct. 43, 48, 137 U. S. 113, 24 L. Ed. 590.

### REDUCTION.

See "Horizontal Reduction."

**REDUNDANT—REDUNDANCY.**

"Redundant," as used in Code, § 160, providing that, if irrelevant or redundant matter be inserted in a pleading, it may be stricken out on motion of any person aggrieved thereby, means what is usually understood as impertinent. According to Webster "redundant" means superfluous, more than is necessary, superabundant. Prolixity may become redundancy. *Carpenter v. West* (N. Y.) 5 How. Prac. 53, 55.

"Redundant matter," as used in Code, § 150, providing that irrelevant or redundant matter in pleading may be stricken out, does not authorize an entire answer, or an entire defense in an answer, to be stricken out as irrelevant or redundant; but the terms mean merely matter impertinently or unnecessarily stated in stating the cause of action in the complaint or a defense in the answer. *Fasnacht v. Stehn*, 5 Abb. Prac. (N. S.) 338, 343.

In pleading, "redundancy" is the introduction of matters foreign to or not necessary to the cause of action or defense stated. It is a needless repetition of immaterial averments or conclusions of law, and may be struck out on motion without any prejudice to the defendants. *Carpenter v. Reynolds*, 17 N. W. 300, 301, 58 Wis. 666.

A needless repetition of immaterial averments is redundancy, although the facts averred, so far from being irrelevant, may constitute the whole cause of action. Matter which is irrelevant is also redundant, but the converse is by no means true. *Bowman v. Sheldon*, 7 N. Y. Super. Ct. (5 Sandf.) 657, 660.

**RE-EMPLOYMENT.**

A person while in the employ of a railroad company as a spare brakeman was injured, and on recovery entered into a written contract whereby, in consideration of his employment for such time as his services and conduct should be satisfactory, he released all claims for damages. It was held that the term "re-employment" means the same service in which he was formerly employed, that of spare brakeman, liable to be laid off when no brakeman was needed and to be re-employed when one was. *Sax v. Detroit, G. H. & M. Ry. Co.*, 89 N. W. 368, 369, 129 Mich. 502.

**RE-ENLISTED.**

"Re-enlisted," as used in an agreed statement of facts in an action to recover a bounty for services in the army of the United States, which states that the "plaintiff re-enlisted while in Virginia," means that the plaintiff was a person who had been mustered and received into the military service

of the United States. *Barker v. Inhabitants of Chesterfield*, 102 Mass. 127, 130.

**RE-ENLISTED VETERAN.**

A warning was given "to see if the town will pay bounties to veterans who have re-enlisted in the field." A vote authorized payment of the bounty "to each re-enlisted veteran who has re-enlisted for," etc. Held, that the words "re-enlisted veteran," in the vote, mean "re-enlisted veteran in the field," and hence one who was discharged before his re-enlistment was not entitled to a bounty. The meaning is the same as though the words "re-enlisted in the field" had been in the vote, as they were in the warning. The term "in the field" has just as clear and well-defined a meaning, when used in reference to army service in a state of war, as any other plain and well-understood expression. "Soldiers in the field," or "veterans in the field," or "army in the field," all mean persons in the military service for the purpose of carrying on the pending war; and a person who had been several months out of the army, though he may in common parlance perhaps be called a veteran, on account of the service he had given before his discharge, could not with propriety be said to be a veteran in the field. *Sargent v. Town of Ludlow*, 42 Vt. 726, 729.

**RE-ENTER.**

A lease reserved to the lessors the right upon default "into and upon said premises to re-enter," and the same to have again as in their first and former estate, and the lessee covenanted to pay any deficiency arising on the reletting of the premises after such re-entry by the lessors as his agents. Held to mean only a re-entry in the technical sense, as known to the common law, by ejectment, and not to include a removal of the lessee by statutory summary proceedings. *Michaels v. Fishel*, 62 N. E. 425, 428, 169 N. Y. 381. The word "re-enter" at common law invests the landlord with the right to maintain ejectment, and this rule has not been changed by statute. *McMahon v. Howe*, 82 N. Y. Supp. 984, 985, 40 Misc. Rep. 546.

**RE-ENTRY.**

"Re-entry," as used in a lease reserving the right of re-entry upon default, the lessee to pay any deficiency arising on the reletting of the premises after such re-entry by the lessors as his agents, means a re-entry in the technical sense, as known to the common law, by ejectment, and does not include a removal of the lessee by statutory summary proceedings. Re-entry is the resumption of possession pursuant to a right reserved when the former possession was parted with. It was a remedy given by the feudal law for

nonpayment of rent, but so ancient that its origin has never been traced. It can be exercised only when the right is expressly reserved in the lease; for without such reservation the remedy of the lessor under the lease, independent of the statute, is confined to an action on the covenant. The method of exercising the right is by an action of ejectment to recover possession of the demised premises. In common law the right to re-enter, except when entry can be made without force, is simply the right to maintain ejectment. Re-entry was coeval with the common law in origin, and it has come down to modern times with its meaning unchanged. Narrow and technical to begin with, it has so continued throughout its history, and is narrow and technical to this day, although the extreme nicety of procedure in exercising the right has been somewhat softened by statute. *Michaels v. Fishel*, 62 N. E. 425, 427, 169 N. Y. 381.

The right of re-entry referred to in Civ. Code, § 791, providing that, "when the right of re-entry is given a lessor in a lease, such re-entry must be made at any time after the right has accrued, on three days' notice," is the right given to the landlord on some default of the tenant during the term, and not the right which he has when the lease is for a fixed term, which has expired. *Earl Orchard Co. v. Fava*, 70 Pac. 1073, 1074, 138 Cal. 76.

The provisions of Act May 13, 1846, § 3, abolishing distress for rent, and providing for 15 days' notice to the tenant to make a re-entry, did not apply where the right of re-entry arose on the breach of any other covenant than that for the payment of rent. *Garner v. Hannah*, 13 N. Y. Super. Ct. (6 Duer) 262, 272.

## RE-ESTABLISHED.

The word "re-established," in a statute providing that a certain ferry was re-established in the name of plaintiff, was construed to be sufficient to vest the ferry in the plaintiff. *Stark v. McGowen* (S. C.) 1 Nott & McC. 387, 392.

## RE-ESTABLISHMENT.

The re-establishment of a grade already established does not necessarily mean the alteration or changing of such grade. *Seaman v. Borough of Washington* (Pa.) 33 Atl. 756, 757.

## RE-EXCHANGE.

Re-exchange is the expense incurred by a bill of exchange being dishonored in a foreign country, in which it was payable, and returned to the country in which it was

made or indorsed and there taken up, the amount of which depends on the course of the exchange between the two countries through which the bill has been negotiated. *Bangor Bank v. Hook*, 5 Me. (5 Greenl.) 174, 175.

## REFER.

Under Rev. St. 1889, § 4219, providing that, if the accused does not testify, it shall not be construed to affect the innocence or guilt of the accused, nor be referred to by any attorney in the case, the words "referred to" are held to mean "alluded to." "Refer" is a synonym of "allude," and these words are used interchangeably. *State v. Moxley*, 102 Mo. 374, 393, 14 S. W. 969.

The word "referred," when used with reference to an action entered as referred, imports a reference in the common form, with power of the referees to decide, in case of necessity, by a majority, and to proceed on hearing one party, if the other, duly notified, fails to be present. *Billington v. Sprague*, 22 Me. (9 Shep.) 34, 45.

## REFEREE.

As court, see "Court."

A referee for the trial and decision of actions is an officer exercising judicial power under public authority. In *re Hathaway*, 71 N. Y. 238, 243.

"Referee," as used in the bankruptcy act, shall mean the referee who has jurisdiction of the case or to whom the case has been referred, or any one acting in his stead. U. S. Comp. St. 1901, p. 3419.

A referee, under the statutes, is an officer of the court for a specific purpose; that is, "to take testimony," "to ascertain a fact," or, it may be, to hear and determine any or all of the issues of fact in an action, and to report a finding upon which judgment may be entered by the court. *Betts v. Letcher*, 46 N. W. 193, 1 S. D. 182.

A referee is a person appointed by the court or a judicial officer, with power (1) to try an issue of law or of fact in a civil action, suit, or proceeding, and report thereon; (2) to ascertain any other fact in a civil action, suit, or proceeding, when necessary for the information of the court, and report the fact, or to take and report the evidence in a suit in equity; (3) to execute an order, judgment, or decree, or to exercise any other power or perform any other duty expressly authorized by the Code. *Ann. Codes & St. Or.* 1901, § 987.

## Master in chancery.

Rev. St. § 824 [U. S. Comp. St. 1901, p. 632], allows a docket fee of \$20 to be taxed

"on a trial before a jury in civil or criminal causes, or before referees, or on the final hearing in equity or in admiralty." "In my judgment, the word 'referee,' as used in this statute, has reference to a class of officers who are appointed in pursuance of the statutes of the various states to hear and determine all the objections that arise on the final hearing of a cause. It does not have reference to or include masters in chancery, whether they hold their place by the general appointment or by a special appointment." *Central Trust Co. v. Wabash, St. L. & P. Ry. Co.* (U. S.) 32 Fed. 684, 685.

#### REFEREE IN BANKRUPTCY.

A referee in bankruptcy is not only a judicial officer charged with the performance of the duties prescribed in the statute, but he is also required to give bond to insure the observance of his official oath. This is an unusual requirement of a quasi judicial officer, and the findings of fact of a referee in bankruptcy on petition for discharge, where a rule of court requires him to hold the meeting to consider it, will not be disturbed, except for clearly shown error. *In re Covington* (U. S.) 110 Fed. 143.

#### REFEREE IN CASE OF NEED.

The drawer of a bill and any indorser may insert thereon the name of a person to whom the holder may resort in case of need; that is to say, in case the bill is dishonored by nonacceptance or nonpayment. Such person is called the "referee in case of need." *Neg. Inst. Law N. D. § 131; Rev. Codes N. D. 1899, § 1044.*

#### REFERENCE.

Arbitration distinguished, see "Arbitration."

The appointment of a referee is denominated a "reference." *Ann. Codes & St. Or. 1901, § 988.*

At common law a reference was the sending of any matter by the court of chancery to a master, or by a law court to a prothonotary, to examine it. *Indiana Cent. Ry. Co. v. Bradley*, 7 Ind. 49, 55.

A submission to a reference is the voluntary act of the parties, and the rule of reference, when made, determines the extent of the powers of the referee. Every enlargement of the rule is, in effect, a new reference, and requires the same assent of the parties as is required to make the submission in the first instance. The mere statement in the referee's report of the enlargement of the rule of reference is not sufficient evidence that it was regularly enlarged, but a record or certificate from the justice to that effect is required. *Lazell v. Houghton*, 32 Vt. 579, 583.

#### REFERENCES.

Act N. Y. April 1, 1848, § 3, providing that it should not be lawful for the state reporter of the judicial decisions to secure or obtain any copyright for such reports, notes, or references, but the same may be published by any person, cannot be construed to include the abstracts of the pleadings and statements of fact which form the basis of the decisions reported. The table of contents, entitled "Cases Reported," which consists of the titles of suits comprised in the book, with reference to the several particular pages where the cases are to be severally found, might be embraced in the term "references." *Little v. Gould* (U. S.) 15 Fed. Cas. 604, 608.

"References," as used in *Laws N. Y. 1850, c. 245, § 479*, providing that the copyright of any "notes or references" made by the state reporter to any of the reports of the judicial decisions of the Court of Appeals should be vested in the Secretary of the State, should be construed as embracing the headnotes and marginal notes of the reporter, together with the arguments of counsel and the cases cited therein. *Little v. Gould* (U. S.) 15 Fed. Cas. 612, 613.

#### REFINED COAL OR EARTH OIL.

"Refined coal or earth oil," in a fire policy prohibiting the keeping of kerosene or other refined coal or earth oil, includes gasoline, though it is not specifically designated. *Kings County Fire Ins. Co. v. Swigert*, 11 Ill. App. (11 Bradw.) 590, 598.

"Refined coal or earth oils," as used in a fire policy containing a condition that it shall be void if "refined coal or earth oils" are kept for sale, etc., will be construed to include kerosene. *Bennett v. North British & Mercantile Ins. Co.*, 81 N. Y. 273, 275, 37 Am. Rep. 501.

The term "refined coal or earth oils" naturally includes naphtha, benzine, benzole, and kerosene, as such oils do not differ in nature, but only in degree of inflammability; but in a policy of insurance against fire prohibiting the keeping of benzine, benzole, naphtha, or refined coal or earth oils upon the premises, the term does not include kerosene, by reason of the specific enumeration of the oils of the same nature as kerosene and the omission to specifically enumerate the latter oil. *Morse v. Buffalo Fire & Marine Ins. Co.*, 30 Wis. 534, 537, 11 Am. Rep. 587.

#### REFINED SUGAR.

"Refined sugar," as used in the revenue act, placing a duty of two cents per pound on all sugar refined in the United States, applies exclusively to such as have assumed

at some time the form of white refined loaf or lump sugar, and does not include bastard sugars, which are a species of sugar of a very inferior quality, of less value than the raw material, the residuum or refuse of clayed sugars, left in the process of refining after taking away the loaf and lump sugar which results from that process. In the sense of having been clarified and freed from their feculence, sugars which have undergone the full process of refining after they have arrived at the point of granulation are popularly to be deemed refined sugars, whether they have been clayed or not, but such is not the popular meaning of the term. *Barlow v. United States*, 32 U. S. (7 Pet.) 404, 410, 8 L. Ed. 728.

"Refined," as used in Act Cong. July 24, 1873, imposing a duty on all sugar refined within the United States after a certain date, refers to a particular process in preparing the sugar for sale, which is terminated before the sugar is put into the molds. The act of refining is completed when the sugar is fit to be granulated. *United States v. Pennington* (U. S.) 27 Fed. Cas. 493.

"Refined sugar," as used in the act of Congress relating to a drawback on the exportation of refined sugars, means the sugars known in the market as "loaf" and "lump." Whether they remain in the lump, or are crushed, every product of raw sugar that has gone through the process of refining, and which can again be converted into sugar, cannot, in a commercial sense and within the meaning of the law, be considered as refined, though in a certain sense they may be so considered. *United States v. Eighty-Five Hogsheads of Sugar* (U. S.) 25 Fed. Cas. 991, 993.

## REFINEMENT.

A refinement is understood to be the verbiage which is frequently found in indictments in setting forth what is not essential to the constitution of the offense, and therefore not required to be proved on the trial. *State v. Gallimon*, 24 N. C. 372, 377.

An objection that an indictment for assault with intent to commit rape did not set out the constituents of the offense of rape, made after verdict, is a "refinement," within Code, § 1183, providing that judgments on indictments shall not be stayed by reason of any informality or refinement, if in the bill or proceeding sufficient matter appears to enable the court to proceed to judgment. *State v. Peak*, 41 S. E. 887, 888, 130 N. C. 711.

## REFLECT.

The word "reflect" is defined by Webster, *inter alia*, as follows: "(5) To bring reproach;

to reflect on; to cast censure or reproach." A writing reflecting upon an individual, therefore, is libelous. *Cooper v. Greeley* (N. Y.) 1 Denio, 347, 359.

## REFLECTION.

See "After Reflection."

## REFORM.

The power of the court to reform a contract means the power to reduce it to the terms agreed on by the parties. *Sullivan v. Haskin*, 41 Atl. 437, 438, 70 Vt. 487.

## REFORMATION.

Where a party has been found to be incapable of conducting his own affairs by reason of habitual drunkenness, the court will not discharge his committee and restore the property to him unless a permanent reformation appear; and the word "reformation," used in this connection, means nothing less than a total abstinence from all alcoholic liquors for at least one year. It must also be a voluntary abandonment of the use of intoxicants, and not an abandonment which is the result of constraint or of the want of means to procure liquor; and hence, where, on an application by an habitual drunkard to be restored to the possession of his property, it does not appear that the relinquishment of intoxicants has been voluntary, and there is some evidence of intoxication within a year, the application will be denied. *In re Hoag* (N. Y.) 7 Paige, 312, 313.

### Of instruments.

"Reformation" is appropriate when an agreement has been made or a transaction has been entered into or determined on as intended by all the parties interested, but in reducing which to writing a mistake has been made, either through common mistake or a mistake of one in fraud of the other, so that the written instrument fails to express the real agreement. *De Voin v. De Voin*, 44 N. W. 839, 841, 76 Wis. 66; *Gaffney Mercantile Co. v. Hopkins*, 52 Pac. 561, 562, 21 Mont. 13.

The reformation of a deed or mortgage is an equitable remedy, granted for the purpose only of effecting a remedy, and will not be granted to destroy an equity. *Ocean Beach Ass'n v. Trenton Trust & Safe Deposit Co.* (N. J.) 48 Atl. 559, 561.

## REFORMATORY.

"Reformatory" includes all institutions and places in which efforts are made either to cultivate the intellect, instruct the conscience, or improve the conduct, or places in which persons voluntarily assemble, re-

ceive instruction, and submit to discipline, or are detained therein for either of these purposes by force; and a bequest for the building of a "boys' reformatory" is void for uncertainty. *Hughes v. Daly*, 49 Conn. 34, 35.

A reformatory institution is in a certain sense a penal institution, being a substitute for a jail or penitentiary; its scheme being to not only punish, but at the same time to discipline and reform, the youth of both sexes who have committed small offenses or are likely to become outcasts in society. *McAndrews v. Hamilton County*, 58 S. W. 483, 484, 105 Tenn. 399.

## REFRACTORY METAL.

Refractory earth or metal is one that requires extraordinary heat to fuse it. *Jenkins v. Johnson* (U. S.) 13 Fed. Cas. 525, 527.

## REFRESHMENT SALOON.

"Refreshment saloon," as used in an ordinance requiring refreshment saloons or restaurants to procure licenses, etc., means a room or rooms fitted up for purposes similar to those of a restaurant, whether or not spirituous liquors are kept, and is synonymous with "eating house," and does not include a shop which is used for the manufacture and sale of tobacco, snuff, and cigars. *State v. Hogan*, 30 N. H. (10 Fost.) 268, 272.

## REFRIGERATOR CAR.

A refrigerator car is built for the purpose of carrying freight, and the only material difference between it and an ordinary freight car is that the former is provided with appliances for preserving ice, in order to preserve the contents, while the latter is not. Railroad Commissioners' Order No. 2 requires every railroad company operating within the state to receive every loaded car tendered to it by a connecting carrier for transportation. Held, that the fact that a car tendered was a refrigerator car not suitable or usually used for the transportation of the kind of freight loaded therein was no defense to an action for refusal to receive the car. *Gulf, C. & S. F. R. Co. v. Lone Star Salt Co.*, 63 S. W. 1025, 1027, 26 Tex. Civ. App. 531.

## REFUGE.

The phrase "taken refuge in the state of Texas," in an extradition warrant, stating that the persons whose arrest and surrender is hereby ordered stand charged with a certain crime in the demanding state and that they have taken refuge in the state of Texas, is equivalent to a statement that they are

fugitives from justice. *Ex parte Stanley*, 8 S. W. 645, 647, 25 Tex. App. 443, 8 Am. St. Rep. 440.

## REFUND.

"Refund," as used in Pub. Laws 1887, c. 33, providing that, where the municipal officers of a city or town in which a deceased person, who had served in the army, navy, or marine corps of the United States during the Rebellion lived, have paid the expense of his burial, the state shall refund the amount so paid by the town, implies a payment to the town of money previously paid by the town. *Rackliff v. Inhabitants of Greenbush*, 44 Atl. 375, 376, 93 Me. 99.

The word "refund" in strictness means to pour back, but in a will bequeathing dividends of bank stock to testator's sister, and providing that, if at any time during her life the whole or any part of said stock shall be paid off and refunded, then the amount so paid off and refunded shall be paid to the sister, the word was used as a synonym for "paid," which is also one of its definitions. *Maynard v. Mechanics' Nat. Bank (Pa.)* 1 Brewst. 483, 484.

Where dividends received by a stockholder of a corporation impair or reduce the capital stock of such corporation, the capital stock is "refunded," within Comp. Laws 1897, § 7057, providing that, if the capital stock of a corporation is withdrawn or refunded to the stockholders before payment of all corporate debts for which the stock is liable, the stockholder shall be liable to corporate creditors to the amount so refunded to them. The capital stock may be refunded to the stockholders as well by distribution by way of dividends declared in the ordinary way as by basing them upon formal actions to reduce the capital stock. *American Steel & Wire Co. v. Eddy*, 89 N. W. 952, 130 Mich. 266.

In a declaration of trust, declaring that the trustee holds a sum in trust, and that he will refund it, the word "refund," when disposal of the fund itself is meant, is used in the sense of "restore." *Gutch v. Fosdick*, 48 N. J. Eq. (3 Dick.) 353, 356, 22 Atl. 590, 591, 27 Am. St. Rep. 473.

## REFUSE.

Standard lexicographers use "refuse" as synonymous with "waste." Thus Worcester: "Refuse: (a) Left as worthless when the rest is taken; worthless; waste"—and one of the meanings given by him of "waste" is "refuse." "Refuse wood or timber of any sort," as used in Acts 1868, c. 448, providing that no person shall cast or throw into the Penobscot river any slabs, boards, or lath edgings, bark, grindings of edges, wood, lum-



ber, refuse wood, or timber of any sort, includes sawdust and shingle shavings. *State v. Howard*, 72 Me. 459, 463.

"Refuse matter," as used in an ordinance empowering the board of health of the city to contract for the removal of such refuse matter as accumulates in the preparation of food for the table, embraces nothing which has not been refused or rejected as unsuitable for table use. It may be thus rejected because it has little or no value for human food, or because it is decayed or unwholesome. It must in its nature be perishable, and can include little which is not liable to become decomposed or offensive if left where it falls. The term "refuse matter" can only extend to matter which is in fact noisome, or which has been refused or rejected by the owner as worthless. *State v. Orr*, 35 Atl. 770, 771, 68 Conn. 101, 34 L. R. A. 279.

## REFUSE—REFUSAL.

See, also, "Neglect and Refuse."

"Refuses or neglects," as used in Gen. St. 1866, c. 11, § 27, providing that when a person refuses or neglects to make a statement of his personal property, or to subscribe on oath to the statement, to a tax assessor, the latter may examine any other person whom he may suppose has knowledge, etc., embraces all cases of refusal, neglect, or omission, fraudulent, willful, intentional, or otherwise, by any person, to make a true statement of all the personal property exempt, as well as unexempt, which by the provisions of the chapter such person is required to list for taxation, either as owner or holder, guardian, parent, husband, trustee, executor, etc. *Thompson v. Tinkcom*, 15 Minn. 295, 299 (Gil. 226, 230).

Where a grantee of the mortgagor called on the mortgagee and asked the amount of his claim on the mortgaged estate, and was answered that he owned the whole, that he had bought it and paid for it, and, on such grantee showing his deed and again asking the amount of the claim, he was referred to the records, and on being asked what sort of money would answer the mortgagee replied, "Nothing but specie," and that, if money was tendered, he would do as he thought proper about taking it, and that his papers were at another town, and he could not ascertain what was due on the mortgage, there was a sufficient demand and refusal to entitle such grantee to maintain an action to redeem the land from such mortgage. *Willard v. Fiske*, 19 Mass. (2 Pick.) 540, 544.

### Demand, offer, or notice implied.

The word "refuse" signifies to deny a request, demand, invitation, or command, and hence proof of a refusal to pay necessarily

involves the proof of a previous demand, and so, where a declaration averred that payment had been refused, a previous demand was presupposed. *Shaler v. Van Wormer*, 33 Mo. 386, 388.

"Refusal," as used in Pol. Code, § 996, providing that an office becomes vacant on the refusal or neglect of one who is elected or appointed thereto to file his official oath or bond within the time prescribed, means to decline the acceptance of something offered, or to fail to comply with some requirement. The person could not refuse the appointment of an office until he received information of his appointment. The power to refuse a thing must necessarily be based upon a knowledge of the existence of the thing. *People v. Perkins*, 26 Pac. 245, 246, 85 Cal. 509.

A deed providing that the estate granted shall be void if the grantee shall "neglect or refuse" to support a certain fence, implies some previous demand, notice, or request to replace the fence if the same has been removed or destroyed, and that the grantee either refused in terms to do the act required, or had failed to replace it after a reasonable time allowed for that act. *Merrifield v. Cobleigh*, 58 Mass. (4 Cush.) 178, 185.

When used in reference to the payment of money, the word "refusal" means a failure to pay the money when demanded, while "neglect" means a failure to pay money which the party is bound to pay without demand. *Kimball v. Rowland*, 72 Mass. (8 Gray) 224, 225.

"Refusing," in its ordinary meaning, carries the idea of an application to the person refusing, and the word "neglecting," coupled with the word "refusing" by the conjunction "or," in a petition stating that a husband had "neglected or refused" to file a schedule of exempt property, weakens the meaning of the latter word, and deprives it of such meaning. *Davis v. Lumpkin*, 32 S. E. 626, 628, 106 Ga. 582.

"The word 'refuse,' as defined by the Century Dictionary, means to deny, as a request, demand, or invitation; to decline to accept; to reject, as to refuse an offer." Thus a complaint, alleging that defendant refused to accept goods which he had contracted to purchase, authorized the admission of evidence that plaintiff offered to manufacture and deliver such goods, and that such offer or offers were declined by defendant. *Bowen v. Young*, 75 N. Y. Supp. 1027, 1029, 37 Misc. Rep. 547.

The ordinary signification of the word "refuse" is to deny a request or demand; and where a complaint alleged a contract by which a father agreed to convey a certain piece of land to his daughter, full performance on her part, and that the father failed,

neglected, and refused to make the conveyance, and after his death his heirs had refused to convey to her, the allegations were held sufficient in an action for specific performance, without alleging a further demand. *Burns v. Fox*, 14 N. E. 541, 542, 113 Ind. 205.

The word "refuse," in Act Cong. June 28, 1898, § 6, providing that, if the chief of a tribe refuse or fail to bring suit for land, then any member of the tribe may bring suit, clearly implies a demand, for without it there can be no refusal; thus making a demand necessary for the commencement of an action by a member of the tribe. *Brought v. Cherokee Nation* (Ind. T.) 69 S. W. 937, 940.

The words "refused when due," in an acceptance of a foreign bill of exchange, on its presentation for honor, on condition that it is regularly protested and refused when due, import that there must be a distinct act of refusal, and, unless there be a request, there cannot be a refusal. *Mitchell v. Baring*, 10 Barn. & C. 4, 10.

In a will devising a copyhold to testator's daughter-in-law for life, remainder in fee to her son A., on an express condition that A. should convey certain property severally to his sisters, but, in case he should object or refuse to make such conveyances, then the devise to him was void, the words "object or refuse" did not necessarily express a positive act; but the testator assumed that the grandson would convey if he did not object, and the words did not imply or make necessary a request by the sisters for the conveyance. *Taylor v. Crisp*, 8 Adol. & El. 779.

#### As failure.

Const. art. 14, providing that any officer who "refuses" to take the oath therein prescribed shall forfeit his office, will not be construed to mean that a failure to take such oath within a prescribed time is a refusal; and where a party has taken a statutory oath, instead of a constitutional oath, it will not be held a refusal, since "refuse" means to deny, as a request, demand, invitation, or command, or to decline to do or grant. *Duffy v. Edson*, 84 N. W. 264, 268, 60 Neb. 812.

A refusal to pay a tax is one thing, and a failure to pay is another. The former may be the result of willfulness, or a denial of the legality of the tax. The latter may be the result of sickness and poverty and utter inability to pay. *Inhabitants of Cape Elizabeth v. Boyd*, 29 Atl. 1062, 86 Me. 317.

Gen. Laws, c. 229, § 10, providing that any party who gives notice of the taking of a deposition, and who "neglects and refuses" to take the same, shall be liable to the adverse party for 25 cents per mile for actual travel of himself and his attorney to attend

the same, includes a case of innocent omission through no fault of the party giving the notice, and no distinction is made between that and a case of willful neglect. *Robertson v. Northern R. R.*, 63 N. H. 544, 549, 3 Atl. 621.

"Refusing to comply" ordinarily means the same as "failing to comply." *Smith v. Hance*, 11 N. J. Law (6 Halst.) 244, 251.

"Refusing to comply," as used in a will providing that, on a legatee refusing to comply with the condition that he change his name, which must be done by petition to the Legislature, and take an oath prescribed in the will, the property should go to the next male heir on the same terms, does not have the same operation in law as his failing to comply, although they may, in general, have such operation. Where the condition to be performed depends on the will of the devisee, his failure to perform it is equivalent to a refusal; but where the condition does not depend on his will, but on the will of those over whom he can have no control, there is a manifest distinction between refusing and failing to comply with it. *Taylor v. Mason*, 22 U. S. (9 Wheat.) 325, 344, 6 L. Ed. 101.

The omission of the selectmen of the town to make a written report to the town of their alteration of a town way on a written petition for an alteration is such a refusal to alter it as gives jurisdiction of the matter to the county commissioners, under a statute providing that, on the refusal or neglect of the selectmen to make an alteration upon petition, an appeal will lie from their decision to the county commissioners. *Inhabitants of New Marlborough v. Berkshire County Com'rs*, 50 Mass. (9 Metc.) 423, 433.

A Georgia statute provides that, if any party plaintiff should fail or refuse to make discovery relative to allegations of usury set up in the plea, the defendant might make affidavit in writing which could be used on trial. Under this statute it was held in *Persons v. Hight*, 4 Ga. 474, 497, that the words "fail" and "refuse" meant substantially the same thing; both contemplating a failure to come up to the requirements of the statute.

#### As neglect.

"Refuse the payment of," as used in a condition in a mortgage authorizing certain proceedings if the mortgagee shall refuse the payment of any of its notes, means something more than a mere neglect to pay by the day. *Parish v. Wheeler*, 22 N. Y. 494, 514.

#### As option.

In the ordinary acceptation of the term, a "refusal" is an understanding that nothing will be done with the subject to which it relates until the person to whom the refusal

is given shall give some positive answer in regard to it. *Hosford v. Carter* (N. Y.) 10 Abb. Prac. 452, 454.

A lease, providing that, after the termination of the term, the lessee should have the "refusal of the premises" for three years longer, meant that he should have an option for renting the premises for three years longer at the same terms. *Tracy v. Albany Exch. Co.*, 7 N. Y. (3 Seld.) 472, 474, 57 Am. Dec. 538.

"Refusal to purchase," as used in an agreement giving a party the "right, option, and refusal to purchase" land within a certain time, gives to the party having such option no interest, either legal or equitable, in the land. *Ex parte Birch*, 8 Ill. (3 Gilman) 134, 138, 143.

#### Of instruction.

The refusal of the court to pass on instructions submitted was a refusal, within the meaning of Rev. St. 677, § 47, requiring that the instruction shall be in writing, and shall be given or refused. *Karriger v. Greb*, 42 Mo. 44.

### REGALIA.

"Regalia" is sometimes used in the Spanish law as indicating the right "which a sovereign has over anything in which a subject has a right or property or 'propiedad.'" *Hart v. Burnett*, 15 Cal. 530, 568.

### REGARD.

See "In Regard to."

A direction by the court to referees that, in deciding the matter submitted to them for decision, "regard should be had to the law," is construed as directory, and leaves the judgment of the referees conclusive as to the law. *Walker v. Simpson*, 18 Atl. 580, 582, 80 Me. 143.

"Regard," as used in a will naming five executors and trustees, and providing that, whenever their number should be reduced to two, the judge of probate of the district should appoint a third, and in so doing should regard the wishes of the existing trustees, if taken in its natural import, is equivalent to "be governed." *Appeal of Allen*, 38 Atl. 701, 703, 69 Conn. 702.

### REGION.

A strictly correct definition of the word "region" is neighborhood, vicinity, district, quarter, or ward. Under a statute authorizing application for process against railroad companies by two reputable citizens, resident in the region traversed by the line of the

railroad, for process against it on the ground that it had issued stock contrary to law, it is held that a contention that the word "region" indicates that the statute was not intended to apply to street railway companies was without foundation, and that the term properly applied to the territory traversed by a street railway company. *Cheetham v. Attorney General* (Pa.) 38 Wkly. Notes Cas. 124, 128.

### REGISTER.

"To register" is to enter in a register; to record formally and distinctly; to enroll; to enter in a list. *Reck v. Phoenix Ins. Co.*, 7 N. Y. Supp. 492, 54 Hun, 637.

Under the old law, when the actual record of a deed was necessary to give it priority, actual record was necessary for its admission in evidence without further proof. Until actual record it was not, then, a "registered deed." Now, however, when a deed has full effect from the moment it is filed for record, it becomes from that moment "a registered deed," within the meaning given to that term by the court. *Durrence v. Northern Nat. Bank*, 43 S. E. 726, 727, 117 Ga. 385.

#### As copyright.

The word "registered," on a label which has been registered in the Patent Office under Act Cong. 1874, is not synonymous with the word "copyright," so as to impart to an alleged infringer of the copyright constructive notice of the fact that the label is copyrighted. The label should contain the word "copyright," the name of the person owning the copyright, and the date of completion thereof. *Higgins v. Keuffel* (U. S.) 80 Fed. 627, 628.

#### Enrollment of vessel distinguished.

"Register," as used in Act Dec. 31, 1788, and Act July 18, 1793, authorizing foreign vessels wrecked and repaired in the United States to be registered or enrolled, applies to vessels engaged in the foreign trade. Vessels engaged in the foreign trade are "registered," and those engaged in the coasting and home trade are "enrolled," and the words "register" and "enrollment" are used to distinguish the certificates granted to those two classes of vessels. *The Mohawk*, 70 U. S. (3 Wall.) 568, 571, 18 L. Ed. 67.

### REGISTER (Noun).

A register is an official record. *Reck v. Phoenix Ins. Co.*, 7 N. Y. Supp. 492, 54 Hun, 637.

The register of a clerk of a court is, as its name imports, "a book in which the clerk is to enter the titles of actions, with brief

notes under them, from time to time, of all papers filed and proceedings had therein." Code Civ. Proc. § 1052; *Wolters v. Ross*, 128 Cal. 644, 649, 59 Pac. 143, 144.

### REGISTER IN BANKRUPTCY.

As court, see "Court."

Rev. St. § 5003, providing that the evidence or examination in any one of the proceedings authorized in its title may be taken before a register in bankruptcy, means any register in bankruptcy, and is not limited to the register before whom the proceedings are pending or to a register of the district. In re Comstock (U. S.) 6 Fed. Cas. 236.

### REGISTERED BOND.

"A registered bond is one which is a simple certificate of indebtedness in favor of a particular individual, payable at a date named, with interest at days named. The name of the payee is entered on the books of the corporation debtor, municipal or private, as the registered owner, or, if it be a government bond, on the register of the government. On the days when, by the terms of the bond or certificate of indebtedness, the interest falls due, it is paid directly to the registered creditor without presentation of the bond, usually by check drawn to his order and sent by mail, or, if he so demands, by cash in hand; but by long-settled course of practice the payment is made by check to the order of the creditor. These bonds or certificates of indebtedness are not negotiable, and can be transferred only by an entry on the books of the debtor corporation, with a proper indorsement on the bond itself, or by the issue of a new certificate. The peculiarity of this class of securities lies in the fact that it is not necessary to produce them to the debtor at each time that the interest is due, and the danger of loss by robbery or fire is entirely removed." *Benwell v. City of New York*, 36 Atl. 668, 669, 55 N. J. Eq. 260.

### REGISTERED PROVISIONALLY.

The words "registered provisionally," following the word "corporation," are not equivalent to a notice that it is not incorporated; but the great majority of a community, hearing the word "corporation," would not understand that the additional words gave it any other than the ordinary meaning. *Regina v. Whitmarsh*, 14 Q. B. 803, 804.

### REGISTERED TONNAGE.

The "registered tonnage" of a ship is the cubical contents of the ship expressed in tons, or the amount of weight which she will carry as entered on some official record. *Reck v. Phoenix Ins. Co.*, 7 N. Y. Supp. 492, 54 Hun, 637.

The term "registered tonnage" refers to a vessel's carrying capacity as stated in the ship's papers. *Reck v. Phoenix Ins. Co.*, 29 N. E. 137, 139, 130 N. Y. 160.

### REGISTRAR.

In statutes relative to elections the term "registrars" shall mean the board of registrars of voters of a city or town or the board of election commissioners of the city of Boston, when applicable. Rev. Laws Mass. 1902, p. 105, c. 11, § 1.

### REGISTRATION.

"Registration," as used in a statute providing that no transfer of certificates of stock shall be valid as against bona fide creditors and subsequent purchasers without notice, except from the time such transfer shall have been registered or made upon the book or books of such company, is used in the sense of entering in the book a statement or memorandum of facts to serve as memorial or evidence. The purpose of the statute is obviously to give notice of the title to creditors and purchasers, so as to prevent fraudulent transfers, and to protect the corporation itself in determining the questions of membership, the right to vote, the payment of dividends, and other incidents of ownership. A written memorandum in proper form would as well answer the purposes thus intended as a formal record. *Fisher v. Jones*, 3 South. 13, 16, 82 Ala. 117.

Registration is the act of making a list, catalogue, schedule, or register. The word "registration" is an ordinary one. It is used in a generic sense, not technical, and, when applied to voters, unless there is a system of registration described by act of Congress providing for the appointment of supervisors of congressional elections, and applied by such act as the only registration of voters under the law, it is any list, register, or schedule containing all the names, the being on which lists, registers, or schedules constitutes a prerequisite to voting; and the Delaware assessment lists, made primarily by the assessors of the different hundreds and completed by the levy courts of the different counties, are such lists, though they contain not only a list of voters, but all other persons beside. In re Supervisors of Election (U. S.) 1 Fed. 1, 5.

Acts 1806, c. 49, § 3, provides that any deed, the execution of which is established by acknowledgment, shall take effect only from the date of such acknowledgment "for the purpose of admission to registration." The latter clause was necessary to explain the manner in which the acknowledgment should be made to give effect to the deed; and where an acknowledgment was not formally done, so as to authorize registration,

both the deed and the registration are ineffectual to communicate any legal estate to the grantee. *Robertson v. Sullivan*, 10 Tenn. (2 Yerg.) 91, 93.

Registration is the method of proof prescribed for ascertaining the electors who are qualified to cast votes, and the registers are the lists of such electors. *People v. Bell*, 119 N. Y. 175, 181, 23 N. E. 533, 535.

### REGISTRY.

Registry of a deed merely serves to give notice to third parties. In law it is notice. *Stafford v. Morse*, 54 Atl. 397, 398, 97 Me. 222.

The term "registry of deeds," as used in the chapter relating to the collection of taxes, shall mean the registry of deeds for the county or district in which the land taxed lies. *Rev. Laws Mass. 1902*, p. 229, c. 13, § 1.

The "registry of a deed" is the only statutory method of giving notice of the change of property by means of the conveyance, and it is also the only statutory mode of giving effect and operation to it as to any person or persons, except against the grantor and his heirs. *Hewes v. Wiswell*, 8 Me. (8 Greenl.) 94, 97.

The word "registry" has the same meaning both in Spanish and English law, both systems deriving it from the Latin "*liber rerum gestarum*," which the Roman lawyers contracted into "*registrum*." To register a thing is to write it in a book, and it is said by high authority on Spanish law (*Gamboa*) that this is especially required in the case of a mining title, to preserve it from the danger of simulation, defacement, fraud, and loss, to which separate papers would be exposed. *United States v. Castillero*, 67 U. S. (2 Black) 17, 109, 17 L. Ed. 360.

The registry of a deed is intended to contain all the essential parts of a full and complete notice of every fact necessary to be known, instead of merely putting the party on the scent, and requiring him to run all around the world after the grantor and the grantee, seeking information as to the true nature of the transaction. Hence it is held that, though an absolute deed and defeasance made at the same time constitute a mortgage, if the deed alone, and not the defeasance, be recorded, it is to be considered as an unrecorded mortgage. *Friedley v. Hamilton* (Pa.) 17 Serg. & R. 70, 71, 17 Am. Dec. 638.

The registry of a deed adds nothing to its effectiveness as a conveyance. All that it accomplishes is to impart notice. *Shirk v. Thomas*, 22 N. E. 976, 977, 121 Ind. 147, 16 Am. St. Rep. 381.

The words "enrollment," "registry," or "record," in a statute making it criminal to

deface any registry or record, are not confined to records of courts of justice. Every registry or enrollment directed by law and preserved for the use of the public is embraced by this act of assembly. It extends without doubt to the public books in the land office. *Ream v. Commonwealth* (Pa.) 3 Serg. & R. 207, 209.

### REGRATING.

"Regrating" was the common-law offense of buying corn or other dead victual in any market, and selling it again in the same market, or within four miles of the place. *For-syth Mfg. Co. v. Castlen*, 37 S. E. 485, 487, 112 Ga. 199, 81 Am. St. Rep. 28.

### REGULAR.

Webster defines "regular" to mean conformable to a rule; methodical; periodical. *Zulich v. Bowman*, 42 Pa. (6 Wright) 83, 87.

"Regular" is derived from "*regula*," meaning "rule," and its first and legitimate signification, according to Webster, is "conformable to a rule; agreeable to an established rule, law, or principle, to a prescribed mode, or according to established, customary forms." *Myers v. Rashback* (N. Y.) 4 How. Prac. 83, 85.

As used in a deed and a vote of a town to sell lands that all buildings shall be "regular and uniform," this phrase cannot be construed to bind the land for all time to an arbitrary building line. *Hamlen v. Keith*, 50 N. E. 462, 463, 171 Miss. 77.

### REGULAR ASSISTANT.

A "regular assistant" in a postoffice, when used with reference to an office requiring an assistant employé only during a few hours of each day, may well be said to be a person who has taken the oath of office, and who assists in receiving, opening, and distributing mail from time to time. *United States v. Brent* (U. S.) 24 Fed. Cas. 1225, 1227.

### REGULAR BALLOT.

"Regular ballot," as used in Act March 21, 1874, § 2, providing that, whenever any ballot with a certain designated heading shall contain printed thereon in place of another any name not found on the regular ballot having such heading, such name shall be regarded by the judges of election as having been placed there for the purpose of fraud, means a piece of paper to be voted by an elector which contains the name of the party and of the candidates chosen by those who voluntarily organize themselves into a body or party, for the purpose of promoting their interests by electing to office persons who will carry out their views, and the words

were used in view of the usage of parties in thus preparing and printing their ballots. *Roller v. Truesdale*, 26 Ohio St. 588, 592.

### REGULAR BUSINESS.

It can hardly be successfully urged that one who acts as a president of a mill and lumber company, a corporation regularly engaged in buying and selling millwork, is not carrying on a regular business or engaged in a regular employment, within a statute providing that any person residing in one county, but carrying on a regular business in another, may be sued in either county. *Cromwell v. Willis*, 53 Atl. 1116, 1117, 96 Md. 260.

### REGULAR CHANNEL.

"Regular channel," as used in a warranty by the assured in a towage policy, reciting that the steam tug, with her tow, should not go out of the "usual and regular channel," cannot be interpreted as a warranty that the tug should never through any fault or error of navigation get out of the proper depth of water. What is meant by the clause is that, in going from place to place, the vessel should go by way of the "usual and regular channel," and should not intentionally take any unusual channel, or any route out of the usual course, but should pursue the ordinary and accustomed route. *Egbert v. St. Paul Fire & Marine Ins. Co.* (U. S.) 71 Fed. 739, 742.

### REGULAR CLERK.

The phrase, "regular clerk," as used in Acts 1873, c. 335, § 28, providing that the heads of all departments shall have power to appoint and remove all clerks and employés in their respective departments, but no regular clerk shall be removed until he has been informed of the cause of the removal, and has been allowed an opportunity of making an explanation, does not include the superintendent of telegraph in the fire department. *People v. Board of Fire Com'rs* (N. Y.) 23 Hun, 317, 319; *People v. Board of Fire Com'rs of City of New York*, 86 N. Y. 149, 151.

### REGULAR COURSE OF BUSINESS.

A note is said to be transferred in the regular course of business when it is used in such a way that a business man of ordinary intelligence and capacity would receive it, when offered for the purpose in which it is transferred, as money, and would give credit therefor without any suspicion of the integrity thereof. *Roberts v. Hall*, 37 Conn. 205, 215, 9 Am. Rep. 308.

### REGULAR DEALER.

Any person in the retail lumber trade, owning and operating a lumber yard in

which a general assortment of stock in kind and quality commensurate with the demands of the community where located is kept for sale, is a "regular dealer," within the meaning of the constitution of a retail lumber dealers' association, declaring that any regular dealer in the lumber trade may become a member of the association. *Jackson v. Stanfield*, 36 N. E. 345, 350, 137 Ind. 592, 23 L. R. A. 588.

### REGULAR DEPOT.

"Regular station or depot," within the meaning of a statute imposing a penalty on a railroad company for refusal to receive and forward freight when tendered at a regular station or depot, does not include a place on a railroad line where its conductors have frequently stopped trains to receive and let off freight and passengers, but where there has never been any station agent or agent's office, or books kept, tickets sold, or bills of lading given. *Kellogg v. Suffolk & C. R. Co.*, 5 S. E. 379, 380, 100 N. C. 158.

The term "regular depot or stopping place," within the meaning of the statutes requiring locomotive engineers or other persons who have the control of railroad locomotives or trains to blow the whistle or ring the bell at least one-quarter of a mile before reaching any public crossing, or any regular depot or stopping place on such road, does not include a place where it is not the habit of the company to stop its trains, except for the purpose of putting on or putting off any passenger who so desires. *Cook v. Central R. & Banking Co. of Georgia*, 67 Ala. 533-542.

### REGULAR DOCUMENT.

"Regular document," as used in Rev. St. N. Y. § 4226, providing that the preceding section shall not operate on unregistered vessels owned by citizens of the United States and carrying boat lease, and "sea letter or regular document issued from a custom house" of the United States, includes a certificate issued by the collector of the custom house, stating that the owner is an American citizen. *The Miranda* (U. S.) 51 Fed. 523, 525, 2 C. C. A. 362.

### REGULAR ELECTION.

"Regular," as used in Act Feb. 7, 1889, § 6, providing that at the regular election to be held in the year 1890 the county commissioners of two certain counties should submit the question of location of the county seat to the voters of such counties, is synonymous with the word "general," and as used was intended to mean the general election as provided for by Revised Statutes. *Doan v. Logan County Com'rs*, 26 Pac. 167, 170, 3 Idaho, 38.

The word "regular" means conformable to an established rule, law, or principle, and the exact literal signification of the phrase "next regular election" is the next election held conformably to established rule or law. *State v. Cobb*, 2 Kan. 32, 54.

In Acts Adj. Sess. 1863, p. 279, providing that, if any of certain officers in St. Louis county shall hereafter vacate his office, except by the expiration of his term, it shall be the duty of the Governor to appoint until the next "regular election" a suitable person to perform the duties of the office, the phrase quoted meant the next general election. When applied to elections, the terms "regular" and "general" have been used interchangeably and synonymously. The word "regular" is used in reference to the general elections occurring throughout the state. *State ex rel. Attorney General v. Conrades*, 45 Mo. 45, 47.

"Regular election," as used in Const. art. 3, § 11, providing that, in case of vacancy in any judicial office, it shall be filled by appointment of the Governor until the next regular election that shall occur more than 30 days after such vacancy shall have happened, should be construed to mean the next election held conformably to established rule or law; that is, the next regular election prescribed by law for the election of a particular officer to be elected. *Ward v. Clark*, 10 Pac. 827, 35 Kan. 315.

In Const. art. 3, § 11, providing that, in case of vacancy in any judicial office, it shall be filled by appointment of the Governor until the next regular election that shall occur more than 30 days after such vacancy shall have happened, the expression "regular election" does not necessarily mean general election, or township election, or any state, county, city, or district election, but simply means the regular election prescribed by law for the election of the particular officer to be elected. The next regular election to be held for any particular office could, of course, be only such an election as could be regularly and legally held for that particular office. It could not be an election held for some other office, or at a time not fixed by law for filling such office, or without law, or merely because an election might be properly held at that time for the accomplishment of some other purpose. *Matthews v. Shawnee County Com'rs*, 9 Pac. 765, 768, 34 Kan. 608.

"Regular election," as used in Const. art. 4, § 11, providing that, in case of vacancy, the judge of the district court "shall have power to appoint a clerk until a regular election can be held," does not mean general election, but any election by the people which is provided for by law. *Banton v. Wilson*, 4 Tex. 400, 408.

As used in Const. art. 4, § 31, providing that, in case of a vacancy of certain offices,

the Governor may fill such vacancy by appointing a successor, who shall hold until the next regular election, means the next regular election for the office in which a vacancy has occurred. *People v. Wilson*, 72 N. C. 155, 161.

St. 1863, p. 605, § 14, authorizing the board of education, in case of vacancy in an office for superintendent, to appoint a person to fill the vacancy until the regular election then next following, when the office shall be filled by the election of the people, means the next general election, and not the next election at which superintendents are to be elected. The phrase "regular election" is employed in the sense of general, as contradistinguished from a called or special, election. *People v. Babcock*, 55 Pac. 1017, 1018, 123 Cal. 307.

#### REGULAR HOTEL.

The words "regular hotels and eating houses," in Rev. St. § 8092, providing that all places where intoxicating liquors are sold shall be closed on Sunday, but that the term "place," in reference to regular hotels and eating houses, shall be construed to mean a room or part of the room where such liquors are usually exposed to sale, designates the place of the principal and not the subordinate business, which is the carrying on of the hotel or eating house. *Lederer v. State (Ohio)* 3 O. C. D. 303, 304.

#### REGULAR INDORSEMENT.

A "regular indorsement" is an indorsement in blank of third persons under the name of the payee, and such indorsements are held to impose only the obligation of second indorsers, and parol evidence is not received to vary that obligation; but in Vermont no distinction has ever been made between regular and irregular indorsements, but they have been held alike *prima facie* to impose the obligation of maker. *National Bank v. Dorset Marble Co.*, 17 Atl. 42, 43, 61 Vt. 106, 2 L. R. A. 428.

#### REGULAR INTERVAL.

By the term "regular intervals," as used in an application for a patent, we are to understand intervals that conform to a prescribed rule. *Hanifen v. Armitage (U. S.)* 117 Fed. 845, 850.

#### REGULAR MARKET PRICE.

"Regular market price" is the same as "current market price," so that proof that articles were to be furnished at the regular market price does not constitute a variance from an allegation that they were to be furnished at the current market price. *Santa Monica Lumber & Mill Co. v. Hege*, 51 Pac. 555, 557, 119 Cal. 376.

**REGULAR MEETING.**

A regular meeting of town trustees is such a meeting as the law requires to be held at a stated time and place. *State v. Trustees of Wilkesville Tp.*, 20 Ohio St. 288, 293.

The term "stated meeting," or "regular meeting," of a board of directors or controllers, whenever they occur in the act relating to the organization of boards of school directors, shall be taken to mean the first meeting thereof for organization after the annual election of directors or controllers, and the monthly or other periodical meetings held thereafter in accordance with the standing regulations of the board; but, if there are no standing regulations, then every meeting held in succession from said first meeting for organization, by adjournment to a time and place certain, and so entered on the minutes of the proper board, shall be to all intents and purposes regarded as a regular meeting. *P. & L. Dig. Laws Pa.* 1894, p. 766, § 52; *Act April 11, 1862*, § 3 (*P. L.* 471).

**REGULAR MINISTER OF THE GOSPEL.**

*Rev. St. c. 71*, declares that "all regular ministers of the gospel" of any denomination having the cure of souls shall be authorized to solemnize the rites of matrimony according to the rites and ceremonies of their respective churches. Held, that the term "regular minister of the gospel," as used in such act, imports that the person shall be something more than a minister or preacher, and that he had, according to the constitution of his church, the right to celebrate matrimony, and to some extent at least the power to administer the Christian sacraments as acknowledged and held by his church. *State v. Bray*, 35 N. C. 289, 290.

**REGULAR PANEL.**

The words "regular panel," as used in the statute providing that, when a jury for the trial of a cause cannot be made up from the regular panel, the judge may deliver to the proper officer a list of jurors sufficient to complete the panel, means the panel drawn from the wheel, whether drawn for the particular case, or to serve for the term, or some stated time. *Barr v. City of Kansas*, 25 S. W. 562, 563, 121 Mo. 22.

The expression "regular panel," in reference to juries, means the number of persons who are to constitute the regular attendance of the court during the term as regular jurors—that is, as the standing jury; and as used in *Ky. St. §§ 2243, 2246*, providing that 30 names shall be drawn, from which list of 30 names the regular panel of the petit jury shall be selected in the order in which their

names appear, the regular panel consists of 24 persons, and not of 30 persons mentioned. *Stone v. Saunders*, 51 S. W. 788, 106 Ky. 904.

**REGULAR PASSENGER TRAIN.**

"Regular passenger train," as used in *Railroad Act July 1, 1879*, § 25 (*Hurd's Rev. St.* 1889, p. 1060), providing that every railroad corporation shall cause its "regular passenger trains" to stop a sufficient length of time at its stations at county seats to accommodate passengers, includes all trains engaged in carrying passengers, running regularly every day upon an advertised time-card of the company, equipped as all other passenger trains are. *Cleveland, C., C. & St. L. Ry. Co. v. People*, 51 N. E. 842, 844, 175 Ill. 359.

A train designated as a "fast mail train," and used mainly for carrying the mail, but which also has coaches for the use of passengers, which runs daily on schedule time, and is advertised by time-tables and travelers' guides as a passenger train, is a regular passenger train, within *Rev. St. Ill.* 1891, c. 114, § 88, requiring all regular passenger trains to stop a sufficient length of time at the railroad stations or county seats to receive and let off passengers with safety. *Illinois Cent. Ry. Co. v. People*, 33 N. E. 173, 176, 143 Ill. 434, 19 L. R. A. 119.

*Act May 29, 1879*, which requires all regular passenger trains to stop at county seat stations a sufficient length of time to receive and let off passengers with safety, should be construed to mean a train engaged in carrying passengers running regularly every day on an advertised time-card of the company, and equipped as are all passenger trains. The term does not merely imply an accommodation train, stopping at all stations, but should be construed to include a through passenger train, equipped and operated as other passenger trains on the road, carrying passengers and baggage, running on an official time-table, which only differs from other passenger trains in that the other stopped at all stations, while this one did not. The act would not include a freight or excursion train, or a special train. *Chicago & A. R. R. v. People*, 105 Ill. 657, 659.

**REGULAR PHYSICIAN.**

The term "regular physician" means that the physician to whom the term is applied is a member of the county society and town association. *Bradbury v. Bardin*, 35 Conn. 577, 581.

**REGULAR PLACE OF WORSHIP.**

The term "regular place of stated worship," in *Act May 14, 1874*, exempting from



taxation all churches, meeting houses, or other regular places of stated worship, does not include a parsonage situated on the same lot with the church, although occasional religious services are held therein. *Wood v. Moore* (Pa.) 1 Chest. Co. Rep. 265, 266.

The term "regular places of stated worship," in Act May 14, 1874, exempting all churches, meeting houses, or other regular places of stated worship from taxation, does not include a church in the process of erection. *Erie County Com'rs v. Bishop* (Pa.) 13 Phila. 509, 510.

### REGULAR POLICEMEN.

"Regular" means constant, fixed, and not temporary, and as used in Acts 1898, c. 192, authorizing street commissioners to appoint regular policemen, it means policemen who are to serve, when appointed, until removed for cause. *Board of Street Com'rs of Hagerstown v. Williams*, 53 Atl. 923, 924, 96 Md. 232.

### REGULAR RATES.

The words "regular rates," as used in a contract with a telephone company whereby a subscriber was to pay regular rates for the use of his telephone, prima facie must be construed with reference to rates paid by other parties at the same time, in the same place, and for the same service. *Martinsburg Deposit Bank v. Central Pennsylvania Telephone & Supply Co.*, 24 Atl. 754, 755, 150 Pa. 36.

### REGULAR REAL ESTATE BUSINESS.

"Regular real estate business," as used in a partnership agreement to do a regular real estate, insurance, and mortgage loan business, means business of real estate brokers, and not that of operating or speculating in real estate. *Davis v. Darling*, 30 N. Y. Supp. 321, 322, 80 Hun, 299.

### REGULAR SESSION.

A session of county commissioners, held by adjournment from a regular session, is a "regular session," within Rev. St. c. 18, § 1. *Town of Waterville v. Kennebec County Com'rs*, 59 Me. 80, 89.

Under Rev. St. c. 25, § 1, providing that certain petitions should be presented to the county commissioners "at one of their regular sessions," an application is properly made if presented at an adjournment of a regular session, as a petition presented during a regular session at any period of the session is presented at a regular session. *Harkness v. Waldo County Com'rs*, 26 Me. (13 Shep.) 353, 356.

### REGULAR STATION.

The term "regular station," as used in Rev. St. c. 114, § 94, providing that, if any passenger on any railroad car shall refuse to pay his fare, the conductor may cause him to be removed from the train at any regular station, means the place on the railroad where passenger trains usually stop for the purpose of having passengers get on and off such trains. *Illinois Cent. R. Co. v. Latimer*, 21 N. E. 7, 9, 128 Ill. 163.

The Code, which prescribes a fine for the refusal of a railroad to receive goods for transportation at any regular station, thereby denotes a place where the railroad transacts regular and orderly business, with suitable buildings and appliances, and with agents to give bills of lading and receipts to shippers tendering or receiving freight at all appropriate times. The fact that a place is set down in the circulars and orders of the railroad as a station, and that a mail train stops there regularly, is not sufficient to make it a regular station. *Land v. Wilmington & W. R. Co.*, 10 S. E. 80, 81, 104 N. C. 48.

"Regular station or depot," within the meaning of a statute imposing a penalty on a railroad company for refusal to receive and forward freight when tendered at a regular station or depot, does not include a place on a railroad line where its conductors have frequently stopped trains to receive and let off freight and passengers, but where there has never been any station agent, or agent's office, or books kept, tickets sold, or bills of lading given. *Kellogg v. Suffolk & C. R. Co.*, 5 S. E. 379, 380, 100 N. C. 158.

The term "regular station," as used in the chapter relating to the maintenance of railroad stations, shall be construed to mean such as are now maintained by the several railroads in this state, and such as may be required by other provisions of the chapter. *V. S.* 1894, 3889.

### REGULAR SURVEY.

A survey of a ship, made at the call of the captain thereof by the master and wardens of the port of Orleans, together with a skillful carpenter, certified under their hands how the vessel surveyed appeared to them, and entered in a book kept for that purpose in their office, is a "regular survey," within a policy of marine insurance, providing that it was declared and understood that, if the vessel named therein after a regular survey should be condemned, the insurers should not be bound to pay the sum thereby insured, etc. *Janney v. Columbian Ins. Co.*, 23 U. S. (10 Wheat.) 411, 417, 6 L. Ed. 354.

"Regular survey," as used in a policy of marine insurance, that, if the vessel should be declared unseaworthy upon a regular sur-

vey, the insurer should not be bound on such policy, must in every instance be such as is known to the laws and customs of the port in which the vessel happens to be. An exemplification of a condemnation of a vessel in a foreign court of vice admiralty, reciting the certificate of surveyors that the vessel was unworthy of being repaired and insufficient and unfit ever to go to sea again, is a regular survey within the meaning of such policy. *Dorr v. Pacific Ins. Co.*, 20 U. S. (7 Wheat.) 581, 612, 5 L. Ed. 528.

### REGULAR TERM.

See "Next Regular Term."

A regular term of court is "a term begun at the time appointed by law, and continued at the discretion of the court to such time as it may appoint, consistent with the law." *Wightman v. Karsner*, 20 Ala. 446, 451.

Where a term of court was in one sense a "regular term," and so denominated by the statute, but still limited by the statute to the transaction of business relating solely to taxation, it was in no sense a regular term of the court for the transaction of business generally. *Matkin v. Marengo County*, 34 South. 171, 174, 137 Ala. 155.

### REGULAR TURNS.

The expression "regular turns of loading," with reference to coal, means in turn at the spout, as directed by act of Parliament; but evidence is not admissible to show that such is the custom in loading coke. *Leide-man v. Schultz*, 5 J. Scott, 38, 50.

### REGULARLY.

Webster defines "regularly" to mean a uniform order at certain intervals or periods, as by day and night. *Zulich v. Bowman*, 42 Pa. (6 Wright) 83, 87.

"Regularly" means constituted, appointed, or conducted in a proper manner, or conformable to law or custom; so that the use of the term in a stipulation that a certain person had been regularly licensed is equivalent to "lawfully licensed," as used in the statute. In *re Liquor Certificate No. 14,111*, 51 N. Y. Supp. 281, 284, 23 Misc. Rep. 446.

The word "regularly" is defined as meaning in a regular manner; in a way or method accordant to rule or established mode; in uniform order; methodically; in due order. Such is its signification in an ordinance requiring a railroad company to operate the road regularly, etc. *City of Belleville v. Citizens' Horse Ry. Co.*, 38 N. E. 584, 587, 152 Ill. 171, 26 L. R. A. 681.

### REGULARLY EMPLOYED.

"Regularly employed," as used in St. 1873, c. 284, § 1, exempting a vessel regularly

employed in the coasting trade from compulsory pilotage, did not necessarily mean continuously so employed, but would include the case of a vessel actually and legally so employed at the time the services of a pilot are tendered, though the word "employed" is more commonly used as signifying continuous occupation, and the use of the word "regularly" strengthens this construction. *Wilson v. Gray*, 127 Mass. 98, 99.

"Regularly employed," as used in Pub. St. c. 70, § 32, exempting "vessels regularly employed in the coasting trade" from compulsory pilotage, includes "a vessel regularly documented and sailing under a coasting license, and engaged in transporting coal from the depot of the charterer in one port to his depot in another port, for sale at the latter port in the regular course of business." *Chase v. Philadelphia & R. R. Co.*, 135 Mass. 347, 349.

### REGULARLY CALLED FOR TRIAL.

"Regularly called for trial" means calling a case for the purpose of entering on the actual trial thereof in accordance with previous orders regularly made. *Union Pac. Ry. Co. v. Horney*, 5 Kan. 340, 346.

### REGULARLY GIVEN IN FOR TAXES.

A statute requiring property to be "regularly given in for taxes" means given in according to the law applicable to the giving in of such taxes. *Macon & A. R. Co. v. Little*, 45 Ga. 370, 383.

### REGULARLY ISSUED.

A warranty of county bonds in a sale thereof by a private citizen, that they were "genuine and regularly issued," does not merely mean that they are not forgeries, and were not issued without consideration, and that they were ordered by the proper officers, but means that they are not subject to any defense founded on a want of legal form in the signature or seals. *Smeltzer v. White*, 92 U. S. 390, 391, 392, 23 L. Ed. 508.

### REGULARLY LAID OUT.

Comp. Laws 1879, c. 84, § 41, provides that every railroad company shall construct and keep in repair a good and substantial crossing at each point where the railroad crosses in regularly laid out public highways. Under this statute it is held that the expression "regularly laid out" would embrace only such highways the existence of which could be ascertained from the statutes or public records, and did not include such highways as depended for the proof of their existence upon the parol evidence of the people of the neighborhood, and had not been legalized or laid out by statute, or established by dedica-

tion on any public record. *Missouri, K. & T. Ry. Co. v. Long*, 27 Kan. 684, 694.

## REGULATE.

To regulate means to adjust by rule, method, or established mode; to direct by rule or restriction; to subject to governing principles or laws. *Higgins v. Mitchell County Com'rs*, 51 Pac. 72, 73, 6 Kan. App. 314; *State v. McCann*, 72 Tenn. 1, 13; *Otto Gas Engine Works v. Hare*, 67 Pac. 444, 445, 64 Kan. 78.

A power to regulate implies a continued existence of the matter to be regulated. *State v. Clarke*, 54 Mo. 17, 33, 14 Am. Rep. 471; *State v. McCann*, 72 Tenn. (4 Lea) 1, 13.

"Regulation," as used in the title of the ordinance for the regulation of street parades, etc., means the control and government thereof; the word necessarily implying that street parades are lawful, but that certain restrictions may be necessary to preserve the public from harm. *Anderson v. City of Wellington*, 19 Pac. 719, 723, 40 Kan. 173, 2 L. R. A. 110, 10 Am. St. Rep. 175.

"Regulation," as used in Const. art. 14, § 1, providing that the use of all water not appropriated, etc., is hereby declared to be a public use, and subject to the regulation and control of the state, etc., does not mean confiscation, or a taking without just compensation, so as to include the fixing of unreasonable rates. *Spring Valley Waterworks v. City of San Francisco*, 22 Pac. 910, 914, 82 Cal. 288, 6 L. R. A. 756, 16 Am. St. Rep. 116.

Regulation is not discrimination, and a contract which so far discriminates that the favored party pays a substantial sum for the privileges conferred cannot be considered to be a "regulation" in any fair sense of that term. *Hedding v. Gallagher*, 45 Atl. 96, 98, 69 N. H. 650, 76 Am. St. Rep. 204.

"Regulating the internal affairs of towns and counties," as used in the Constitution, providing that the Legislature shall not pass private, local, or special laws regulating the internal affairs of towns and counties, etc., should not be construed as equivalent to "relating to towns and counties," since the words of the constitutional provision were not intended to forbid all special legislation on these subjects, but only such as regulated internal affairs, leaving the power undisturbed as to the residue. *Pell v. City of Newark*, 40 N. J. Law (11 Vroom) 71, 75, 29 Am. Rep. 266.

### As abolish.

A law which extinguishes a municipal corporation by repealing its charter is not a law regulating the internal affairs of such corporation. It produces no dissimilarity in

city governments, and does not conflict with the provision of the state Constitution which prohibits the passage of any private, local, or special law regulating the internal affairs of town and counties. *Worthley v. Steen*, 43 N. J. Law (14 Vroom) 542, 543.

Const. art. 6, § 8, providing, except as herein otherwise provided, the Legislature shall have the same power to "alter and regulate" the jurisdiction and proceedings in law and equity that they have heretofore exercised, implies that the old jurisdiction shall in some degree continue in an altered or regulated form, and does not authorize the Legislature to entirely deprive a court of a part of its original jurisdiction. *People v. Coughtry*, 12 N. Y. Supp. 259, 58 Hun, 245.

In construing a statute authorizing a city to regulate sidewalks within its limits, the court said: "Its object was to place within the control of the city the whole subject, and under it, if it was not deemed necessary that any sidewalk should be constructed, it was not obliged to accept one, and impose the burden upon the city. While the word 'regulate,' as applied to sidewalks, more often implies the existence of the thing to be regulated, the use of the streets of a city implies the power to prohibit the use of them under certain circumstances." It was held that the city, under this power, could not only refuse to construct, but could remove sidewalks already constructed. *Attorney General v. City of Boston*, 7 N. E. 722, 724, 142 Mass. 204.

### As control.

"Regulate," as used in Act Feb. 15, 1877, entitled "An act to regulate fees," etc., means and includes the power to control. *State v. Ream*, 21 N. W. 398, 399, 16 Neb. 681.

"Regulate," as used in General Incorporation Law, art. 5, § 1, cl. 9, conferring power on the city council to regulate the use of streets, includes control, and hence it authorizes a city to control such streets. *Chicago Dock & Canal Co. v. Garrity*, 3 N. E. 448, 450, 115 Ill. 155.

### As equalize.

"Regulate and equalize salaries," as used in Act 1879, entitled "An act to regulate and equalize the salaries of certain public officers," is to be construed to mean to regulate such salaries so as to equalize them. "To regulate, with the end of rendering equal, may be taken as its fair meaning, without any great strain on a literal construction of the words." *State v. McCann*, 72 Tenn. (4 Lea) 1, 13.

### As establish.

The term "regulate" ordinarily implies, not so much the establishment of a new thing, as the arrangement in proper order of such

as already exist. *United States v. Harris* (U. S.) 26 Fed. Cas. 185, 193.

#### **As fix.**

"Regulate" means to adjust by rule, method, or established mode; to direct by rule or restriction; to subject to governing principles or laws—and is so used in *Laws Kan.* 1895, c. 140, entitled "An act regulating fees and salaries of county officers"; and hence the act is constitutional, in that it expresses its meaning as fixing salaries in its title. *Higgins v. Mitchell County Com'rs*, 51 Pac. 72, 73, 6 Kan. App. 314.

"Regulate fees and salaries," as used in the title of Act April 9, 1880, entitled "An act to regulate the fees and salaries of certain public officers, were used in their ordinary, popular sense, and were intended to describe the law, the purpose of which was to control, adjust, and limit the sums the officers named were thereafter to receive for their services as officials. *Commonwealth v. Bailey*, 81 Ky. 395, 398.

The word "regulate," as used in Const. art. 11, § 5, declaring that the Legislature, by general and uniform laws, shall provide for the election or appointment in the several counties of supervisors, sheriffs, and county clerks, and it shall regulate the compensation of all such officers in proportion to duties, means to fix or adjust the compensation of all county officers in proportion to their duties. *Dougherty v. Austin*, 94 Cal. 601, 29 Pac. 1092, 16 L. R. A. 161.

#### **As govern.**

One of the synonyms of the word "regulate" is "govern." An act entitled "An act to regulate the recording of title notes or evidences of conditional sales," may be read "An act to govern the recording of title notes," etc. *Otto Gas Engine Works v. Hare*, 67 Pac. 444, 445, 64 Kan. 78.

"Regulate" is defined to mean "govern by or subject to certain rules or restrictions," and it is held that authority in a city charter to regulate bill-posting includes the right to prescribe the means by which it shall be conducted. *City of Rochester v. West*, 29 App. Div. 125, 130, 51 N. Y. Supp. 482.

"Regulate" means to subject to governing principles; to rule; to govern. Act 1883, reading: "In making loans and disbursing interest collected, the trustee and auditor of state shall be governed by the law now in force regulating the manner of making loans of the University Fund"—means that such officer, when loaning that fund, will be controlled by the law governing the manner of making such loans. *Fisher v. Brower*, 64 N. E. 614, 618, 159 Ind. 139.

#### **As grant exclusive franchise.**

"Regulate ferries," as used in Act May 4, 1852, which provides that the board of

trustees of the city of Oakland shall have power to regulate ferries, meant that the trustees should have power to impose regulations on ferries, but did not mean that they had a right to grant an exclusive ferry privilege. *Minturn v. Larue*, 64 U. S. (23 How.) 435, 436, 16 L. Ed. 574.

#### **As grant exemptions.**

"Regulate," as used in Act 1875, entitled "An act to authorize the incorporation of rural cemetery associations and regulate cemeteries," is broad enough to cover a grant of exemption from taxes and assessments. It is too limited a meaning of the word "regulate" which conceives it to be applicable only to the imposition of restrictions. The word is of far broader meaning, and includes all direction by rule of the subject-matter. As applied to property devoted to cemetery purposes, it would naturally include, not only the making of rules for its management by those having it in charge, but also the making of rules governing the conduct of others in respect thereto, and of the public in respect to public burdens thereon. *City of Newark v. Mt. Pleasant Cemetery Co.*, 33 Atl. 396, 397, 58 N. J. Law (23 Vroom) 168.

#### **As license.**

Where a penal statute prohibits disorderly houses in the state, and another statute confers on a certain city power to suppress and restrain such houses, and authorizes the city council to restrain and punish the inmates, and to prevent and punish the keeping of such houses, and authorizes the adoption of summary measures for the removal or suppression, or the regulation and inspection, of all such establishments, the words "suppress, restrain, and regulate" should not be construed as giving power to license such houses. *Ex parte Garza*, 13 S. W. 779, 28 Tex. App. 381, 19 Am. St. Rep. 845.

"Regulate," as used in a village charter, authorizing the same to regulate by its by-laws victualing shops, confers the power to license, as well as to prescribe the manner of their use. *Village of St. Johnsbury v. Thompson*, 9 Atl. 571, 573, 59 Vt. 300, 59 Am. Rep. 731.

"Regulate," as used in Act Ark. March 9, 1875, giving to municipal corporations organized under the act power to regulate hotels and other houses for public entertainment, includes power to license as a means of regulating. *Town of Russellville v. White*, 41 Ark. 485, 486.

"Regulate," as used in the Portland city charter, providing that the city council has power and authority to control and regulate slaughterhouses, washhouses, and public laundries, etc., includes the power to license such houses. *The Laundry License Case* (U. S.) 22 Fed. 701, 703.

"Regulate," as used in Sess. Acts 1870, pp. 463, 464, giving the city council of St. Louis power by ordinance to regulate or suppress bawdy or disorderly houses, etc., should be construed to prescribe the rule by which they are to be governed. The word as used in the statute gives the city power to control such places, including the power to license them. *State v. Clarke*, 54 Mo. 17, 33, 14 Am. Rep. 471.

The power to regulate the sale of intoxicating liquor does not give power to license. *City of Keokuk v. Dressell*, 47 Iowa, 597, 599 (citing *City of Burlington v. Bumgardner*, 42 Iowa, 673).

Where a city council is given authority to regulate and restrain beer rooms and drinking shops, the words "regulate and restrain" should be construed to confer the power to require, as a proper measure of regulation and restraint, a bond to be given by an applicant for a license. In *re Schneid-er*, 8 Pac. 289, 290, 294, 11 Or. 288.

Power to regulate does not require the exercise of the same power as the power to license, and does not give the latter power. Thus a power to regulate and tax taverns and houses does not give the right to license such houses. *City of Burlington v. Bumgardner*, 42 Iowa, 673, 674.

Under Gen. Laws, § 62, cl. 81, empowering a municipality "to direct the location and regulate the management and construction of packing houses, renderies, bone factories," etc., the power to require a license is one of the means of regulating the exercise or pursuit of this business. There are, no doubt, a great variety of other means that might be adopted to accomplish the purpose; but these municipalities are not restricted as to the means they shall employ to regulate the business. In the various illustrations of the meaning of the word "regulate," we find, among others, "to direct," "to rule," "to govern," "to conduct." As the language is used in reference to the power of a city or village government, we must suppose that it was intended to mean that such bodies might rule or govern this character of business.—*Chicago Packing & Provision Co. v. City of Chicago*, 88 Ill. 221, 225, 30 Am. Rep. 545.

A municipal power to license, regulate, and restrain the sale of intoxicating liquors authorizes a prohibition of the bartering or giving away of liquors without license. *Vinson v. Town of Monticello*, 19 N. E. 734, 735, 118 Ind. 103; *Miller v. Ammon*, 12 Sup. Ct. 884, 885, 145 U. S. 421, 36 L. Ed. 759.

Act April 24, 1862, § 4, amendatory of an act incorporating the city of Oakland, providing that the city council shall have power to "make regulations" for licensing, taxing, and regulating all such vehicles, busi-

ness, and employments as the public good may require, carries with it and includes the power to pass an ordinance requiring a license to be taken out. *Ex parte Mount*, 6 Pac. 78, 79, 66 Cal. 448.

#### As refuse license.

"Regulate," as used in 1 Comp. Laws 1888, § 1753, subd. 40, providing that a city council shall have power to license, regulate, and tax the sale of intoxicating liquors, means to control, restrict, and direct, and includes the power to refuse a license to a petitioner in the discretion of the common council. *Perry v. City Council*, 25 Pac. 739, 740, 7 Utah, 143, 11 L. R. A. 446.

"Regulate" is defined by Webster to mean "to direct by rule or restriction." An act to regulate the sale of intoxicating liquor authorizes the board in its discretion to refuse to grant a license. *People v. Board of Excise of the City of Brooklyn*, 16 N. Y. Supp. 798, 799.

#### As prescribe rules.

"Regulate," as used in Const. art. 4, § 25, declaring that the Legislature shall not pass any special or local law regulating county and township business, or in a case where a general law is applicable, means to prescribe a rule for acting, to direct a mode in which a transaction shall be conducted; the word being derived from the Latin word "rego," signifying to guide or direct, through the noun "regula," a rule. Hence an act directing a board of supervisors of a city and county to pay a certain claim is invalid. *Conlin v. Board of Sup's of City and County of San Francisco*, 46 Pac. 279, 281, 114 Cal. 404, 33 L. R. A. 752.

A right to regulate the running of cars means, according to the ordinary acceptance of the term "regulate," to prescribe rules or laws by which the running of cars within a city is to be governed, and the power may, without any strained construction, well apply to the means or force by which the cars are propelled. A right to "regulate the running" seems *ex vi termini* to imply the authority to regulate the power by which they are driven. In *re Wright* (N. Y.) 63 How. Prac. 345, 347 (citing *Buffalo & N. F. R. Co. v. City of Buffalo* [N. Y.] 5 Hill, 209).

#### As prohibit.

The words "regulate" and "prohibit" have different and distinct meanings, whether understood in their ordinary and common signification, or as defined by the court in construing statutes. To regulate the sale of liquor implies that the business may be engaged in or carried on subject to established rules or methods. *Miller v. Jones*, 80 Ala. 89, 96; *Bronson v. Oberlin*, 41 Ohio St. 476, 483, 52 Am. Rep. 90.

"Regulate," as used in a statute giving to a city the right to regulate bowling alleys, does not authorize forbidding the maintenance of such alleys within the fire limits of a city of about 2,000 inhabitants, or within 100 yards of any residence or business house, where the only location possible under an ordinance so forbidding is about 600 yards from the business portion of the town, and remote from any thoroughfare or public place, since such restriction is a virtual prohibition. The power to regulate does not properly include the power to suppress or prohibit, for the very essence of regulation is the existence of something to be regulated. The power to regulate includes the power to restrain, so long as the restraint imposed is reasonable. The restraint must not so confine the exercise of any occupation as to amount to a prohibition. The power to regulate a trade, business, or occupation in any given town or city is to be determined by the environments and conditions of such town or city, and what would apply to one town or city might not apply to another. *Ex parte Patterson*, 58 S. W. 1011, 1013, 42 Tex. Cr. R. 256, 51 L. R. A. 654.

Act S. O. Dec. 24, 1892, providing that the manufacture and sale of intoxicating liquors should be prohibited within the state, except as provided by certain regulations contained therein, should be construed to mean prohibition, since the regulation of the traffic is the prohibition of it, except in accordance with certain rules. *Cantini v. Tillman* (U. S.) 54 Fed. 969, 970.

Regulation means a rule or order prescribed for management or government, and under a power to provide for the erection, management, and regulation of slaughterhouses a city has power to prohibit their operation. *City of St. Louis v. Howard*, 24 S. W. 770, 771, 119 Mo. 41, 41 Am. St. Rep. 630.

The word "regulate," as used in the title of Pub. Acts 1897, No. 151, entitled "An act to regulate the catching of fish in the waters of the state by the use of pound or trap nets and other apparatus," is sufficiently broad to cover a provision in the act prohibiting the taking of fish during certain portions of the year; the object of the law being the preservation of the industry of fishing and a valuable food product, so that any provision tending to these ends is within the term "regulate." *Osborn v. Charlevoix Circuit Judge*, 114 Mich. 655, 658, 72 N. W. 982.

The power to regulate a useful trade does not authorize its prohibition or the creation of a monopoly, and where a camp meeting association was empowered to authorize persons to engage in certain pursuits in the park, and establish regulations therefor, it did not give the corporation the right to restrain or prohibit such pursuits. Thousand

Island Park Ass'n v. Tucker, 65 N. E. 975, 976, 173 N. Y. 203, 60 L. R. A. 786.

The statutes which provide for the incorporation of cities, and declare that the common council of a city shall have power "to regulate ferries" across streams passing through and bordering upon the corporate limits of such city, designate the kind of boats to be used, the time and place of landing, and the rates of ferriage, do not give to the city council power to prohibit ferries from running without a license obtained from the city council. The words are not used as a synonym of, but rather as the correlative of, the words "to prohibit," "to prevent," "to restrain," "to establish," "to construct," or "to direct the location of." *Duckwall v. City of New Albany*, 25 Ind. 283, 285.

An ordinance entitled "An ordinance to regulate and control the driving of cattle through the streets of Jersey City," meant "to establish rules and limits," but did not import that the driving of cattle should be prohibited. *McConvill v. Jersey City*, 39 N. J. Law (10 Vroom) 38, 44.

"Regulate," as used in a title of a Michigan act to regulate the sale of liquors, etc., should not be construed as synonymous with "prohibit," and hence an amendatory section, which prohibits the sale thereof within certain specified limits, was not embraced in the title. *People v. Gadway*, 28 N. W. 101, 103, 61 Mich. 285, 1 Am. St. Rep. 578.

"Regulate," as used in Rev. St. § 696, providing that a city or town council shall have power to regulate and restrain all places where spirituous liquor is sold at retail, does not include the power to prohibit. *Mernaugh v. City of Orlando*, 27 South. 34, 35, 41 Fla. 433.

"Regulate" and "prohibit" are not synonymous terms, but have different and distinct meanings. To regulate a business implies that the business may be engaged in or carried on subject to established rules or methods, while to prohibit is to prevent the business being engaged in or carried on entirely or partially. The two are incongruous, and a title to an act which expresses a purpose to regulate the sale of liquor will not authorize an absolute prohibition. *In re Hauck*, 38 N. W. 269, 275, 70 Mich. 396.

"Regulate," as used in Act Mo. March 30, 1871, authorizing a city to regulate or suppress bawdyhouses, is not synonymous with the word "prohibit," as used in a former statute prohibiting their existence; and hence the latter act is repealed by the passage of the former. *State v. De Bar*, 58 Mo. 395, 397.

A statutory authority to a city to "regulate all places where intoxicating liquors

are sold" to be used on the premises does not confer the power to prohibit the sale of intoxicating liquors. *Sweet v. City of Wash.*, 41 Ind. 7, 11.

The term "regulate," in a clause of the Constitution authorizing the Legislature to regulate the wearing of arms, does not authorize the passage of a law prohibiting the wearing of arms. The power to regulate does not fairly mean the power to prohibit. On the contrary, to regulate necessarily involves the existence of the thing or act to be regulated. *Andrews v. State*, 50 Tenn. (3 Heisk.) 165, 180, 8 Am. Rep. 8.

"Regulate," as used in Laws 1870, c. 77, authorizing the common council of the city of Albany to enact ordinances "to regulate the erection, use, and continuance of slaughter-houses," implies a power of restriction and restraint, and applies not only to the form or material to be used in the erection of a slaughterhouse, but also has reference to the locality where the same may be erected, and may be construed to permit a total prohibition in particular areas or localities. *Cronin v. People*, 82 N. Y. 318, 321, 37 Am. Rep. 564.

"Regulate," as used in the grant of power to a city to regulate the sale of liquors, etc., implies the power to restrain such sales to certain hours of the day or to certain days of the week. *Corporation of Town of Minden v. Silverstein*, 36 La. Ann. 912, 913.

A city charter granting the power to "regulate and to manage markets" impliedly authorizes the city council to adopt an ordinance prohibiting the sale of particular commodities at stores, stalls, and places outside market houses established for such purposes; the power to regulate not authorizing prohibition in a general sense, but being limited to confining the business referred to to certain hours of the day, to certain localities or buildings in the city, and to the manner of its prosecution within those hours, localities, and buildings. *Ex parte Byrd*, 4 South. 397, 398, 84 Ala. 17, 5 Am. St. Rep. 328.

Within the meaning of the Constitution requiring that the subject of every act of the Legislature shall be stated in the title, the title "To regulate the sale of intoxicating liquors," etc., sufficiently expresses the subject of an act prohibiting the sale of such liquors to minors and to persons in the habit of getting intoxicated; such matters being properly included within the subject of regulating the sale. *Williams v. State*, 48 Ind. 306, 308.

A power given to villages to license, regulate, and prohibit the sale of intoxicating liquors has been held to authorize the licensing of the sale of liquor in one part of such a village and the prohibition of such

sales in other parts. *People v. Cregler*, 28 N. E. 812, 815, 138 Ill. 401.

"Regulation," as used in Laws 1871, c. 290, § 6, providing that a city shall have power to pass an ordinance for the regulation and government of public parks, squares, and places in the city, etc., includes an ordinance or resolution that no bicycle or tricycle should be allowed in the parks. *In re Wright* (N. Y.) 29 Hun, 357, 358.

#### As provide for.

"Regulate," as used in the Declaration of Rights, declaring that the Legislature may regulate the trial and punishment of inferior grades of larceny, should be construed to mean "provide" or "provide for." *Ex parte Bell*, 19 Fla. 608, 614.

#### As punish.

"To regulate" means to adjust by a rule or regulation, and any attempts to fix rules for the manufacture, transportation, use, and sale of explosives, that do not also prescribe a punishment for the violation of such rules and regulations, would necessarily be imperfect. Therefore Act June 16, 1887, entitled "An act to regulate the manufacture, transportation, use, and sale of explosives, and to punish an improper use of the same," which provides for licensing the manufacture of explosive compounds, prohibits the storing of such explosives within a certain distance of inhabited dwellings, and punishes fraudulent acts to procure the transportation of explosives in public conveyances, and makes it felony punishable by imprisonment to manufacture or procure such explosives with the intent to use the same for unlawful destruction of life or property, is not in conflict with Const. art. 4, § 13, providing that no act shall embrace more than one subject, which shall be expressed in its title. *Hronek v. People*, 134 Ill. 139, 141, 24 N. E. 861, 8 L. R. A. 837, 23 Am. St. Rep. 652.

"Regulate the police," as used in a city charter giving power to regulate the police of the city, includes the power to pass an ordinance to punish vagrants. *City of St. Louis v. Bentz*, 11 Mo. 61, 62.

#### As regulate location.

A municipal power to regulate certain industries, including livery stables, may be construed to authorize the city to determine the places where such stables shall be located, as well as the manner in which the business of keeping them shall be carried on. *State ex rel. Russell v. Beattie*, 16 Mo. App. 131, 134.

#### As restrain.

To regulate is to govern, and restraint is the essence of all government. Hence to regulate is to restrain; so that, when the

Legislature undertook to regulate the business of railway corporations as common carriers, it necessarily meant to circumscribe their privileges, or to compel the exercise of such business within certain limits. *Dillon v. Erie R. Co.*, 43 N. Y. Supp. 320, 323, 19 Misc. Rep. 116.

"Regulate," as used in a city charter authorizing the city to license and regulate bill-posters, bill distributors, and sign advertising, means to govern by or subject to certain rules or restrictions. It implies a power of restriction and restraint, not only as to the manner of conducting a specified business, but also as to the erection in or upon which the business is to be conducted. *City of Rochester v. West*, 58 N. E. 673, 674, 164 N. Y. 510, 53 L. R. A. 548, 79 Am. St. Rep. 659 (citing *Cronin v. People*, 82 N. Y. 318, 321, 37 Am. Rep. 564).

#### As tax.

"Regulate," as used in a corporate charter authorizing a city to regulate and license a business or trade, confers no power to impose a tax upon such business or trade. *Muhlenbrinck v. Long Branch Com'rs*, 42 N. J. Law (13 Vroom) 364, 36 Am. Dec. 518.

"Regulate public instruction," as used in the title of Acts 1872, p. 456, entitled "An act to regulate public instruction" in the county of R., is broad enough to include the power to tax, and hence such power may be given in the body of the act. *Smith v. Bohler*, 72 Ga. 546, 553.

A statutory power to municipal corporations to license and regulate sales by transient merchants does not give the municipalities power to tax such occupation. "The municipality, under the power given it to license, had the power to impose such a charge as would cover, not only the necessary expenses of issuing it, but also the additional labor of officers and other expenses imposed by the public, but nothing beyond this. As said in *City of Burlington v. Putnam Ins. Co.*, 31 Iowa, 103, 'licenses are a part of the police regulations of the city, and should be charged for as such, and only to such extent as may reasonably compensate the city for issuing and enforcing the license, and for the care exercised by the city under its police authority over any particular person licensed.' \* \* \* The amount of the license fee or charge is to be considered in determining whether the exaction is not really one of revenue or prohibition, instead of one of regulation under the police power." Thus the power does not warrant a municipality in imposing a license fee of \$250 per month or \$25 per day, if the license is issued for a shorter period, as it amounts to a prohibitory tax. *City of Ottumwa v. Zekind*, 64 N. W. 646, 647, 95 Iowa, 622, 29 L. R. A. 734, 58 Am. St. Rep. 447.

#### County business.

The phrase "regulating county business," as used in Const. art. 4, § 20, prohibiting the enactment of special and local laws regulating county business, does not render void a statute prescribing the manner in which the payment of the indebtedness of a particular county shall be conducted. *Youngs v. Hall*, 9 Nev. 212, 217.

The relocation of a county seat is not within Const. art. 4, § 22, prohibiting special laws regulating county and township business. *Mode v. Beasley*, 42 N. E. 727, 730, 143 Ind. 306.

#### Foreign stock companies.

"Regulate," as used in a statute entitled "An act to regulate foreign stock corporations," clearly means the regulation in respect of their exercise of corporate franchises and powers, and includes the power to provide certain requirements, which must be complied with before such corporations may do business within the state. *Toledo Commercial Co. v. Glen Mfg. Co.*, 45 N. E. 197, 199, 55 Ohio St. 217.

#### Markets.

The authority given by a city charter "to establish and regulate markets" authorizes the creation of the market and its subsequent regulation, and refers by the words "to establish" to the act of originating, and the words "to regulate" comprise all that can be required to be done after the market is created. *Ketchum v. City of Buffalo*, 14 N. Y. 356, 361.

#### Practice of medicine.

To regulate is to adjust by rule, to subject to governing principles, or to restrict within certain rules and limitations; so that within the power to regulate the practice of medicine would fall the power to determine who might practice, and determine what shall be regarded as legitimate practice. *People v. Blue Mountain Joe*, 21 N. E. 923, 925, 129 Ill. 370.

#### Prices of gas.

"Regulation," as used in an act of a state Legislature giving a taxing district the right of regulation of the prices of gas furnished by gas companies within such district, implies that an investigation shall be made, that an opportunity to present the facts shall be furnished, that when the facts are established they shall by the regulating power be given due consideration, and that such action as shall be taken in view of these facts thus ascertained shall be just and reasonable, and such as will enable the company to maintain its existence, to preserve the property invested from destruction, and to receive on the capital invested a dividend corresponding in amount to the ruling rates



of interest. *New Memphis Gas & Light Co. v. City of Memphis* (U. S.) 72 Fed. 952, 955.

#### Rate of interest.

"Regulating the rate of interest on money," as used in Const. Ill. art. 4, § 22, which forbids the General Assembly to pass any local or special law "regulating the rate of interest on money," does not include fixing of the rate of interest on an installment of a special assessment, where the same is made payable at stated periods in the future. Hence a law which fixed a rate of interest on installments of special assessments is not prohibited by this clause of the Constitution. *McChesney v. People*, 99 Ill. 216, 218.

#### Streets.

"Regulate," as used in a grant of power from a municipality to a certain committee to "regulate the streets, lanes, and squares," etc., should be construed to include the power to widen, alter, and extend the streets, lanes, and squares, so as to provide for the public convenience and the mutual connection of the whole. *United States v. Harris* (U. S.) 26 Fed. Cas. 185, 193.

A city charter, conferring the power to "repair and regulate" streets of the city upon the commissioners of highways, should be construed to mean that they had the power to change the grade of a street after it had once been established. *Waddell v. City of New York* (N. Y.) 8 Barb. 95, 97.

The St. Louis city charter, empowering the mayor and assembly to establish, open, vacate, and improve all streets, and "to regulate their use," authorizes the city to grant a telegraph company the right to use exclusively a portion of the street on condition of contributing toward the expense of opening and improving the street; the term being one of broad import. *City of St. Louis v. Western Union Tel. Co.*, 13 Sup. Ct. 990, 992, 149 U. S. 465, 37 L. Ed. 810.

The power to regulate the use of streets is very comprehensive. The word "regulate" is one of very broad import. Under the power thus delegated it cannot be questioned that municipal authorities can permit the use of the surface of the street for the erection of telegraph and telephone poles and the laying of railroad tracks, and the space above the surface for stringing electric wires, and may also permit the laying of water and gas pipes and sewers beneath the street. *McWethy v. Aurora Electric Light & Power Co.*, 67 N. E. 9, 11, 202 Ill. 218 (citing *State ex rel. St. Louis Underground Surface Co. v. Murphy*, 134 Mo. 548, 31 S. W. 784, 34 S. W. 51, 35 S. W. 1132, 34 L. R. A. 369, 56 Am. St. Rep. 515).

#### Use of water.

"Regulate the use," as used in Gen. St. § 1738, 1739, enacted to regulate the use of

water for irrigation, should not be confined to forbidding of injustice in distribution, the prevention of waste, or the apportionment in times of scarcity, but should be construed as broad enough to include the frustration of unfair exactions and the continuance of reasonable rates. *Golden Canal Co. v. Bright*, 6 Pac. 142, 144, 8 Colo. 144.

#### Value of money.

The power to coin money, and to regulate the value thereof and of foreign coin, has no reference to, and by no possibility can have any reference to, the rate of interest to be charged for money loaned. The power thus conferred upon Congress is the power to coin money and regulate the value of the money so coined. It has been said that the power to coin money would doubtless include that of regulating its value, had the latter power not been expressly inserted. The power of regulating the value of money is a mere repetition of the words granting the power to coin money. 2 Story, Const. (4th Ed.) § 1117. By the power conferred Congress may establish the value of domestic and of foreign coin. The object of the power thus conferred is to save the country from the embarrassments of a perpetually fluctuating and variable currency. The power to coin money is one of the ordinary prerogatives of sovereignty, and is almost universally exercised in order to preserve a proper circulation of good coin of a known value in the home market. 2 Story, Const. (4th Ed.) § 1118. The power to coin money and regulate the value thereof is the power to coin money and affix to it a public stamp and value. *Beach v. Peabody*, 58 N. E. 679, 680, 188 Ill. 75.

#### REGULATE COMMERCE.

See, also, "Commerce"; "Interstate Commerce."

"Regulate," as used in the clause of the federal Constitution giving Congress the power to regulate commerce, means the power to regulate commerce which, prior to the formation of the Constitution, existed in the several states. *Gibbons v. Ogden*, 22 U. S. (9 Wheat.) 1, 227, 6 L. Ed. 23.

"Regulation of commerce" in its constitutional meaning includes every obstacle or burden laid upon transportation by legislative authority. *Hannibal & St. J. R. Co. v. Husen*, 95 U. S. 465, 470, 24 L. Ed. 527.

Many acts of a state may affect commerce, without amounting to a regulation of it in a constitutional sense of the term; and it is sometimes difficult to distinguish between that which merely affects or influences, and that which regulates or furnishes a rule of conduct. While a state may pass sanitary laws, and laws for the protection of life, liberty, health, or property within its

borers, and while for the purpose of self-protection it may establish quarantine and reasonable inspection laws, it may not interfere with transportation into or through the state beyond what is absolutely necessary for its self-protection. It may not, under cover of exerting its police power, substantially burden either foreign or interstate commerce. *Hannibal & St. J. R. Co. v. Husen*, 95 U. S. 470, 24 L. Ed. 527. Code, § 1967, imposing a penalty on railroad companies for the detention of freight more than five days after delivery for shipment without the consent of the shipper, as regards freight to be shipped to another state, does not conflict with Const. U. S. art. 1, § 8, cl. 3, delegating the power to regulate interstate commerce to the federal government, since its enforcement would expedite, and not obstruct, interstate traffic. *Bagg v. Wilmington, C. & A. R. Co.*, 109 N. C. 289, 14 S. E. 79, 81, 14 L. R. A. 596, 26 Am. St. Rep. 569.

"Regulate," as used in the clause of the federal Constitution giving Congress power to regulate commerce with foreign nations, between the states, and with Indian tribes, includes navigation. "The power to regulate commerce comprehends the control for that purpose and to the extent necessary of all navigable waters of the United States which are accessible from a state other than those in which they lie. For this purpose they are the public property of the nation, and subject to all the requisite legislation by Congress. This necessarily includes the power to keep them open and free from any obstruction to their navigation interposed by the states or otherwise, to remove such obstructions when they exist, and to provide by such sanctions as they may deem proper against the recurrence of the evil and for the punishment of the offense." *Gilman v. Philadelphia*, 70 U. S. (3 Wall.) 713, 724, 18 L. Ed. 96; *South Carolina v. Georgia*, 93 U. S. 9, 10, 23 L. Ed. 782.

Pub. St. c. 139, prohibiting the discrimination by common carriers in the transportation of goods, etc., is not a regulation of commerce within the meaning of Const. U. S. art. 1, § 8, cl. 3, since it opposes no obstruction and causes no delay to commerce. It simply prohibits discriminations being made in favor of one and against another having occasion to use the facilities afforded for the transportation of goods by common carriers under like circumstances, and though a statute of this sort may doubtless be properly said to affect commerce, it is not everything that affects commerce that amounts to a regulation of it by the Constitution. *Providence Coal Co. v. Providence & W. R. Co.*, 4 Atl. 394, 397, 15 R. I. 303.

"Commerce," as used in Const. U. S. art. 1, § 8, declaring that Congress shall have power to regulate commerce with foreign na-

tions, among the several states, and with the Indian tribes, means that whenever the subjects over which a power to regulate commerce is asserted are in their nature national, or admit of one uniform system or plan of regulation, they may justly be said to be of such a nature as to require exclusive legislation by Congress; and hence any regulation by a state which operates to cause delay and to impose expense, or to interpose an obstacle to the free transportation of commerce among the states, is a regulation of commerce within the meaning of the Constitution. *City of Council Bluffs v. Kansas City, St. J. & C. B. R. Co.*, 45 Iowa, 338, 359, 24 Am. Rep. 773.

#### As fixing or limiting transportation charges.

The words "regulate commerce" are properly used to characterize the fixing or limiting of charges for transportation of merchandise from one place to another. *Kaeiser v. Illinois Cent. R. Co. (U. S.)* 18 Fed. 151, 153.

#### As to prescribe rules.

"The 'power to regulate commerce,' which was given to Congress by the federal Constitution, was defined by Chief Justice Marshall in *Gibbons v. Ogden*, 22 U. S. (9 Wheat.) 1, 6 L. Ed. 23, as the power to regulate, that is, to prescribe the rule by which commerce is to be governed." *Kentucky & I. Bridge Co. v. Louisville & N. R. Co. (U. S.)* 37 Fed. 567, 634, 2 L. R. A. 289; *Cuban S. S. Co. v. Fitzpatrick*, 66 Fed. 63, 67; *Wilkerson v. Rahrer*, 11 Sup. Ct. 865, 867, 140 U. S. 545, 35 L. Ed. 572; *City of Baltimore v. Baltimore Trust & Guarantee Co.*, 17 Sup. Ct. 696, 701, 166 U. S. 673, 41 L. Ed. 1160 (citing *Gloucester Ferry Co. v. Pennsylvania*, 5 Sup. Ct. 826, 114 U. S. 196, 29 L. Ed. 159).

The term "regulate commerce," as it is used in the clause of the federal Constitution authorizing Congress to regulate commerce, means to prescribe rules by which it shall be governed, that is, the conditions upon which it shall be conducted; to determine how far it shall be free and untrammelled, how far it shall be burdened by duties and imposts, and how far it shall be prohibited. *Welton v. Missouri*, 91 U. S. 275, 279, 23 L. Ed. 347; *Bowman v. Chicago & N. W. R. Co.*, 8 Sup. Ct. 1062, 115 U. S. 611, 29 L. Ed. 502; *Pacific Coast S. S. Co. v. Railroad Com'rs (U. S.)* 18 Fed. 10, 11.

"The power vested in Congress to regulate commerce with foreign nations and among the several states and with the Indian tribes is a power to prescribe the rule by which that commerce is to be governed, and is a power complete in itself, acknowledging no limitations other than those prescribed in the Constitution. It is coextensive with the subject on which it acts, and cannot be

stopped at the external boundary of a state, but must enter its interior and must be capable of authorizing the disposition of those articles which it introduces, so that they may become mingled with the common mass of property within the territory entered." *Leisy v. Hardin*, 10 Sup. Ct. 681, 683, 135 U. S. 100, 34 L. Ed. 128; *United States v. Holliday*, 70 U. S. (3 Wall.) 409, 417, 18 L. Ed. 354; *Smith v. Turner*, 48 U. S. (7 How.) 283, 395, 12 L. Ed. 702; *Brown v. Maryland*, 25 U. S. (12 Wheat.) 420, 446, 6 L. Ed. 678; *Hill v. City of St. Louis*, 60 S. W. 116, 119, 159 Mo. 159.

It was said in the case of *Gibbons v. Ogden*, 22 U. S. (9 Wheat.) 1, 6 L. Ed. 23, in reference to the power of Congress to regulate commerce, that as the words "to regulate" imply in their nature a full power over the thing to be regulated, this excludes necessarily the action of all others that would perform the same operation on the same thing. That regulation is designed for the entire result, applying to those parts which remain as they were as well as to those which are altered. It produces a uniform whole, and is as much disturbed and deformed by changing what the regulating power designed to leave untouched as that on which it has operated. *State v. North*, 27 Mo. 464-472.

#### **Taxation.**

The word "regulate," as used in the Constitution, authorizing Congress to regulate interstate commerce, means to adjust by rule. Therefore the tax imposed under Act 1864, imposing a tax on every 2,000 pounds of freight carried within the commonwealth, is merely a charge on the corporation for freight carried over the road, is a tax on the business measured by the number of tons carried, and does not conflict with the federal Constitution; the purpose of the act not being to regulate transportation, but to raise money for the support of the government. *Commonwealth v. Philadelphia & R. R. Co.*, 62 Pa. (13 P. F. Smith) 286, 296 (citing *Webst. Dict.*).

A state statute, levying a tax on the gross receipts of railroads for the carriage of freights and passengers into, out of, or through the state, is a "regulation of interstate commerce," and void. *Fargo v. Stevens*, 7 Sup. Ct. 857, 863, 121 U. S. 230, 30 L. Ed. 888.

A city ordinance providing for a license to be paid by peddlers is to be regarded as a tax upon the goods they sell, and any discrimination against persons not residents of the state and against goods not manufactured in the state is a "regulation of commerce," not within the power of a state to enforce. *City of Marshalltown v. Blum*, 12 N. W. 266, 58 Iowa, 184, 43 Am. Rep. 116.

That a tax imposed by a state may constitute a "regulation of commerce" was decided in the case of *Brown v. Maryland*, 25 U. S. (12 Wheat.) 419, 6 L. Ed. 678, and has frequently been decided in subsequent cases. Thus a railroad company, whose only business within the state is discharging freight and passengers brought over its line from without the state, receiving freight and passengers to be sent out over its line, and maintaining terminal facilities, such as wharves and piers and buildings in connection therewith, and the employment of agents, clerks, and laborers, is not subject to a tax on its corporate franchise and business. *People v. Wemple*, 33 N. E. 720, 721, 138 N. Y. 1, 19 L. R. A. 694.

The imposition of a general tax on goods from another state, arriving in the taxing state at their place of destination, is not a regulation of commerce. *Brown v. Houston*, 5 Sup. Ct. 1091, 1093, 114 U. S. 622, 29 L. Ed. 257.

A statute of a state imposing a tax upon the gross receipts of a railroad company is not a regulation, within the provision of the federal Constitution, providing that Congress shall have power to regulate commerce with foreign nations and among the several states, and that the gross receipts are made up in part of freights received for transportation of merchandise from the state into another state or into the state from another. *Philadelphia & R. R. Co. v. Pennsylvania*, 82 U. S. (15 Wall.) 284, 293, 21 L. Ed. 146.

#### **Warehouses and warehousemen.**

A regulation of interstate commerce, contrary to the provisions of the federal Constitution, does not include everything that affects interstate commerce, and does not include an act by a state to regulate public warehouses and the warehousing and inspection of grain. *Munn v. Illinois*, 94 U. S. 113, 135, 24 L. Ed. 77.

#### **Wharfage dues.**

Wharfage dues are not taxes, or duty of tonnage, or regulations of commerce, or obnoxious to the Constitution of the United States, but are lawful charges for conveniences furnished to commerce. *Sweeney v. Otis*, 37 La. Ann. 520, 521.

#### **REGULATION.**

See "Municipal Regulations"; "Police Regulations"; "Reasonable Regulation"; "Rules and Regulations"; "Usual Rules and Regulations."

Distinguished from by-law, see "By-Law."

A regulation is a rule or order prescribed by a superior for the management of some

business or for the government of a company or society. *Curry v. Marvin*, 2 Fla. 411, 415 (citing *Webst. Dict.*); *In re Leasing of State Lands*, 32 Pac. 986, 988, 18 Colo. 359.

The word "regulations," in Const. art. 8, §§ 2, 3, conferring appellate jurisdiction on the Supreme Court under such regulations as may be prescribed by law, refers to the establishment of the procedure by means of which the power may be set in motion and in obedience to which it may be exercised. *Finlen v. Heinze*, 69 Pac. 829, 832, 27 Mont. 107.

Within the term "regulation," when used in reference to railroads, are embraced two ideas: One is mere control of the operation of the roads, prescribing the rules for the management thereof; matters which affect the convenience of the public in their use. Regulation in this sense may be considered as purely public in its character, and in no manner trespassing upon the rights of the owners of the railroads. But within the scope of the word "regulation" as commonly used is embraced the idea of fixing the compensation which the owners of the railroad property shall receive for the use thereof; and, when regulation in this sense is attempted, it necessarily affects the property interests of the railroad owners. *Ames v. Union Pac. Ry. Co.*, 64 Fed. 165, 178.

The terms "ordinances, rules, regulations, and by-laws," as used in a city charter empowering the council to make "ordinances, rules, regulations, and by-laws" for certain purposes, are all equivalent to each other. So that whatever rule, regulation, or by-law affects the subject mentioned must be passed with the formalities required for an ordinance proper. *Hunt v. City of Lambertville*, 45 N. J. Law (16 Vroom) 279, 282; *Taylor v. Lambertville*, 10 Atl. 809, 811, 43 N. J. Eq. (16 Stew.) 107.

"Regulation," as used in Rev. St. § 3333, providing that every by-law, ordinance, or regulation of a municipal council must be published in a certain manner, etc., includes an order establishing the grade of a street. *Meyer v. Fromm*, 9 N. E. 84, 85, 103 Ind. 208.

Under National Banking Act 1864, § 5, providing that the articles of association of a national bank may contain any provisions not inconsistent with the provisions of this act which the association may see fit to adopt for the regulation of its business, a by-law providing that the bank shall have a lien on its stock as against indebted stockholders will be considered as a regulation of the business of the bank. *Bullard v. National Eagle Bank*, 85 U. S. (18 Wall.) 589, 596, 21 L. Ed. 923.

#### **Instruction distinguished.**

Distillery surveyors are held not within Rev. St. § 1765, providing that no officer

of the public service, whose salary is fixed by law or regulation, shall receive any additional pay, etc., although the salaries of such surveyors are fixed by instructions issued by the Commissioner of Internal Revenue; the difference between a "regulation" and an "instruction" being that the former affects a class or classes of officers, and the latter is a direction to govern the conduct of the particular officer to whom it is addressed. *Landram v. United States* (U. S.) 16 Ct. Cl. 74, 86.

#### **As law.**

"Regulations in a legal sense mean law." A divorce is neither a rule nor a regulation. Hence a territory organized under the authority given Congress to make all needful rules and regulations respecting the territories does not have power to grant a legislative divorce. *In re Higbee*, 5 Pac. 693, 694, 4 Utah, 19.

#### **As partial restriction.**

The definition of the word "regulation," in an ordinance relating to restaurants and saloons, is that it is a partial restriction, which does not wholly prohibit. *Richards v. City of Bayonne*, 39 Atl. 708, 709, 61 N. J. Law, 496.

#### **As rule of action.**

A "regulation of an executive department" is a rule made by the head of the department for its action under an act of Congress conferring power to do so, and does not include a mere order of the President or of a Secretary. *Harvey v. United States* (U. S.) 3 Ct. Cl. 38, 41.

The term "regulations" implies a rule for a general course of action, but does not apply to a case in which specific instructions are to be given applicable to that case alone. *Christopher v. City of New York* (N. Y.) 13 Barb. 567, 573.

"Regulations," as used in Comp. Laws 1876, p. 31, authorizing writs of error and appeals to be taken to the Supreme Court of the United States in the same manner "and under the same regulations as from the Circuit Courts of the United States," means the rules by which the actions of Circuit Courts of the United States are limited and controlled in granting appeals, and the action of the Supreme Court of Utah is limited and controlled by the rules which govern those courts. *Bullion Beck & Champion Min. Co. v. Eureka Hill Min. Co.*, 12 Pac. 660, 661, 5 Utah, 182.

#### **As rule of law.**

"Regulations," as used in Rev. St. U. S. § 189, providing that writs of error shall in all cases be allowed from the final decisions of the District Courts "under such regulations as may be prescribed by law," is to be construed to mean "the rules of law

by which this right is to be exercised." *Doran v. Territory*, 2 Pac. 532, 533, 3 Wyo. 91.

## REHEARING.

As used in the Probate Code, a rehearing is a re-examination of the facts involved in a decree or order upon grounds set forth in a motion or petition to open and vacate or modify the same, or some part thereof. *Rev. Codes N. D. 1899, § 6249.*

The term "rehearing," technically speaking, was appropriate only to the proceeding in chancery by which a certain class of errors in a decree or decretal order could, before enrollment, be corrected. It had no application to orders made upon mere motion. Those could not be reached by a rehearing, but were varied or discharged by the court on application by motion. *Belmont v. Erie R. Co. (N. Y.) 52 Barb. 637, 651.*

After a decision by the Master of the Rolls or Vice Chancellor, if the case be heard by the Lord Chancellor, it is called a "rehearing," in England. Such a rehearing, without any inquiry beyond a request by the party feeling aggrieved and a certificate of counsel that the reasons for it were sufficient, might not be questionable, where a party has a right to have his case considered by other officers. But another class of cases, such as are here denominated "rehearings," are a second hearing before the same judge or court, on the application of a party supposing himself injured by the decision made after the first hearing. A rehearing of a case in equity is not granted by the federal Circuit Court on the mere certificate of counsel as to the sufficiency of the reasons for it. *Emerson v. Davies (U. S.) 8 Fed. Cas. 626.*

A "rehearing," strictly speaking, is simply a new hearing and a new consideration of the case by the court in which the suit was originally heard, and upon the pleadings and depositions already in the case. An order denying a rehearing is not appealable, since the case could be reheard upon the merits upon an appeal from the original decree. But an order denying an application to open a decree and for leave to answer and present the merits of the defense, on the ground that the solicitor who appeared for the defendant was not authorized to appear for him and that the case was heard upon a stipulation admitting the allegations of the bill, given by the solicitor and without the defendant's knowledge or consent, is not, strictly speaking, an order denying an application for a rehearing, and is appealable. *Read v. Patterson, 14 Atl. 490, 494, 44 N. J. Eq. (17 Stew.) 211, 6 Am. St. Rep. 877.*

### As new trial.

Where the language of a notice of appeal is that the appeal will be taken from an

order denying plaintiff's motion for rehearing, the word "rehearing" is used in the sense of a new trial. *Kimple v. Conway, 10 Pac. 189, 190, 69 Cal. 71.*

## REIMBURSE.

As used in Act April 5, 1893, appropriating money for the relief of B. county, and declaring that the act was passed to reimburse said county for expenses incurred, etc., the term "reimburse" should be construed to have been used in its ordinary meaning, which is defined by Webster to be "to replace in a treasury or purse as an equivalent for what has been taken, lost, or expended; to refund; to pay back; to restore, as to reimburse the expenses of a war." In construing statutes, words should be given their ordinary meaning; and, so interpreting the language of this appropriation, it is clear that the state was only required to refund or pay according to the expenses incurred by the county. *State v. Moore, 59 N. W. 755, 759, 40 Neb. 854, 25 L. R. A. 774.*

To reimburse is to pay back, and the primary meaning of the word is to be imputed to it, where the meaning is not controlled by contract stipulations. *Philadelphia Trust, Safe Deposit & Ins. Co. v. Audenreid, 83 Pa. 257, 264.*

### Payment of interest included.

The primary meaning of the word "reimburse" is to pay back; to make return or restoration of an equivalent for something paid, expended, or lost; to indemnify; to make whole. And hence, where the trustees of an insolvent bank advanced a certain percentage of its debts to the receiver and received certain real estate, under an agreement that they were eventually to sell it and reimburse themselves for the sums advanced, etc., the term "reimburse" will be construed to include interest on the advancement. *Woerz v. Schumacher, 56 N. E. 72, 73, 161 N. Y. 530.*

## REIMBURSEMENT.

"Reimbursement," as used in an agreement by which certain persons were to receive a certain sum each as reimbursement for money paid by them, respectively, into a firm business, implies that it had not been withdrawn. *Fuller v. Atwood, 13 R. I. 316.*

## REINSTATE.

A statute providing that if, within two years after the tax sale, the proprietor or his legal representative repay the purchaser the moneys paid for the taxes, together with interest, he shall be reinstated in his original right, did not intend to restrict the word

"reinstated" to its literal meaning; else the legal representative could in no case be benefited by the act under the redemption. The literal meaning of the word "reinstatement" would confine the redemption to him in whom the title was at the time of the tax sale, although the redemption were paid by his vendee. But the clear meaning of the act is that the legal representative was to have the same right and title after redemption as if no tax sale had been made, and the word "reinstated" must be construed consistently with this meaning. *O'Neale v. Caldwell* (U. S.) 18 Fed. Cas. 695, 697.

As used in a statute providing that the commissioners of the sinking fund "shall have power in their discretion to remove any warden, and, if the General Assembly fail or refuse to concur in said removal within 20 days after the fact of removal is conveyed to it, then it shall be the duty of said commissioners to reinstate the said warden," the word "removal" means to move away from a position occupied, or to displace, as to remove a building; and "reinstatement" means to restore to a state from which one has been removed. *South v. Sinking Fund Com'rs*, 5 S. W. 567, 569, 86 Ky. 186.

#### REINSTATEMENT.

In reference to the right of an insured person to be reinstated after the policy has been fulfilled by a breach, "fulfilled" implies placing the insured in the same condition that he occupied and sustained toward the insurer next before the forfeiture was incurred, and does not imply reinsurance, or the making of a new contract or policy of insurance. *Lovick v. Provident Life Ass'n*, 14 S. E. 506, 507, 110 N. C. 93.

#### REINSURANCE.

Miller says that "reinsurance" is a hedging contract, by which the underwriter withdraws himself from all risk. *Herckenreth v. American Mut. Ins. Co.* (N. Y.) 3 Barb. Ch. 63, 70.

Reinsurance is a contract whereby one party, called the "reinsurer," in consideration of a premium paid to him, agrees to indemnify the other against the risk assumed by the latter by a policy in favor of a third party. *Commercial Mut. Ins. Co. v. Detroit Fire & Marine Ins. Co.*, 38 Ohio St. 11, 16, 43 Am. Rep. 413 (citing *Phillips, Ins.* § 374).

The terms "unearned premiums," "reinsurance reserved," "liability reserved," "net value of policies," or "premium reserved," as used in the article of the Code relating to the department of insurance, severally intend the liability of an insurance company upon its insurance contracts, other than accrued claims, computed by rules of valua-

tion established by section 2583. *Civ. Code Ala.* 1896, § 2575.

A contract of reinsurance is one by which an insurer procures a third person to insure him against loss or liability by reason of such original insurance. *Civ. Code Cal.* 1903, § 2646; *Civ. Code Mont.* 1895, § 3530; *Rev. Codes N. D.* 1899, § 4533; *Civ. Code S. D.* 1903, § 1879. *Civ. Code*, § 2648, declares that a reinsurance is presumed to be a contract of indemnity against liability, and not merely against damage. A reinsurer is not liable to the insurer for a loss which, unknown to either party, occurs before the reinsurance was effected, where the parties contracted with reference to a custom that reinsurance took effect from the time when it was granted. *Union Ins. Co. v. American Fire Ins. Co.*, 40 Pac. 431, 107 Cal. 327, 28 L. R. A. 692, 48 Am. St. Rep. 140.

"Reinsurance is a contract of indemnity to the reinsured, and binds the reinsurer to pay to the reinsured the whole loss sustained in respect to the object insured, to the extent for which he is reinsurer." *Home v. Mutual Safety Ins. Co.*, 3 N. Y. Super. Ct. (1 Sandf.) 137, 151; *London & Lancashire Fire Ins. Co. v. Lycoming Fire Ins. Co.* (Pa.) 15 Pittsb. Leg. J. (N. S.) 384.

Reinsurance is insurance by the first insurer of the whole or some part of his interest in the risk created by his contract of insurance; or, as it is otherwise defined, it is the contract that one insurer makes with another to protect the first from a risk he has already assumed. *Iowa Life Ins. Co. v. Eastern Mut. Life Ins. Co.*, 45 Atl. 762, 765, 64 N. J. Law, 340 (citing *Port. Ins. p.* 259; *May, Ins.* § 9).

"Reinsurance" is indemnity to the insurer for the loss up to the amount, whether for the whole or part of the risk stipulated, and for which the premium is paid. It is a contract, as put by the books, by which the original insurer procures another to insure him against loss by reason of the original insurance. *Chalaron v. Insurance Co. of North America*, 21 South. 267, 270, 48 La. Ann. 1582, 36 L. R. A. 742.

By a contract of reinsurance, in whatever language expressed, the obligation of the reinsurer is to indemnify the insurer against the liability for the loss by fire of the property insured. They stand in a relation to each other much like that of principal and surety. The only material difference is that the reinsurer is not, in law, directly liable to the insured. As between the two, he is the principal obligor. *Hunt v. New Hampshire Fire Underwriters' Ass'n*, 38 Atl. 145, 147, 68 N. H. 305.

"Reinsurance is a mere contract of indemnity in which an insurer reinsures a risk in another company," and is solely for the

benefit of the latter, and not the policy holder. *Barnes v. Hekla Fire Ins. Co.*, 57 N. W. 314, 56 Minn. 38, 45 Am. St. Rep. 438.

According to Arnould reinsurance is a contract by which, in consideration of a certain premium, the original insurer throws on another the risk for which he has made himself responsible to the original assured, to whom, however, he alone remains liable on the original insurance. According to Marshall the reinsurance may be on the risk or part of it. *Philadelphia Ins. Co. v. Washington Ins. Co.*, 23 Pa. (2 Harris) 250, 253.

Reinsurance is properly applied to an insurance effected by one underwriter with another, the latter wholly or partially indemnifying the former against the risks which he has assumed; that is to say, after an insurance has been effected, the insurer may have the subject of insurance reinsured to him by some other. *Appeal of Goodrich*, 2 Atl. 209, 211, 109 Pa. 523, 529.

A contract of reinsurance is peculiar in its character, and differs from the ordinary policy of insurance. It creates no privity between the reinsurer and the party originally insured. It is simply an agreement to indemnify the assured, partially or altogether, against a risk assumed by the latter in a policy issued to a third party. In such a case the assured is not the owner of the property at risk, and no relation to it except as insurer under the original policy. But in that relation the party issuing the original policy has an insurable interest, which will support a contract intended to indemnify him against the hazard he has assumed. *Royal Ins. Co. v. Vanderbilt Ins. Co.*, 52 S. W. 168, 169, 102 Tenn. 264.

A contract of "reinsurance" is one by which an insurer procures a third person to insure him against loss or liability by reason of such original insurance. *Civ. Code*, § 2646. A contract between insurance companies, by which one assumed and undertook the care, control, and management of the business and risks of the other, is broader than a contract of reinsurance. *Whitney v. American Ins. Co.*, 59 Pac. 897, 899, 127 Cal. 461.

When the insurer for some reason finds it convenient that another shall bear, either in whole or in part, the liability to the insured which he has assumed, and agrees with another insurer to assume the whole or a part of his liability as regards the insured, it is termed a contract of reinsurance. 1 *Bid. Ins.* § 378. While a contract of reinsurance implies the same subject-matter of insurance as the original policy, and runs against perils of the same kind, it need not be for the identical hazard insured against in the first policy, but may be for a less, though not for a greater, risk. Reinsurance, like any other contract, depends upon the

intention of the parties, to be gathered from the words used, taking into account, when the meaning is doubtful, the surrounding circumstances. Custom or usage is presumed to enter into the intention, when it is found as a fact, not only that it existed, but was uniform, reasonable, and well settled, and either known to the parties when the contract was made, or so generally known as to raise a presumption that they had it in mind at the time. *London Assur. Corp. v. Thompson*, 62 N. E. 1066, 1067, 170 N. Y. 94.

## REINSURANCE RESERVE.

In the chapter relating to insurance, "unearned premiums," "reinsurance reserve," "net value of policies," or "premium reserve" severally intend the liability of an insurance company upon its insurance contracts, other than accrued claims, computed by the established rules of valuation. *Rev. Laws Mass.* 1902, p. 1120, c. 118, § 1.

A reinsurance reserve is a fund which must be equal in amount at all times to the aggregate policy liabilities at their then present value. It is created to secure those liabilities, and is from that circumstance impressed in a certain sense with an equity in favor of the holders of policies. *New Haven Trust Co. v. Gaffney*, 47 Atl. 760, 761, 73 Conn. 480.

## REINSURE.

The word "reinsure" has a definite meaning, and has the same meaning in its ordinary and popular sense. It is equally effective with the word "insure," and the word "insure" may be used in a policy of reinsurance with the same force and validity. *Home v. Mutual Safety Ins. Co.*, 3 N. Y. Super. Ct. (1 Sandf.) 137, 151.

## REISSUED PATENT.

A reissued patent merely secures those rights of an inventor more definitely in some particular wherein the original patent was defective. *Ingersoll v. Holt* (U. S.) 104 Fed. 682, 683.

A patent is prima facie evidence that the patentee was the first and original inventor of the improvements described in the specifications, and a reissued patent, granted under authority of the act of 1836, is prima facie evidence that the machine described in the specifications thereof is substantially the same as the machine intended to be patented by the original drawing. *Sloat v. Spring* (U. S.) 22 Fed. Cas. 330, 334.

## REJECT.

The word "reject," as used in Act March 26, 1846, authorizing commissioners in pro

ceedings to determine the amount of compensation for land taken for a highway to reject four jurors, or any less number, for interest or other cause, means "challenge." *Zimmerly v. Road Com'rs*, 25 Pa. (1 Casey) 134.

To "reject," as defined by Webster, means to throw away; to discard; to refuse to receive; to refuse to grant, as to reject a prayer or request. Under Gen. St. c. 113, tit. "Wills," § 27, giving a circuit court jurisdiction of appeals from every judgment of the county court admitting a will to record or rejecting it, a will is rejected when the court to whom the application is made refuses to probate the writing. *Preston v. Fidelity Trust & Safety Vault Co.*, 94 Ky. 295, 302, 22 S. W. 318.

A claim for breach of contract with the board of public works of the District of Columbia, marked "disallowed" by the board of audit, is "rejected," within the meaning of Act June 16, 1880, § 8, providing that no claim shall be presented to or considered by the court of claims under the provisions of the act which was rejected by the board of audit. *Brown v. District of Columbia*, 8 Sup. Ct. 1314, 1318, 127 U. S. 579, 32 L. Ed. 262.

## RELATE.

Involve as synonymous, see "Involve."

## RELATED.

The phrase "related to," whether used in a statute, will, or contract, has by a perfectly uniform force of decision been held to include only relations by blood, and not connections by marriage, not even a husband or a wife. *Supreme Council Order of Chosen Friends v. Bennett*, 19 Atl. 785, 787, 47 N. J. Eq. (2 Dick.) 39.

A judge who is connected by marriage with the prosecutor in a suit is not related to her, within the meaning of Rev. Code, § 635, making a judge related to the parties incompetent to try the case. *Newman v. State*, 49 Ala. 9, 13.

## Affinity.

The words "related to," in a provision permitting persons related to a member of a benefit society to be named as beneficiaries, include relatives by affinity as well as by blood. *Bennett v. Van Riper*, 22 Atl. 1055, 1056, 47 N. J. Eq. (2 Dick.) 563, 14 L. R. A. 342, 344, 24 Am. St. Rep. 416.

## RELATED BY AFFINITY.

See "Affinity."

## RELATED BY CONSANGUINITY.

See "Consanguinity."

## RELATION TO HER SEPARATE PROPERTY.

The laws of 1860 and 1862, providing that the wife may sue and be sued in all matters "having relation to her sole and separate property," the same as if she were sole, should be construed to include an action against a married woman for fraud in a contract for the sale of her real estate, made by her husband as her agent. "She is responsible for the fraud, and has had the avails of it. The action is clearly for matters having relation to her sole and separate property. The circumstance that the fraud was committed by her husband, acting as her agent, does not impair liability. She had a right to employ her husband as agent, and, while acting as such in relation to her separate property, her liability for his acts is precisely the same as it would be for the liability of any other agent." *Baum v. Mullen*, 47 N. Y. 579, 579.

## RELATION—RELATIVE.

See "Blood Relations"; "Confidential Relation"; "Family Relation"; "Fiduciary Relation."

Acknowledged relation of parent and child, see "Acknowledge—Acknowledgment."

See "Possession by Relation of Law."

The word "relative," in its most general sense, is very indefinite. *Commonwealth v. Metz*, 17 Pa. Co. Ct. R. 541, 543.

"Relationship" is an affinity or consanguinity within the fourth degree, reckoning according to the civil, and not according to the canon, law. *Churchill v. Churchill*, 12 Vt. 661, 666.

The word "relations," in its widest extent, embraces persons of every degree of consanguinity. When not restricted in its meaning by other words, it extends to all persons who are descended from the same common ancestors. It is synonymous with "kindred," and is expressed also by the word "family" in its largest sense. *Huling v. Fenner*, 9 R. I. 410, 412 (citing *Jarm. Wills*, 33; *Williams, Ex'rs*, 343; *Cruwys v. Coeman*, 9 Ves. 319).

"Relatives," as used in Code 1873, § 1433, providing that relatives of a patient in an insane asylum should be bound for their support, means only those persons from whom the county may collect such claims; that is, persons legally bound for the support of an insane person. The term does not include the father of an adult child. *Monroe County v. Teller*, 2 N. W. 533, 534, 51 Iowa, 670.

The word "relation," as used in Pen. Code, art. 597, subd. 4, stating, as one of the causes which will reduce a homicide to manslaughter, insulting words or conduct of the



person killed toward a female relation of the party guilty of the homicide, includes any female under the protection of such party at the time of the killing. *Clanton v. State*, 20 Tex. App. 615, 631.

In accurate language "relationship" does not imply an interest. But the degree of relationship mentioned in Rev. St. c. 1, § 3, rule 22, providing that, when a person is required to be disinterested or indifferent in acting on any question in which other parties are interested, any relationship in either of said parties, either by consanguinity or affinity, within the sixth degree according to the rules of the civil law, or within the degree of second cousins, shall be construed to disqualify such persons from acting on such question, is regarded as an interest. In the levy of an execution on land, the officer's return that the appraisers were disinterested is therefore in legal effect an affirmation that they were not within the sixth degree of relationship to either of the parties. *McKeen v. Gammon*, 33 Me. 187, 190.

#### As relation by affinity.

A bequest to "relations" does not include those by marriage. *Maitland v. Adair*, 3 Ves. Jr. 231, 232.

The word "relative," as used in Rev. St. c. 74, § 10, providing that where a relative of the testator dies before the testator, leaving lineal descendants, they take such estate as would have been taken by such deceased relative, if he survived, means one connected with the testator by blood—a blood relation—and does not include one connected with the testator by marriage only. *Elliott v. Fessenden*, 22 Atl. 115, 117, 83 Me. 197, 13 L. R. A. 37, 38; *Keniston v. Adams*, 14 Atl. 203, 80 Me. 290.

"Relative" applies ordinarily in a will to consanguinity, and not to those connected by marriage. "Relation" is a very general word, and takes in any kind of connection; but the most common use of it is to express some sort of kindred, either by blood or affinity, though properly by blood. Where a person gives among his relatives, those by affinity are not included. In *Harvey v. Harvey*, 5 Beav. 134, it was decided that the widow of a deceased brother did not come within a devise for the benefit of relations. *Ennis v. Pentz* (N. Y.) 3 Bradf. Sur. 382, 385.

Where a will devises certain property to the testator's relatives, the term "relatives" will be construed to include only legal heirs and persons related by consanguinity, excluding relatives by affinity; and hence a sister-in-law is entitled to no share of such property. *Stoff v. McGinn*, 52 N. E. 1048, 1050, 178 Ill. 46.

A "relation by marriage" is one who, because of the marriage bond, would be entitled

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to take under the statute of distribution; and it is held that the former husband of a woman's deceased cousin is not in any legal sense a relation by marriage, to enable him to apply for a commission de lunatico inquirendo, under an act authorizing relatives to take such steps. *Commonwealth v. Metz*, 17 Pa. Co. Ct. R. 541, 543.

There is no doubt that a brother-in-law comes within the recognized and well-settled meaning of the word "relative." *Marcus v. Leake* (Neb.) 94 N. W. 100, 101.

A brother-in-law is not a "relation," within the meaning of Pub. St. c. 127, § 23, providing that, where a devise is made to a child or other relation, his issue shall take his share in case he dies before testator, provided no different disposition is required by the will. *Horton v. Earle*, 38 N. E. 1135, 162 Mass. 448 (citing *Kimball v. Story*, 108 Mass. 382).

#### As relation by blood.

The word "relation," as used in Rev. St. c. 97, § 29, providing that when a legacy shall be made to any child or other relation of the testator, and the legatee shall die before the testator, leaving issue who shall survive the testator, such issue shall take the estate so given, etc., includes only relations by consanguinity. *Cleaver v. Cleaver*, 39 Wis. 96, 99, 20 Am. Rep. 30.

The term "relation," as used in St. 1850, p. 179, providing that a devise to a relation shall not lapse by the death of the devisee during the testator's lifetime, if the devisee leaves lineal descendants, includes only relations by blood, and not by affinity. The word in its widest popular sense might possibly include relations by affinity, as well as by blood; but courts have been frequently called on to consider it in the interpretation of wills, and it has been uniformly held to include in its legal sense only relations by consanguinity. In *re Pfuel's Estate*, 48 Cal. 643, 644 (citing 2 Kent, Comm. 537, note 2; *Jarm. Wills*, 45; 2 Redf. Wills, 425; *Storer v. Wheatley's Ex'rs*, 1 Pa. [1 Barr] 506).

As used in a will, the words "my relations" mean exactly the same as the words "my own relations," and include relations by blood only. *Worseley v. Johnson*, 3 Atk. 761.

The relatives intended in a will, directing the executor thereof to distribute certain articles among relatives mentioned, as might be deemed discreet, etc., in the absence of an express provision to the contrary, means relatives by blood, and not by affinity. *Blossom v. Sidway* (N. Y.) 5 Redf. Sur. 389, 390.

The word "relative," as used in Rev. St. 1879, § 3971, providing that when any estate shall be devised to any child, grandchild, or

other relative of the testator, and such devisee shall die before the testator, leaving lineal descendants, such descendants shall take the estate, real or personal, as such devisee would have done in case he had survived the testator, applies only to relatives by consanguinity; for the use of the words "child" and "grandchild" in the section excludes the idea that only one connected by marriage is included in the words "other relative." *Brammell v. Adams*, 47 S. W. 931, 935, 146 Mo. 70.

The term "relatives" applies ordinarily to persons in the line of consanguinity and not to those connected by marriage, and a will devising property to the testator's "two nearest family relatives" means nearest in degree, counting from the specified stock. *Ennis v. Pentz* (N. Y.) 3 Bradf. Sur. 382, 385.

#### Children.

"Relatives," as used in a will devising property to testator's wife, to have as her own and exclusive property, and to the exclusion of all and every person or persons, be the same relatives or not, forever, might be very naturally understood as not embracing one's children. *Hargadine v. Puite*, 27 Mo. 423, 424.

#### Husband or wife.

The word "relation" is a very general and comprehensive term, and may include any and every relation that arises in social life. Literally it takes in every kind of connection, and would have so wide a range as to be liable to objection as indefinite and vague. The term is defined by lexicographers as signifying a person connected by consanguinity or affinity. "The most common use of the term is to express some kind of kindred, either of blood or affinity, though properly," says Lord Hardwicke, "by blood." A wife is not a relation within the meaning of Gen. St. c. 92, § 28, providing that when a devise is made to a child or other relation of the testator, and the devisee dies before the testator, leaving issue who survive the testator, such issue shall take the estate so devised. *Esty v. Clark*, 101 Mass. 36, 38, 3 Am. Rep. 320; *Kimball v. Story*, 108 Mass. 382.

"Relations," in dictionaries, means "consanguinis" and "affinis"; but by the statute relating to descents it means kindred by blood only. Strictly, the wife is no relation to the husband. *Worseley v. Johnson*, 3 Atk. 761, 762.

The bequest of a certain residue to a daughter, and, at her death before age, to the testator's nearest relations, does not include the testator's widow. *Storer v. Wheatley's Ex'rs*, 1 Pa. (1 Barr) 506.

The word "relations," whether used in a statute, will, or contract, has by a perfect-

ly uniform course of decision been held to include only relations by blood, and not connections by marriage, not even a husband or a wife. *Supreme Council Order of Chosen Friends v. Bennett*, 19 Atl. 785, 787, 47 N. J. Eq. (2 Dick) 39.

"Relatives," as used in Code Civ. Proc. § 1365, providing that the administration of estates of persons dying intestate must be granted to the relatives of the deceased, is employed in its generic sense, and so as to expressly include the husband and wife in the same category with the other relatives enumerated. In *re Davis' Estate*, 39 Pac. 756, 757, 106 Cal. 453.

The word "relatives" is more comprehensive than the term "next of kin." It includes the widow, who, though not next of kin, is a relative by force of the marriage relation. "Relatives" and "next of kin" are not convertible terms, though the latter expression is occasionally used in a way to favor the idea that the terms mean the same thing. *Public Adm'r v. Peters* (N. Y.) 1 Bradf. Sur. 100.

"Relative," as used in Acts 1885, c. 34, § 1, providing that the estate of an illegitimate person who dies intestate, leaving no relatives entitled by existing laws to his estate, shall go to such persons as would have been his heirs on his mother's side, had he been legitimate, should be construed in its ordinary sense, so as to include the surviving husband or wife, and not in the technical sense of blood relationship only. There can be no doubt that the word "relative," when employed in a stricter technical sense, signifies a relationship by blood only; but as ordinarily used it includes relationship by affinity as well as by consanguinity. *Lewis v. Mynatt*, 58 S. W. 857, 858, 105 Tenn. 508.

#### Illegitimates.

"Relatives," as used in St. 1888, c. 429, limiting the beneficiary of a member of a beneficial association to the husband, wife, children, or relatives of, or persons dependent on, such member, is of broader scope than the word "children," but manifestly cannot be held to include an illegitimate child. *Lavigne v. Ligue des Patriotes*, 59 N. E. 674, 675, 54 L. R. A. 814, 86 Am. St. Rep. 460 (citing *Esty v. Clark*, 101 Mass. 36, 3 Am. Rep. 320; *Kimball v. Story*, 108 Mass. 382; *Elliot v. Fesenden*, 83 Me. 197, 22 Atl. 115, 13 L. R. A. 37).

#### Nephews and nieces.

In its broadest sense, "relatives" means all the persons connected with another by blood or affinity, however remote the connection. There is, however, a limit beyond which these ties are not sufficiently strong to influence a person in making a disposition of his property. The word "relatives" has been

used in wills to designate the next of kin according to the statute of distribution. As used in a will providing that the residue of testator's estate should be sold, and the proceeds invested, and the interest applied for a certain period for the relief of the most destitute of testator's relatives, not to extend beyond the children of his brothers and sisters and their families, is not used in the sense of "next of kin," but in a more limited sense, and means relatives not more remotely connected with the testator than nephews and nieces, including the children of the most destitute of the persons particularly named. *Snow v. Durgin*, 47 Atl. 89, 90, 70 N. H. 121.

#### As next of kin.

"Relations," in a will of a person's estate, signifies next of kin. *Commonwealth v. Metz*, 17 Pa. Co. Ct. R. 541, 543.

"Relations," as used in a will bequeathing personalty, signifies next of kin, and the qualification of a bequest to "poor relations" makes no difference. It is a term inapplicable to real estate; but, when a testator has no different intentions as to his real and personal estate, the word, in order to effectuate his intention, must apply to the next of kin in both cases. *McNeilledge v. Barclay* (Pa.) 11 Serg. & R. 103, 105.

"Relations," as used in a devise to such of testator's relations as his wife should think most deserving and approve of, was a legal description, and operated as a trust in the wife, with power of naming and apportioning, and her nonperformance did not make the devise void, but it would then be divided among such of the "relations" of the testator as are his next of kin at the wife's death. *Harding v. Glyn*, 1 Atk. 469, 470; *Grant v. Lyman*, 4 Russ. 292, 297.

A legacy to each of the decedent's "relations by blood or marriage" was confined to relations by the statute of distributions and to those who married persons entitled under it. *Devisme v. Mellish*, 5 Ves. Jr. 529.

The word "relatives," when used in a will or statute, includes those persons who are next of kin under the statute of distribution, unless from the nature of the bequest, or from the testator having authorized a power of selection, a different construction is allowed. *Bac. Ben. Soc. § 260*. In *Craik v. Lamb*, 1 Colly. 489, 495, Vice Chancellor Shadwell says: "In Johnson's Dictionary, in Richardson's Dictionary, and in Bailey's edition of Facciolati, the word 'relation' is treated as extending to affinity; and the expressions 'a relation by marriage' and 'a relation in the law,' as denoting connections by affinity, are popularly, whether correct or incorrect, of occasional, if not of frequent, use." In our more modern dictionaries we find that "relation" or "relative" is defined as a person con-

nected by blood or affinity. *Bennett v. Van Riper*, 22 Atl. 1055, 1056, 47 N. J. Eq. (2 Dick.) 563, 14 L. R. A. 342, 24 Am. St. Rep. 416.

Where the word "relations" is used in a will, the court has no other rule to go by than the statute of distributions; otherwise, the devise would be void from the uncertainty and generality of the term. *Crossly v. Clare*, Amb. 397.

The word "relations," as used in the practice act, relating to the appointment of a guardian, that an application for such appointment was to be referred to a referee to report what relations the infant had, means those who would, if he died intestate, be entitled to a distributive share of the infant's estate. *Taff v. Hosmer*, 14 Mich. 249, 257 (citing *Hoff. Mast* 131; *Wright v. Atkyns*, 1 Turn. & R. 143; 4 Kent, Comm. 537, note "A").

In the construction of wills the word "relatives" includes those who are entitled as next of kin under the statute of distribution. *Keniston v. Adams*, 14 Atl. 203, 204, 80 Me. 290; *Smith v. Campbell*, 19 Ves. 400, 402.

"Relations," as used in a will bequeathing property to the testator's relations, means next of kin. *Pope v. Whitcombe*, 3 Mer. 689, 690.

Where a bequest is to relations, the next of kin according to the statute of distribution are entitled to the bequest, unless, from the nature of the bequest or the testator's having placed a power of selection, a different construction is allowed. *Drew v. Wakefield*, 54 Me. 291, 298.

The word "relations," as used in wills relating to personalty only, embraces only persons within the statute of distribution. *Gallagher v. Crooks*, 30 N. E. 746, 747, 132 N. Y. 338 (citing *Varrell v. Wendell*, 20 N. H. 431; 2 Jarm. Wills [Bigelow's Ed.] 120; 2 Redf. Wills [3d Ed.] 85; 4 Kent, Comm. [13th Ed.] 537, note "a"); *Anon.*, 1 P. Wms. 327; *Edge v. Salisbury*, Amb. 70.

A legacy to testator's wife and after her decease to the testator's "relations," who shall then be alive, is confined to relations within the statute of distributions. *Greene v. Howard*, 1 Brown Ch. 28, 33; *Widmore v. Woodroffe*, Amb. 636, 640.

"Relations," as contained in wills devising or bequeathing property to the testator's relations, means persons entitled to take under the statute of distribution, and is a term that safely describes a class of persons. *Wright v. Atkyns*, 1 Turn. & R. 143, 161.

The word "relations," when used in a will without any specification of what relations are meant, denotes only such as are

within the statute of distributions. *Varrell v. Wendell*, 20 N. H. 431, 435.

#### **Stepchildren.**

A stepson of the testator is not a relation of his, within the provisions of Gen. St. c. 92, § 28, which saves from lapsing any devise or bequest to a child or other relation of a testator who dies before the testator's death. *Kimball v. Story*, 108 Mass. 382, 385.

"Relatives," as used in statutes providing that a beneficial association may provide in its by-laws for the payment to each member of a fixed sum for the purpose of assisting the widow, orphans, or other relatives of deceased members, should be considered, in its strict sense, as relatives by consanguinity, and not by affinity, and hence does not include stepchildren of the member. *Tepper v. Supreme Council Royal Arcanum*, 45 Atl. 111, 116, 59 N. J. Eq. 321; *Id.*, 47 Atl. 460, 461, 61 N. J. Eq. 638, 88 Am. St. Rep. 449.

"Relatives," as used in Acts 21st Gen. Assem. c. 65, § 7, providing that no corporation or association organized under this act shall issue any certificate of membership or policy to any person unless the beneficiary under such certificate shall be the husband, wife, relative, or legal representative of such insured member, means relatives by affinity, as well as those by consanguinity, and a son is a relative of his stepfather after his own mother's death. *Simcoke v. Grand Lodge A. O. U. W. of Iowa*, 51 N. W. 8, 9, 84 Iowa, 383, 15 L. R. A. 114.

#### **RELATION (In Contract).**

It is said that relation is a fiction of law, resorted to for the promotion of justice and for promoting the lawful intention of parties, by giving effect to acts or instruments which without it would be invalid. 20 Am. & Eng. Enc. Law, 726. It has its most frequent application to sheriff's sales, where the deed is not made for some time after the sale, but, when it is made, relates back to the sale, and, in so far as the defendant in the execution and his privies and strangers purchasing with notice are concerned, vests the title in the purchaser from that time. *Ozark Land & Lumber Co. v. Franks*, 57 S. W. 540, 544, 156 Mo. 673.

#### **RELATIONSHIP.**

See "Blood Relationship."

"Relationship" is described by lexicographers as kindred, affinity, or other alliance. *Esty v. Clark*, 101 Mass. 36, 38, 3 Am. Rep. 320.

"Relationship," as used in the by-laws of a beneficial association, providing that the applicant for membership shall enter upon his application the relationship or dependence

of the members of his family or those depending upon him to whom he desires the benefit paid, refers to the connection between him and the member or members of his family upon whom the benefit is to be conferred. *Tepper v. Supreme Council Royal Arcanum*, 45 Atl. 111, 115, 59 N. J. Eq. 321.

#### **RELATIONSHIP BY MARRIAGE.**

The by-laws of a beneficial association, providing that, when no relationship by marriage or consanguinity is shown in the direction for the payment of the benefit, proof of dependency must be furnished, refer to the wife, who, if she survived the member, would become a widow. *Tepper v. Supreme Council Royal Arcanum*, 45 Atl. 111, 115, 59 N. J. Eq. 321.

#### **RELATIVE CONFESSION.**

"Relative confession is where the accused confesseth and appealeth others thereof, thereby to become an approver." 2 Hale, P. C. c. 29. The law of approver, however, is now obsolete. But the principle is today illustrated when the public prosecutor offers to put an accused on the stand under an implied promise of pardon, and then, if the accused acts dishonestly, procures his conviction upon the testimony so obtained. *Commonwealth v. Knapp*, 27 Mass. (10 Pick.) 477; *Moore's Case*, 2 Lewin, Cr. Cas. 37; *State v. Willis*, 41 Atl. 820, 824, 71 Conn. 293.

#### **RELATIVE PROPORTION.**

The term "relative proportion," in a statute providing that county commissioners shall determine and fix the relative proportion of expenses for maintaining a bridge to be borne by the county and any of the cities and towns lying contiguous to the bridge, as in their judgment may be just and equitable, "does not imply a mathematical ratio, or a comparison by mathematical ratio; but such proportion is to be fixed with reference to all the circumstances of benefit to the respective municipalities affected, and to the population, extent, and ability to bear the burden." The proportion may be fixed by assigning to each town a specific part of the bridge to keep in repair. *Commonwealth v. City of Newburyport*, 103 Mass. 129, 134.

#### **RELATOR.**

As plaintiff, see "Plaintiff."

#### **RELEASE.**

See "Full Release"; "Personal Release"; "Plea of Release"; "Real Release"; "Remise, Release, and Quitclaim."

A release is the giving up or abandoning of a claim or right to the person against

whom the claim exists or the right is to be enforced or exercised. *Smith v. Cantrel* (Tex.) 50 S. W. 1081, 1085.

A release is a setting free, a deliverance, a liberation, a relinquishment, a discharge, and is a word whose operative effect is from the present on, and without retroactive intent. *Parker v. United States* (U. S.) 22 Ct. Cl. 100, 104.

A release is the act of writing by which some claim or interest is surrendered to another person. It is a species of contract, and, like any other contract, it must have a consideration to support it. *Jaqua v. Shewalter*, 37 N. E. 1072, 1074, 10 Ind. App. 234.

A release is a remission of some right or claim by which the releasor remits the same, and estops himself from again setting up his claim, and should always contain a plain and distinct remission of the claim to which it relates. *Power v. Lester* (N. Y.) 17 How. Prac. 413, 416.

"A 'release' has been defined to be the act or writing by which some claim or interest is surrendered to another; the giving up or abandoning of a claim or right to the person against whom the claim exists or the right is to be exercised or enforced. No set form of words is necessary to constitute a release, but such words should be used as would express the intention, and such intention would be recognized in law and equity." *Winter v. Kansas City Cable Ry. Co.*, 61 S. W. 306, 610, 160 Mo. 159.

A release "is the giving or discharging of the right of action which a man hath or may have, or claim against another man of that which is his. It is the conveyance of a man's interest or right which he hath unto a thing to another that hath the possession thereof or some estate therein. Lands, tenements, and hereditaments themselves may be given and transferred by way of release, and all rights and titles to land may be given, barred, and discharged by release, and so also may rights and titles to goods and chattels." *Shep. Touch.* 320, 321, quoted and approved in *Field v. Columbet* (U. S.) 9 Fed. Cas. 12, 13.

A release by its own operation extinguishes a pre-existing right, and cannot be controlled or explained by parol. A release, therefore, should be held to include all demands embraced by its terms, whether particularly contemplated or not. *Sherburne v. Goodwin*, 44 N. H. 271, 277.

By the common law a release can operate only on a vested, and not on a contingent, right. A release of a possibility is void. *Crawford v. Lockwood* (N. Y.) 9 How. Prac. 547, 548.

A release at common law of any interest was made to the person who had the posses-

sion thereof or some interest therein. It is defined as "the conveyance of a man's right which he hath unto a thing to another that hath the possession thereof, or some estate therein," and it was contrary to the nature of a release to give possession. One tenant in common could not release to his companion, because they had distinct freeholds. When a man had the right and possession in him, he was compelled to convey by feoffment. He could give a release only when out of possession, and it could then only be made to the one in possession. *Baker v. Woodward*, 6 Pac. 173, 178, 12 Or. 3 (quoting *Shep. Touch.*).

The term "release," in the law of landlord and tenant, is used to designate the descending of the greater estate upon the less. *Gluck v. City of Baltimore*, 32 Atl. 515, 516, 81 Md. 315, 48 Am. St. Rep. 515.

According to Pothier there are two kinds of release—one called a real release, and the other a personal discharge. A real release is where the creditor declares that he considers the debt as acquitted. It is equivalent to a payment, and renders the thing no longer due, and consequently it liberates all the debtors of it, as there can be no debtors without something due. A personal release merely discharges the debtor from his obligation and extinguishes the debt indirectly, where the debtor to whom it is granted was a sole principal, because there can be no debt without a debtor. But, if there are two or more debtors in solido, a discharge of one of them does not extinguish the debt. It only liberates the person to whom it is given. The debt is extinguished, however, as to the part of the person to whom the discharge was given, and the other only remains obliged for the remainder. *Booth v. Kinsey* (Va.) 8 Grat. 560, 568 (citing Pothier, p. 111, c. 3, art. 2, §§ 1, 11).

A paper purporting to be a receipt by a seaman to the master of his vessel for 25 cents for "assault and battery, in full for all dues and demands," with a witness' name to it, and on which are two wafer seals, cannot, in the absence of proof that either of the seals is that of the person giving the receipt, operate as a "release," in the technical sense of that word as known to the common law. *Michell v. Pratt* (U. S.) 17 Fed. Cas. 516, 517.

#### As a conveyance.

A release is a secondary or derivative sort of conveyance, and defined to be a conveyance of one's right in lands to another who has some former estate in possession. *State v. Engle*, 21 N. J. Law (1 Zab.) 347, 368.

The word "release" is technical, and will pass any interest in the land which the releasor may have. *Bond v. Root* (N. Y.) 18 Johns. 60, 63, 79.

In construing an instrument, stating: "We approve of the course of C., and release said C. from further liability"—the courts say that the word "release" quite frequently imports a conveyance, but never when used in connection with the word "from," and affirmed with reference to the releasee. *Colton v. Field*, 22 N. E. 545, 546, 131 Ill. 398.

A deed of release may operate as a grant, if necessary to carry out the intention of the parties, or may be treated as a confirmation of title. *Smith v. Cantrel (Tex.)* 50 S. W. 1081, 1085.

A release was a form of transfer used at common law only where some right to real estate existed in one person, the actual possession of which was in another. A devise which took effect in 1810 was to three sons and four daughters of real estate in equal shares, with a proviso that, if either should die without lawful issue, his or her share should be divided among the survivors. The future contingent interest of the devisees while all were living was not a mere naked possibility, but passed by release from some of them to the others. *Miller v. Emans*, 19 N. Y. 384, 387.

#### **Covenant not to sue.**

A covenant not to sue is not such a release as will discharge a co-trespasser. *Tompkins v. Clay St. R. Co.*, 4 Pac. 1165, 1169, 66 Cal. 163.

#### **Extinguishment distinguished.**

A release is a discharge of a debt by act of the party, in distinction from an extinguishment, which is a discharge by operation of law. *Baker v. Baker*, 28 N. J. Law (4 Dutch.) 13, 20, 75 Am. Dec. 243.

#### **As constituting a legacy.**

The expression, "I release A. his bond," as used in a will, did not constitute a release, but was a legacy, and, having lapsed, the bond remained in force. *Maitland v. Adair*, 3 Ves. 231, 232.

#### **Statute of limitations.**

A statute of limitations, fixing the time within which an action must be brought to recover taxes due, is not a "release" of such taxes within constitutional prohibition against releasing any liability or obligation in favor of the state; the statute merely limiting the right of action, while leaving the debt still in force. *Custer County Com'rs v. Story*, 69 Pac. 56, 58, 26 Mont. 517.

#### **Mortgage.**

Rev. St. c. 71, § 93, providing that no release or waiver of a homestead exemption shall be valid, unless in writing, subscribed by the householder and his wife, refers to release or waiver as to an execution or other

process of the court, and does not include a mortgage. *Olson v. Nelson*, 3 Minn. 53, 59 (Gil. 22, 25).

#### **Parol agreement.**

The word "release," as used in Comp. Laws, § 3491, providing that an obligation is extinguished by a release therefrom given to the debtor by the creditor upon a new consideration, implies the giving up or abandoning of a claim or right to the person against whom the claim exists or the right is to be exercised or enforced. Whatever may have been the rule at common law, under the statutes of South Dakota a parol agreement to release a debtor is enforceable, if founded upon a new consideration. *National Bank of Commerce v. Guthrie*, 78 N. W. 995, 996, 11 S. D. 517.

#### **Receipt distinguished.**

A "release" extinguishes a pre-existing right, while a "receipt" is mere evidence of a fact. *Equitable Securities Co. v. Talbert*, 22 South. 762, 767, 49 La. Ann. 1393.

#### **Satisfaction distinguished.**

The word "release," when applied to the release of a cause of action for tort, differs from the word "satisfaction," in that the former may be given, although no part of the damage has been paid, and a technical release to one joint tort-feasor does not release other joint tort-feasors, while a satisfaction, by whomsoever made, if accepted as such, is a bar to future proceedings on the same cause of action. *Miller v. Beck*, 79 N. W. 344, 346, 108 Iowa, 575.

#### **Seal.**

The word "release," when not interpreted by the context, has a technical meaning which presupposes a seal; but it is also an apt word to express the general idea of discharge or deliverance. So it is held that a requirement in an assignment for the benefit of creditors that they execute releases was intended to secure the absolute discharge of the debtor as to creditors coming in under the assignment, and hence any instrument which is sufficient for that purpose was a compliance with the requirement, though it was not a technical release under seal. *Burgliss v. Westmoreland*, 17 S. E. 56, 57, 38 S. C. 425.

A release may be under seal, or may not; but, if it has a seal, the same imports consideration. *Winter v. Kansas City Cable Ry. Co.*, 73 Mo. App. 173, 187.

An instrument under seal, in which the obligor agrees and binds himself to dismiss a suit which is pending and to pay the costs, though it also contains a deed for the land in controversy between the parties and a covenant to surrender a bond for title to the

land, is nevertheless a release of the cause of action pending. *Stinson v. Moody*, 48 N. C. 53, 56.

#### **As termination of interest.**

The word "release," as used in a proposition that a person offered as a witness in a cause who has an interest in the result may be rendered competent by releasing his interest, cannot have its legal and technical meaning; for in a strict legal sense it means a surrender or giving up an estate for years, for life, in remainder, or in reversion to the tenant in fee of the remainder or reversion in the first case, and to the tenant of the particular estate in the second. The release of a witness cannot generally have this effect. The intent to divest a witness of all interest in the event of the suit, which intent is accomplished, satisfies the rule. *Cates v. Wacter's Heirs* (S. C.) 2 Hill, 442.

The word "release," within Act May 23, 1887, § 6, providing that an incompetent witness may become fully competent for either party by a release in good faith of his interest in the matter at issue, requires that witness' interest in the subject shall be effectually terminated, and should be made to the party against whom the claim is asserted, or for his benefit. *Darragh v. Stevenson*, 39 Atl. 37, 38, 183 Pa. 397.

#### **As waiver or relinquishment.**

While the word "release" is sometimes used in conveying to transfer a title, its general meaning is to surrender a right or to discharge a liability; and, when it is used in connection with the word "claims," it never has any other meaning than that of waiver, surrender, or relinquishment. No right of action can pass by a release of all causes of action. *Trustees of Amherst College v. Ritch*, 45 N. E. 876, 892, 151 N. Y. 282, 37 L. R. A. 305.

#### **RELEASE AND ASSIGN.**

"Release and assign," as used in a conveyance of lands, by which one did thereby release and assign unto a certain person, his heirs, etc., all said lands and claim to lands to which the grantor became entitled to as a soldier in the service of the United States, should be construed as raising a trust or use for the benefit of the bargainee, which by the statute of uses was transferred in possession; for the words amount to a personal contract of sale or bargain, thereby instantly raising a trust on which the statute operates, for no precise technical words are required to raise a use. *Jackson v. Fish* (N. Y.) 10 Johns. 456, 457.

#### **RELEASE DEED.**

"In law a release or deed of release is a conveyance of a man's right in the lands

or tenements to another who has some estate in possession." This, however, is a strictly technical definition, but by long-established practice it makes no difference whether the releasee has an existing estate in possession or not. A quitclaim or release deed is one of the regular modes of conveying property known to law, and it is almost the only mode in practice where a party sells property and does not wish to warrant the title. The release will convey to him under any circumstances the interest the releasor has in the property. Under these principles a quitclaim deed of "all right, title, interest, claim, and demand whatsoever, which I [the releasor] have or ought to have in or to" a certain tract of land, was sufficient to pass a right of entry upon the land for the breach of conditions contained in a prior deed by the grantor; and this, although the quitclaim deed contained a statement that the premises had been theretofore mortgaged to the grantor. *Hoyt v. Ketcham*, 5 Atl. 606, 608, 54 Conn. 60 (quoting *Webst. Dict.*).

#### **RELEASE, REMISE, AND QUITCLAIM.**

As used in a deed, the words "release, remise, and forever quitclaim" are not words of release only, but are operative words of conveyance, though the grantor has no prior estate. Thus in *Wilson v. Albert*, 1 S. W. 209, 89 Mo. 537, the same operative words were used in a deed of quitclaim then under consideration, and it was ruled that the deed contained sufficient operative words of conveyance. The same rule was subsequently announced in *Bray v. Conrad*, 13 S. W. 957, 101 Mo. 331, and must be regarded as the settled law of this state. *McAnaw v. Tiffin*, 45 S. W. 656, 657, 143 Mo. 667.

#### **RELEASED.**

In a finding that property was released by an officer upon giving a bond, "released" meant "delivered" or "surrendered." *Hicks v. Mendenhall*, 17 Minn. 475, 483 (Gil. 453, 460).

The word "released," as placed on the face of the bill of lading by the agent of a common carrier, means exemption from the common-law liability as an insurer. *Morganston Mfg. Co. v. Ohio R. & C. Ry. Co.*, 28 S. E. 474, 121 N. C. 514, 61 Am. St. Rep. 679.

#### **RELEASED ON BAIL.**

"Released on bail," as used in the criminal practice act relating to defendants who had been "released on bail," implies that the person so released is not in prison after such release, though for some purpose it is true that a person released on bail in a civil proceeding is still in the custody of the law; but he cannot be said to be so in custody in a criminal proceeding. *Ex parte Jones*, 41 Cal. 209, 210.

**RELET.**

The word "relet," as used in a lease of a parcel of land containing a clause by which the lessor agreed to pay the lessee the value of all buildings and scales which the lessee should place and leave on the premises at the end of the term, provided the said premises should not be relet to the lessee, means a new letting for a fixed and definite term, such as was the term created by the original lease. *Mosely v. Allen*, 138 Mass. 81, 83.

**RELEVANT.**

Any circumstance is relevant which makes more probable the hypothesis set up. *Walls v. Walls*, 32 Atl. 649, 650, 170 Pa. 48.

The meaning of the word "relevant," as applied to testimony, is that it directly touches upon the issue which the parties have made by their pleadings, so as to assist in getting at the truth of it. *Platner v. Platner*, 78 N. Y. 90, 95; *Porter v. Valentine*, 41 N. Y. Supp. 507, 508, 18 Misc. Rep. 213; *Moran v. Abbey*, 58 Cal. 163, 168.

"By the term 'relevant' we do not mean that the evidence shall be addressed with positive directness to the disputed point, but we mean evidence which according to the common course of events, either taken by itself or in connection with other facts, proves or renders probable the past, present, or future existence of the other." *Seller v. Jenkins*, 97 Ind. 430, 438 (quoting *Steph. Ev. art. 1*).

The word "relevant" means that any two facts to which it is applied are so related to each other that according to the ordinary course of events one, either taken by itself or in connection with other facts, proves or renders possible the past, present, or future existence or nonexistence of the other. *Plumb v. Curtis*, 33 Atl. 998, 1000, 66 Conn. 154; *Buckwalter v. Arnett* (Ky.) 34 S. W. 238, 241. Legal relevancy includes logical relevancy, but has a higher evidentiary force. *Cole v. Boardman*, 63 N. H. 580, 581, 4 Atl. 572; *Lamprey v. Donacour*, 58 N. H. 376, 377.

A fact which renders the existence or nonexistence of any fact in issue probable by reason of its general resemblance thereto, and not by reason of its being connected therewith, is deemed not to be relevant to such fact. *Stuart v. Kohlberg* (Tex.) 53 S. W. 596, 597.

A declaration is relevant, as stated by *Steph. Ev. p. 33, art. 27*, "when it was made by the declarant in the ordinary course of business, or in the discharge of professional duty, at or near the time when the matter stated occurred, and of his own knowledge. Such declarations are irrelevant, except so

far as they relate to the matter which the declarant stated in the ordinary course of his business or duty." *McNair v. National Life Ins. Co.* (N. Y.) 13 Hun, 144, 146.

**RELEVANCY.**

See "Legal Relevancy"; "Logical Relevancy."

"Relevancy," as that term is used by writers on the law of evidence, omitting metaphysical distinctions, is that which "conduces to prove a pertinent theory in a case," or one which influences or controls the case. *Levy v. Campbell* (Tex.) 20 S. W. 196.

Relevancy is that which conduces to the proof of a pertinent hypothesis. Hence it is relevant to put in evidence any circumstances which tend to make the proposition at issue more or less improbable. *Whart. Ev. §§ 20, 21*. In *Trull v. True*, 33 Me. 367, it was held that "testimony cannot be excluded as irrelevant which would have a tendency, however remote, to establish the probability or improbability of the fact in issue." *State v. O'Neill*, 9 Pac. 286. It is held in the cases generally that more liberality may properly be accorded to the admission of evidence affecting the probabilities of a hypothesis, where, if explainable, opportunity is left within the power of the opposing party to submit an explanation of it. *State v. Witham*, 72 Me. 531, 537; *Seller v. Jenkins*, 97 Ind. 430, 438 (quoting 1 *Whart. Ev. § 20*); *Nickerson v. Gould*, 82 Me. 512, 514, 20 Atl. 86; *Ward v. Young*, 42 Ark. 542, 554.

**RELICT.**

"Relict," as used in *Rev. St. § 4159*, providing that, if there are no children or legal representatives, the estate of an intestate shall pass to and be vested in the husband or wife, relict of such intestate, is applied to the survivor of a pair of married people, whether the survivor is the husband or the wife; the relict of the united pair, not the relict of the deceased individual. The relict is the survivor of the union of married people, not simply the survivor of the decedent individually, and the expression "Louisa Heeter, relict of Sebastian Heeter," does not mean simply that Louisa is the relict of Sebastian, but that Louisa is the relict of the former marriage union of Louisa and Sebastian as husband and wife. *Spitler v. Heeter*, 42 Ohio St. 100, 101.

**RELICTIO.**

"Reliction" is the term applied to land made by the rescission of the water by which it was previously covered. In order that a shore owner take land by way of accretion or reliction, it must appear that the addition



was to his shore, either by the deposit of earth or by receding of the waters from his land, and such addition must be by slow process. *Hammond v. Shepard*, 57 N. E. 867, 868, 186 Ill. 235, 78 Am. St. Rep. 274.

"Dereliction" or "reliction" is land added to a front tract by the permanent uncovering of the waters, the laying bare of the bottom by the retirement of the waters, as contradistinguished from a filling up of the bottom by deposits, causing the water to recede. "Dereliction," as used in the English law, meant when the sea shrank back below the usual water mark and remained there. In those cases the law is held to be that, if this be by little and little, it should go to the owner of the land adjoining. It is recognized by the Louisiana law as a mode of acquiring property, but the mere temporary subsidence of the waters occasioned by the seasons, coming in the winter and staying to the spring, going in the summer and gone in the autumn, does not constitute dereliction, in the sense of an addition to the contiguous land, susceptible of private rights as riparian rights. *Sapp v. Frazier*, 26 South. 378, 380, 51 La. Ann. 1718, 72 Am. St. Rep. 493.

## RELIEF.

The word "relief," in resolutions by a town making provision for the "aid and relief" of families of volunteer soldiers, implied want, need, or necessity on the part of the applicants, and indicated that provision there made was charitable, and did not tend to give the applicant any vested right as under a contract. *Russell v. City of Providence*, 7 R. I. 568, 574.

## RELIEF FUND.

The "relief fund" of a fraternal order is made up of contributions of the members of the lodges, and is exclusively within the management and control of the supreme lodge, and is of the nature of a classified insurance, to which the appointee of the member is entitled on the death of the member. *Lady Lincoln Lodge v. Faist*, 28 Atl. 555, 52 N. J. Eq. (7 Dick.) 510.

## RELIEVE.

"Relieve," as used in a contract employing teachers, reserving the right to relieve one of the number on certain conditions, is synonymous with the word "remove," and a request to the teacher to resign does not constitute a removal. *Kennedy v. School Dist.* No. 1, 55 Pac. 567, 568, 20 Wash. 399.

## RELIGION.

In all Christian countries the word "religion" is ordinarily understood to mean some

system of faith and practice resting on the idea of the existence of one God, the creator and ruler, to whom his creatures owe obedience and love. *In re Knight's Estate*, 28 Atl. 303, 159 Pa. 500.

Religion is morality, with a sanction drawn from a future state of rewards and punishments. *McAlister v. Marshall* (Pa.) 6 Bin. 338, 350, 6 Am. Dec. 458.

The word "religion," in its primary sense (from "religare," to rebind—bind back), imports, as applied to moral questions, only a recognition of a conscious duty to obey restraining principles of conduct. In such sense we suppose there is no one who will admit that he is without religion. *In re Hinckley's Estate*, 58 Cal. 457, 512.

"Religion," as used in Const. art. 1, § 7, reciting that, "religion, morality, and knowledge being essential to good government, it shall be the duty of the General Assembly to pass suitable laws to protect every religious denomination in the peaceable enjoyment of its own mode of public worship, and to encourage schools and the means of instruction, should be construed in its generic or unlimited sense. The meaning is that true religion shall be promoted by encouraging schools and means of instruction. The word "knowledge" comprehends in itself all that is comprehended in the other two words "religion" and "morality," and which can be the subject of human instruction. True religion includes true morality. All that is comprehended in the word "religion," or the words "religion and morality," and that can be the subject of human instructions, must be included under the general term "knowledge." Nothing is enjoined, therefore, but the encouragement of means of instruction in general knowledge, the knowledge of truth. The fair interpretation seems to be that true religion and morality are aided and promoted by the increase and diffusion of knowledge, on the theory that Knowledge is the handmaid of Virtue, and that all three, religion, morality, and knowledge, are essential to good government. But there is no direction as to what system of general knowledge, or of religion or morals, shall be taught, nor as to what particular branch of such system or systems shall be introduced into the schools. By this generic word "religion" is not meant the Christian religion or Bible religion, but it means the religion of man, and not the religion of any class of men. Board of Education of City of Cincinnati v. Minor, 23 Ohio St. 211, 241, 13 Am. Rep. 233; *In re Walker* (Ohio) 66 N. E. 144, 147.

### Criminal act.

The guaranty of the federal Constitution against the establishment of religion or any interference with the free exercise thereof does not operate to authorize the commission

of acts contrary to the criminal law of any country as being sanctioned by the tenets of a religious sect, and therefore the practice of polygamy cannot be justified as being embraced within the religion of the offender. *Reynolds v. United States*, 98 U. S. 149, 162, 25 L. Ed. 244.

#### **Form of worship distinguished.**

"Religion" is a term referring to one's views of his relations to his Creator and to the obligations they impose of reverence for His being and character and of obedience to His will. The term is often confounded with a "cultus" or form of worship of a particular sect, but is to be distinguished from the latter. *Davis v. Beason*, 10 Sup. Ct. 299, 300, 133 U. S. 333, 33 L. Ed. 637.

#### **RELIGIOUS ASSEMBLY.**

A religious assembly means nothing more than an assembly of religious persons, and the term is insufficient in an indictment for disturbing religious worship, as it fails to show whether the persons assembled were in fact engaged in religious worship. *State v. Fisher*, 25 N. C. 111, 114.

A religious assembly, within the meaning of the law in reference to a disturbance thereof, includes a religious congregation when assembling in their house of worship and about to begin their religious exercises, as well as the assemblage when actually engaged in religious worship. *State v. Ramsay*, 78 N. C. 448, 453.

#### **RELIGIOUS BOOKS.**

A will, wherein testator devised a certain sum in trust for the purchase and distribution of religious books, meant those books which tended to promote religion taught by the Christian dispensation. *Simpson v. Welcome*, 72 Me. 496, 500, 30 Am. Rep. 349.

#### **RELIGIOUS CONGREGATIONS.**

"Religious congregations," within the meaning of Act July 2, 1839, exempting five acres of land, with the improvements thereon, if attached to religious congregations, universities, colleges, academies, and schoolhouses, is shown, by reason of the use of the words "universities, colleges, academies, and schoolhouses," to mean the church buildings, and not the congregations. *Cumberland County v. Big Spring Church (Pa.)* 17 Leg. Int. 300.

#### **RELIGIOUS CORPORATION.**

The term "religious corporation," defined by Laws 1895, c. 723, art. 1, § 2, as a cor-

poration created for religious purposes, in Tax Law, § 4, subd. 7, exempting religious corporations from taxation, includes a Young Men's Christian Association, and the Missionary Society of the Methodist Episcopal Church. In *re Watson's Estate*, 73 N. Y. Supp. 1058, 1060, 36 Misc. Rep. 504; *id.*, 63 N. E. 1109, 171 N. Y. 256.

Laws 1895, c. 723, § 2, defines "religious corporation" as a corporation created for religious purposes. A Young Men's Christian Association is not a religious corporation, within the meaning of Laws 1896, c. 908, § 221, declaring that any property bequeathed to any religious corporation shall be exempt from certain taxation. "The question, it seems to me, is not whether the corporation in question is organized for beneficial purposes, but whether there is included in its work some work of a religious character. It was incorporated by virtue of a special act, in which it was stated that its object was to be primarily the improvement of the moral and spiritual condition of the young men of Brooklyn, by means always appropriate to and in unison with the spirit of the Gospel, and secondarily the improvement of their intellectual, physical, and social condition by the same means. The measure of whether this is a religious corporation can be best determined by a test of whether it could be incorporated under the general religious corporation law of this state. An inspection of the statute plainly shows that, if it was desired to incorporate this corporation to-day, it could not be done under the general statute providing for religious corporations, but would have to come under the statute providing for membership corporations." In *re Fay's Estate*, 76 N. Y. Supp. 62, 63, 37 Misc. Rep. 532.

A corporation organized to provide, by building, purchase, hiring, or otherwise, floating and other churches for seamen in the city and port of New York, and to provide clergymen to act as missionaries in said churches, is a corporation organized for religious purposes, within a statute providing that bequests to such corporations shall be exempt from the transfer tax. In *re Prall's Estate*, 79 N. Y. Supp. 971, 972, 78 App. Div. 301.

A religious corporation consists of the persons who have been stated attendants upon divine worship for one year and have contributed to the support of the church according to its usages and customs. *Madison Ave. Baptist Church v. Baptist Church in Oliver St. (N. Y.)* 1 Abb. Prac. N. S. 214, 222.

A corporation established for purely academic purposes, for education in literature and in the arts and sciences, is in no sense a religious corporation, though it be given into the care and under the management of a religious body. *State v. Trustees*

of Westminster College, 74 S. W. 990, 175 Mo. 52.

## RELIGIOUS CREED.

See "Creed."

## RELIGIOUS DENOMINATION.

See "Religious Sect."

## RELIGIOUS INSTITUTION.

P. L. 1893, p. 106, providing that all gifts, bequests, or devises to any "religious institution" shall not be taxed, cannot be construed to include a school having a theological department, which is an adjunct of the principal departments of the institution, which are academic and collegiate; for, if the theological department is to be regarded as religious, the two others are purely secular, and an institution of such blended secular qualities can in no sense be classed as a religious institution. *Alfred University v. Hancock* (N. J.) 46 Atl. 178, 180.

## RELIGIOUS LIBERTY.

Religious liberty does not include the right to introduce and carry out every scheme or purpose which persons see fit to claim as part of their religious system. No one can stretch his own liberty so as to interfere with that of his neighbors and violate the peace. *Franzee's Case*, 30 N. W. 72, 75, 63 Mich. 396, 6 Am. St. Rep. 310.

Bill of Rights, art. 5, guarantying to every person religious liberty and freedom, etc., does not mean a license to engage in acts having a tendency to disturb public peace under the form of religious worship, nor does it include the right to disregard those regulations which the Legislature has deemed reasonably necessary for the security of public order; and hence the term "religious liberty" does not include the beating of a drum in the compact part of a town, but such acts may be prohibited without violation of the Bill of Rights. *State v. White*, 5 Atl. 828, 830, 64 N. H. 48.

## RELIGIOUS MEETING.

Camp meeting as, see "Camp Meeting."

## RELIGIOUS PRINCIPLES.

Religious principles are those sentiments concerning the relations between God and man which may influence human conduct. The mere fact that in those relations an individual has discovered no divine purpose of punishment for specific acts does not militate against his possession of religious principles. *State v. Powers*, 17 Atl. 969, 970, 51 N. J. Law (22 Vroom) 432.

## RELIGIOUS PURPOSES.

As charity, see "Charity."

A statute exempting buildings erected and used for religious purposes from taxation does not exempt a parsonage. *Church of Redeemer v. Axtell*, 41 N. J. Law (12 Vroom) 117, 119.

The phrase "religious purposes," as used in Act April 18, 1877, providing that when, because of the growth of cities or other causes, any burial ground belonging to or in charge of any religious society has ceased to be used for interments, the courts of quarter sessions, on petition of the trustees of the society, setting forth that the erection or improvement of buildings for religious purposes are hampered, interfered with, and the welfare of such religious society is injured, after four weeks' advertisement, on hearing, may authorize the removal of the remains of the dead from so much of the burial ground as may be needed for buildings for religious purposes only, includes a building for Sunday school rooms and lecture rooms. *Craig v. First Presbyterian Church*, 88 Pa. 42, 45, 32 Am. Rep. 417.

## RELIGIOUS SECT.

"People believing in the same religious doctrines, who are more or less closely associated or organized to advance such doctrines and increase the number of believers therein," constitute a religious sect. *State v. District Board of School Dist. No. 8*, 44 N. W. 967, 973, 76 Wis. 177, 7 L. R. A. 330, 20 Am. St. Rep. 41.

A religious sect is a body or number of persons united in tenets, but constituting a distinct organization or party, by holding sentiments or doctrines different from those of other sects or people. *State v. Hallock*, 16 Nev. 373, 385.

"Religious sect, order, or denomination," as used in Const. 1865, art. 1, § 13, providing that a "religious sect, order, or denomination" was capable of receiving a devise, etc., is not to be limited in meaning to such religious bodies as are composed of many local congregations linked together by rules of the sect, order, or congregation, so that what property one holds belongs in some sense to the whole, but includes a local congregation uncontrolled by any general ecclesiastical organization. *Boyce v. Christian*, 69 Mo. 492, 494.

## RELIGIOUS SOCIETY.

The term "religious society" has in the English ecclesiastical law and in our law a well-defined meaning, and as commonly used in our law it is synonymous with "parish" or "precinct," and designates an incorporated

society created and maintained for the support of public worship. *Riffe v. Proctor*, 74 S. W. 409, 410, 99 Mo. App. 601.

A statute declaring every denomination of religious societies to be beneficiaries in a certain fund means only such association of persons having a system of religious faith, written or traditional, and does not include a society having no system of public worship or religious services as a sect or denomination, and being organized for the purpose of maintaining a library, and being in fact a library association merely. *State v. Trustees of Township 9*, 7 Ohio St. 58.

"Religious society," as used in a New York statute providing for the incorporation of religious societies, etc., means an assembly met, or a body of persons who usually meet, in some stated place for the worship of God and religious instruction. *Robertson v. Bullions* (N. Y.) 9 Barb. 64, 67.

"Religious society," as used in Pen. Code, § 95, providing that every person who shall disturb any religious society shall be fined, is used in its ordinary meaning, and includes all religious societies or congregations met for religious worship, without regard to their being incorporated. An ordinary Sunday school, where the Bible and religious precepts are taught, is a worshipping assembly, within these statutes, and they will also be held to include a meeting of the Salvation Army. *State v. Stuth*, 39 Pac. 665, 666, 11 Wash. 423.

The term "religious society" may with propriety be applied in a certain sense to a church, as that of religious association, religious union, or the like, yet in the true sense, and as commonly used in our law, it is synonymous with "parish," "precinct," etc., and designates an incorporated society created and maintained for the support and maintenance of public worship. In this, its legal sense, a church is not a religious society. It is a separate body, formed within such parish or religious society, whose rights and usages are well known, and to a great extent defined and established by law. *Weid v. May*, 63 Mass. (9 Cush.) 181, 188.

A religious society is a body of persons associated together for the purpose of maintaining religious worship only, omitting the sacraments. *Silsby v. Barlow*, 82 Mass. (16 Gray) 329, 330.

The term "religious society," in a statute exempting from taxation certain property belonging to religious societies, is not to be understood as limited to religious societies organized as incorporated churches, but includes a society whose organization and objects are of a benevolent, charitable, or missionary character, as falling within the general sense of the term "religious," as contra-

distinguished from private and sectarian institutions. *Hebrew Free School Ass'n v. City of New York* (N. Y.) 4 Hun, 446, 449.

#### As incorporated society.

In Acts 1852, c. 282, § 1, exempting from taxation schoolhouses owned by religious societies, the term "societies" applies only to incorporated societies, and not to any number of persons who come together for some religious purpose. *Church of St. Monica v. City of New York*, 23 N. E. 294, 295, 119 N. Y. 91, 7 L. R. A. 70.

"Society," as used in Organic Act, § 1, providing that the title to the land now occupied as missionary stations among the Indian tribes of the territory, together with the improvements thereof, be confirmed and established "in the several religious societies to which said missionary stations respectively belong, applies to those incorporated societies, who as persons could send missionaries and could take land as grantees, and does not apply to a bishop or a church at large. *Corporation of the Catholic Bishop of Nesqually v. Gibbon*, 21 Pac. 315, 317, 1 Wash. St. 592.

#### RELIGIOUS TEACHER.

"Religious teacher" is synonymous with "minister," as used in the provisions of Const. art. 4, § 39, providing that no law shall be passed forbidding any person from paying tithes or other rates for the support of any minister or teacher of religion, and section 40, providing that no money shall be appropriated for the benefit of any religious sect or society, nor shall property belonging to the society be appropriated for any such purposes. A teacher in the public schools, who reads selections from the Bible to the scholars, will not be held to be a teacher of religion; hence such act is not forbidden by the Constitution. *Pfeiffer v. Board of Education of Detroit*, 77 N. W. 250, 253, 118 Mich. 560, 42 L. R. A. 536.

#### RELIGIOUS USES.

Act April 26, 1855, making a bequest for religious uses void, made less than one calendar month before testator's death, should be construed to apply to money given to a league incorporated for the improvement of its members, and for the dissemination of scientific truths by means of music, literature, lectures, and debates, which held meetings on Sundays, was wholly dependent for funds on gifts and contributions, which opposed all isms, Christian and infidel being alike eligible to membership, and before which lectures against Christianity were sometimes had, followed by debates in the same spirit. *In re Knight's Estate*, 28 Atl. 303, 304, 159 Pa. 500.

"Religious uses," as used in Act 1855, prohibiting devises or legacies for religious uses, unless by will executed at least one month before the death of the testator, includes a bequest to a church to be expended in masses for the repose of his soul. *Appeal of Rhymer*, 93 Pa. 142, 145, 39 Am. Rep. 736.

### RELIGIOUS WORSHIP.

See "Actual Place of Religious Worship"; "House of Religious Worship"; "Society for Religious Worship."

Buildings exclusively used for religious worship, see "Exclusively Used."

In the trial of a person for disturbing a congregation assembled for religious worship, the court defined "religious worship" as where the congregation has assembled for the purpose of performing acts of adoration to the Supreme Being, or to perform religious service in the recognition of God as an object of worship, love, and obedience. *Green v. State*, 56 S. W. 915, 916, 42 Tex. Cr. R. 416. According to the rites and services of any system of faith entertained with respect to the Deity. *Wood v. State*, 11 Tex. App. 318, 321.

A Young Men's Christian Association, organized to endeavor to bring young men under moral and religious influences, and holding meetings every Sunday afternoon in a building owned by the association, where a service was had, hymns were sung, and the Scriptures were read and expounded, actually used its building for religious worship, within the meaning of Const. § 170, exempting property so used from taxation. *Commonwealth v. Young Men's Christian Ass'n (Ky.)* 76 S. W. 522.

A parsonage erected for the convenience and accommodation of the pastor of a church is not exempt, under a statute exempting from taxation every "building erected for religious worship," and the pews and furniture within the same, and the lands whereon such building is situated, upon a lot adjacent to the lot upon which the church stood. *Trustees of M. E. Church v. Ellis*, 38 Ind. 3.

"Religious worship," as defined by Webster, is the act of paying honors to the Supreme Being, religious reverence and homage, adoration paid to God, or a being viewed as God. A Young Men's Christian Association, organized as a corporation not for pecuniary profit, having for its object the promotion of growth in grace and Christian fellowship among its workers, and aggressive Christian work, especially by and for young men, and to seek out and aid the worthy poor, not being under the control of any one religious denomination, but made up of representatives from a number of such denominations, is not an organization having for its object religious worship. *Hamsher v.*

*Hamsher*, 23 N. E. 1123, 1124, 132 Ill. 273, 8 L. R. A. 556.

"Religious worship," as used in Rev. St. § 3233, does not include a parsonage, as a parsonage may be properly used for church purposes, but it cannot be said to be used for religious worship. *First Presbyterian Church v. City of New Orleans*, 30 La. Ann. 259, 31 Am. Rep. 224.

Whether a temperance camp meeting is a public assembly convened for the purpose of religious worship, within the meaning of Gen. Laws, c. 273, § 9, is a question of fact; the term "religious worship" having no technical meaning in a legal sense. *State v. Norris*, 59 N. H. 536.

A deed granting an easement as long as a certain building is used as "a place of religious worship" does not authorize the continuance of such easement when the building is used as a public school. *City of Philadelphia v. Yeaton (Pa.)* 40 Leg. Int. 160.

Pub. Laws, c. 533, exempting from taxation "buildings for religious worship," does not exempt a building used for a free school under the management and control of the Roman Catholic Church, although one room in the building is used as a chapel. *St. Joseph's Church v. Assessors of Taxes of Providence*, 12 R. I. 19, 21, 34 Am. Rep. 597.

Pub. St. c. 41, § 2, exempts from taxation buildings for free public schools and for religious worship, in so far as they are occupied for religious or educational purposes. Held, that a building for religious purposes is exempt from taxation, though used for educational purposes, so long as the use is merely incidental or occasional, or so long as the use, if habitual, is permissive, and does not interfere with the use for religious purposes. *St. Mary's Church v. Tripp*, 14 R. I. 307, 308.

"Religious worship," within the meaning of a statute prohibiting the erection of any booth, stall, etc., for the purpose of selling, giving away, or otherwise disposing of any kind of articles of traffic or spirituous liquors within three miles of any place of "religious worship" during the time of holding any meeting for religious worship at such place, is not restricted to any denomination, or to any place or mode of religious worship. The open fields, the woods, or a house erected for religious worship are alike within its terms, and, so long as it is religious worship, it makes no difference whether the worshippers are Christians or pagan idolaters. *Rogers v. Brown*, 20 N. J. Law (Spencer) 119, 120.

The phrase "religious worship," as used in Code, § 4833, punishing the disturbance of religious worship, does not embrace a gathering for the purpose of a Sunday school celebration and Christmas tree, at which no religious service has been appointed, though

speeches are made on the subject of Sunday schools and morality. *Layne v. State*, 72 Tenn. (4 Lea) 199, 200.

The basement of a synagogue was used for the janitor's residence, and for baths which were open to all who applied and paid the fee demanded, whether in observance of religious rites or not. The baths in the basement were connected with the religious ceremonies and observances of the congregation, and used as a part of such rites and ceremonies, and contributions voluntarily given by the bathers went to the support of the building. Held, that the premises were not used exclusively for religious purposes, within the meaning of the Revised Statutes, providing that buildings erected and used for public worship shall be exempt from taxation. *Congregation Kal Israel Auschi Poland v. City of New York*, 1 N. Y. Supp. 35, 37.

## RELINQUISH.

"Relinquish," as used in an agreement by which, for a certain consideration, the obligor bound himself to "relinquish" a certain annuity, did not necessarily mean a release of the annuity by deed; but abstaining from demanding and receiving the annuity was a relinquishment. *Home v. Booth*, 3 Man. & G. 709, 742.

The mere addition of the words "relinquishes her dower" to the certificate of a married woman's acknowledgment of a conveyance of her own estate will not avoid the deed as to her. *Perkins v. Carter*, 20 Mo. 465, 467; *Dellatus v. Poston*, 19 Mo. 425, 432.

## RELOAN.

The word "reloan" describes the act of loaning money a second time, or oftener. *Spurgeon v. Smitha*, 17 N. E. 105, 106, 114 Ind. 453.

## RELUCTANT.

Reluctant means striving against, opposed in desire, unwilling, disinclined, or disinclined to yield; and as used by the trial court in passing on a motion for a new trial, that "the motion for a new trial in the within case is hereby reluctantly" overruled, meant that, as the jury, who were charged with the determination of the facts, settled them by their verdict, the court, while he could not approve the findings, allowed them to stand because the jury had so found. *Central of Georgia Ry. Co. v. Harden*, 38 S. E. 949, 952, 113 Ga. 453.

## RELYING.

The use of the word "relying" in a will in which testator bequeaths certain property

to certain beneficiaries, and recites that the bequest is made relying upon the beneficiaries to dispose of the same for the benefit of such charitable and benevolent and educational purposes as they shall judge will most promote the comfort and improve the condition of the poor, is only an utterance of confidence. It is not an imperative expression. It neither commands nor imposes a duty, but at most indicates the faith of the person using it in the honor or honesty or affection of the person addressed. *Willets v. Willets* (N. Y.) 35 Hun, 401, 405.

## REM.

See "In Rem."

## REMAIN.

### As continue.

"Remain," as used in the compact between Virginia and Kentucky in reference to lands ceded to Kentucky, providing that all private rights and interests of land within the said district, derived from the laws of Virginia prior to such separation, shall remain valid and secure under the laws of the proposed state, and shall be determined by the laws now existing in this state, should be construed to mean "continue." *Beard v. Smith*, 22 Ky. (6 T. B. Mon.) 430, 489.

### As continue unchanged.

"Remain" means to continue unchanged, and as used by a testator in requesting that his nephew "remain with and manage for my wife until her death," and that certain slaves "remain with my wife and nephew until the death of my wife," requires them to abide in the place where they were when the will was executed. *Harris v. Wright*, 24 S. E. 751, 754, 118 N. C. 422.

"Remain" means to continue; to stay; to be left; to be left after another or others have gone. *Webst. Dict.*; *Cent. Dict.*; *Soule, Synonyms*. Where, at the death of a collector of taxes, another person was not then in the office of collector, and was not qualified to collect taxes for such town until a period after the death of such other collector, he was not a remaining collector, within the meaning of Gen. St. 1883, § 4021, providing that, whenever a vacancy shall exist, the remaining collector shall be fully empowered to discharge the duties of such vacant office for the unexpired portion of the term. *State v. Fowler*, 32 Atl. 162, 164, 66 Conn. 294.

"Remain," as used in an insurance policy providing that the policy should become void "if the dwelling house should become vacant and unoccupied, and so remain," means that to avoid the policy the house must have become vacant and remained so at the time of the fire causing the loss. *Laselle*

v. Hoboken Fire Ins. Co., 43 N. J. Law (14 Vroom) 468, 469.

#### **Illegal use implied.**

A municipal ordinance, making it a misdemeanor for any person to remain upon any sidewalk to the annoyance of any person, will be construed not to prohibit the lawful use by remaining on a sidewalk, though it annoys other persons. "The object of the ordinance, we think, was to prevent the incumbering of sidewalks by the illegal use of them, by the occupation of them by one or more persons, not for the purpose of passage in a reasonable manner, or for taking across them into dwelling houses, stores, or shops fuel or merchandise, with a due regard to the convenience of others, or for other lawful purposes, but occupying it in an unreasonable manner, either as to the mode or duration of time, so that other passengers would be unlawfully delayed or annoyed." *State v. Goulding*, 44 N. H. 284, 286.

#### **As received or realized.**

Where the articles of association of a mutual benefit association provided for the payment of such sum as the by-laws of such society may prescribe, the sum to be raised by voluntary contributions, and said sum so to be paid in no case to exceed the total sum of such dues remaining in the treasury of said society, the word "remaining" must be construed as meaning received or realized from an assessment for the death loss made pursuant to the by-laws. *Lake v. Minnesota Masonic Relief Ass'n*, 63 N. W. 261, 263, 61 Minn. 96, 52 Am. St. Rep. 538.

#### **Residence implied.**

"Remained therein," as used in a rule admitting to the practice of law those who were licensed in another state and who remained therein as practicing attorneys for at least one year, where they have since pursued the study of law for one year within the state, implies a residence in the state where the candidate was admitted during the year that he is required to practice therein. In *re Simpson*, 60 N. E. 747, 748, 167 N. Y. 403.

#### **Ownership and power of disposal implied.**

The words "remaining at my wife's death," as used in a will making disposition of all the personal property remaining at my wife's death, imply power in the wife to use, consume, and dispose of the personal property, and such power implies absolute dominion. Absolute dominion imports absolute ownership, and where it is the intention of the testator that the first taker shall have an unlimited power of disposition over the property devised or bequeathed, whether such intention be expressed or necessarily implied, a limitation over to another is void, because it is inconsistent with and repugnant to the

estate given to the first taker, although the will shows that it was the testator's intention, in respect to the subject of the gift, that what may remain of it at the death of the first taker should go to another. *Robertson v. Hardy's Adm'r (Va.)* 23 S. E. 766, 767.

The word "remaining," as used in a will directing that, after the decease of the testator's wife, all the stock, etc., remaining shall be sold immediately after her death, indicates that the widow is entitled to an absolute interest in the stock, any part of which she had a right in her lifetime to dispose of at her discretion. *Appeal of Scholl (Pa.)* 2 Atl. 538.

"Remains," as used by a testator in devising to his widow all his estate, both real and personal, during her natural life, for widowhood, "and what then remains to be equally divided among his children," does not imply a power of disposition of the real estate during the life of the widow; the phrase relating only to the personalty. *Foot v. Sanders*, 72 Mo. 616, 621.

A will giving an unlimited power to the testator's wife to sell, dispose of, and convey and use the property, without any restrictions whatever, and providing that a certain person should have one-half of "what remains" at the widow's death, should be construed to mean "what may remain," it being wholly at the widow's option whether there should be any or not, and not construed to denote that there was to be an absolute remainder. *State v. Smith*, 52 Conn. 557, 564.

A will giving to testator's daughter a share of his home farm and all farming utensils and stock, and providing that, if she die unmarried, her brother should have "what remains" of her share of the property, implies that she had an unlimited power of disposal, which is inconsistent with the existence of a valid limitation over. In *re Jackson's Estate*, 36 Atl. 156, 158, 179 Pa. 77.

A will providing that the life tenant shall make at her death distribution of "what remains," and also referring to that which is requested to be done as "such disposition of the property that may at her death remain," will be construed to show that the testator contemplated and intended that his widow, the life tenant, might or would expend all or a part of the money derived from a sale of the property under a power given her in the will, and implies that distribution was to be made of only what she had not disposed of and used. *Coulson v. Alpaugh*, 45 N. E. 216, 227, 163 Ill. 298.

Testator by his will gave his real and personal estate in general terms to his wife, and by a subsequent clause bequeathed to

her one-third of all his estate "that may remain at the time of her death for to dispose of as she may see proper." Held, that the quoted phrase includes personal property as well as realty, and gave her absolute property in the personality. *Downey v. Borden*, 36 N. J. Law (7 Vroom) 460, 469.

"Remains unexpended," as used in the provisions of a will, as follows: "To my daughters L. and M., or either of them, dying leaving no legal issue, the share or shares herein bequeathed to her or them, if not paid over by my executors, and, if paid over, then such part thereof as remains unexpended, I give and bequeath unto my surviving children and their heirs equally between them"—implied absolute ownership on the part of the daughters to whom the shares were first given. *Annin's Ex'rs v. Vandoren's Adm'r*, 14 N. J. Eq. (1 McCart.) 135, 144.

#### As indicating residue.

See "What Remains"; "So Much as Remains"; "Whatever Remains."

#### REMAIN INVIOLEATE.

"Remain inviolate," as used in Const. Tenn. art. 1, § 6, providing that the right of trial by jury shall remain inviolate, means that it shall be preserved as it existed at common law at the time of the adoption of the Constitution. *Gribble v. Wilson*, 49 S. W. 736, 101 Tenn. 612.

#### REMAINDER.

See "Rest, Residue, and Remainder."

#### As balance or residue.

"Remainder," as used in a will, giving decedent's wife an estate and providing, "but on her decease the remainder thereof, if any, I give and devise to my children," is equivalent to whatever may be left. *Baumgras v. Baumgras*, 24 N. Y. Supp. 767, 769, 5 Misc. Rep. 8.

Technically, a remainder is an estate in land limited to take effect and be enjoyed after another estate is determined, and such an estate vests immediately on the death of the grantor, to be enjoyed in possession after the determination of the particular estate; but, as used in a will giving certain property to a wife for life, with the use of the remainder of testator's estate, such remainder after her death to descend to certain parties, the word is used in the sense of "balance of" or "what may remain." *Potts v. Breneman*, 37 Atl. 1002, 1007, 182 Pa. 295.

#### As survivor.

"Remainder," as used in a clause of a will which recited, if W. or T. should die, or either of them, the remainder to enjoy the

other's property, meant the survivor. *Nelson v. Combs*, 18 N. J. Law (3 Har.) 27, 35.

The phrase "remainder of the aforesaid children," in a will directing testator's estate to be divided among his six children, and, if any should die without lawful issue, then their portion to be equally divided among the remainder of the aforesaid children, is not equivalent to the phrase "survivors of my children," but naturally means the rest, the other, of my children. *Presley v. Davis* (S. C.) 7 Rich. Eq. 105, 108, 62 Am. Dec. 396.

#### REMAINDER (Estate in).

See "Contingent Remainder"; "Executed Remainder"; "Executory Remainder"; "Vested Remainder."

A remainder is a remnant of an estate in lands or tenements expectant on a particular estate created together with the same at one time. *Sayward v. Sayward*, 7 Me. (7 Greenl.) 210, 213, 22 Am. Dec. 191.

A remainder is what is left of an entire estate in lands after a preceding part of the same estate has been disposed of, whose regular termination the remainder must await. *Wells v. Houston*, 23 Tex. Civ. App. 629, 654, 57 S. W. 584, 598 (citing 2 Minor, Inst. 331).

An estate in remainder is an estate which is not to take effect or be enjoyed till after the termination of a precedent life estate. *Micheau v. Crawford*, 8 N. J. Law (3 Halst.) 90, 96; *Todd v. Jackson*, 26 N. J. Law (2 Dutch.) 525, 540.

"Blackstone defines an estate in remainder to be an estate limited to take effect and be enjoyed after another estate is determined. To create an estate in remainder the owner of the fee must first carve out of the fee an estate for life or for years, as a supporting or precedent estate to the estate in remainder." *Bunting v. Speck*, 21 Pac. 288, 289, 41 Kan. 424, 3 L. R. A. 690.

A remainder is defined by Kent to be a remnant of an estate in land, depending on a particular prior estate created at the same time and by the same instrument, and limited to arise immediately on the termination of that estate, and not an abridgment of it. *Bennett v. Garlock* (N. Y.) 10 Hun, 328, 337; *Achorn v. Jackson*, 29 Atl. 889, 990, 86 Me. 213; *In re Miller's Will*, 70 Tenn. (2 Lea) 54-69. It is a vested remainder where there is a person in being who would have an immediate right to the possession of the lands upon the ceasing of the precedent estate, and it is contingent when it is limited to take effect either to a dubious and uncertain person or upon a dubious or uncertain event. *Wood v. Griffin*, 46 N. H. 230, 234.

An estate in remainder is one limited to be enjoyed after another estate is determin-



ed, or at a time specified in the future. Civ. Code Ga. 1895, § 3098.

When a future estate is dependent upon a precedent estate, it may be termed a "remainder," and may be created and transferred by that name. Gen. St. Minn. 1894, § 4372; Comp. Laws Mich. 1897, § 8793; Rev. St. Wis. 1898, § 2035.

When a future estate, other than a reversion, is dependent upon a precedent estate, it may be called a "remainder," and may be created and transferred by that name. Civ. Code Cal. 1903, § 769; Civ. Code Mont. 1895, § 1218; Rev. Codes N. D. 1899, § 3333; Civ. Code S. D. 1903, § 249; Rev. St. Okl. 1903, § 4034.

A remainder is a present right, although the enjoyment is future. *Aiken v. Suttle*, 72 Tenn. (4 Lea) 103, 110.

A future estate, dependent upon a precedent estate, is termed a "remainder." It is either vested or contingent. It is vested when there is a person in being who would have an immediate right to the possession of the lands upon the ceasing of the intermediate or precedent estate. It is contingent while the person to whom or the event upon which it is limited to take effect remains uncertain. *Dana v. Murray*, 26 N. E. 21, 24, 122 N. Y. 604.

A remainder is the remnant of an estate, limited to rise immediately on the determination of a precedent particular estate, and it always creates a new estate in the remainderman. One of the rules regulating remainders is that they must pass out of the grantor at the time the particular estate is created. *Booth v. Terrell*, 16 Ga. 20, 24; *Kingsley v. Broward*, 19 Fla. 722.

By a statute in New York it is provided that, where a future estate is dependent on a preceding estate, it may be termed a "remainder," and may be created and transferred by that name. It is further declared that future estates are either vested or contingent. They are vested when there is a person in being who would have an immediate right to the possession of the lands upon the ceasing of the intermediate or precedent estate. They are contingent while the person to whom or the event upon which they are limited to take effect remains uncertain. *Palmer v. Dunham*, 6 N. Y. Supp. 46, 47, 52 Hun, 468.

A remainder over, to vest upon the death of a stranger to the estate, is a valid remainder. The contingency may be postponed for any number of lives, provided they are all in being when the contingent interest is created, and the persons whose lives are taken need have no interest in the estate. *Madison v. Larnon*, 48 N. E. 556, 558, 170 Ill. 65, 77, 9 Am. St. Rep. 356.

7 Wds. & P.—15

The word "remainder," in the law of real estate, necessarily implies what is left, and, if the entire estate in fee be granted, there can be no remainder. It is an established principle of construction of contingent remainders that an estate cannot by deed be limited to another after a fee already granted. *Palmer v. Cook*, 42 N. E. 796, 797, 159 Ill. 300, 50 Am. St. Rep. 165.

The word "remainder," in a will bequeathing one-third part of all testator's personal estate and devising one-third of all the income, rents, and use of his real estate to his wife, and giving his son all the residue and remainder of his estate, "is the correct legal language to pass the land after the expiration of a life estate therein. The law has given that technical meaning to it, and it is a settled rule of consideration that a technical word in a will, unless there is clear evidence of a contrary intent. In *re Frances' Estate*, 75 Pa. (25 P. F. Smith) 220, 224.

Where the testator by will gave certain property to his wife for life, "with remainder thereof, on her decease," to others, the word "remainder," while used in a technical sense, was subordinate to a power given to the life tenant to dispose of the property during life, and the remainder was liable to be defeated as to any part of the estate over which the power was exercised. *Woodbridge v. Jones*, 67 N. E. 878, 879, 183 Mass 549.

A remainder is what is left of an entire estate in lands after a preceding part of the same estate has been disposed of, whose regular termination the remainder must await. 2 Bl. Comm. 164; 2 Minor, Inst. 331. The essential characteristics of the remainder are: (1) There must be a preceding particular estate, whose regular termination the remainder must await. (2) The remainder must be created by the same conveyance and at the same time as a particular estate. (3) The remainder must vest in right during the continuance of the particular estate, or eo instante that it be terminated. (4) No remainder can be limited after a fee simple. The necessary features of a remainder arise out of the definition. The definition describes the remainder as the remnant of the whole after a part has been disposed of. It follows, therefore, of course, that there must be that part in order to fulfill the definition. *Wells v. Houston*, 57 S. W. 584, 598, 23 Tex. Civ. App. 629.

"A remainder," says a distinguished law writer, "is defined by Lord Coke (1 Inst. 143a) to be a remnant of an estate in lands or tenements, expectant on a particular estate, created together with the same at one time. It follows from this definition that, whenever the first fee is limited, there can be no remainder, in the strict sense of the

word; for, the whole being first disposed of, no remnant exists to limit over. The true point of distinction between such conditional limitations over as are and such as are not remainders, in the strict sense of the word, lies here: The former are limited to commence where the first estate is, by the very nature and extent of its original limitations, to expire or determine; whereas the latter are limited so as to be independent of the measure or extent originally given to the first estate, and to take effect in possession upon an event which may happen before the regular determination, to which the first estate is liable from the nature of its original limitation, and so as to rescind it." *Shadden v. Hembree*, 18 Pac. 572, 575, 17 Or. 14 (quoting *Fearne*, Rem. [4th Am. from 10th London Ed.] 11, 13).

"The term 'remainder' is a relative expression, and implies that some part of the thing is previously disposed of. Vested remainders, or remainders executed, are those whereby a present interest passed to the party, or where the estate is invariably fixed to remain to a determinate person after the particular estate is spent. Contingent or executory remainders are those whereby no present interest passes, or where the estate in remainder is limited to take effect, either to a dubious and uncertain person or upon a dubious and uncertain event. *Hudson v. Wadsworth*, 8 Conn. 348, 359.

A remainder is a residue of an estate in lands, dependent on a particular estate, and created together with the same. Co. Litt. 143a. Section 13, tit. 2, pt. 2, c. 1, p. 722, Rev. St., provides "that future estates are either vested or contingent. They are vested when there is a person in being who would have an immediate right to the possession of the lands, upon the ceasing of the intermediate or precedent estate. They are contingent while the person to whom or the event on which they are limited to take effect remains uncertain." *Wadsworth v. Murray*, 51 N. Y. Supp. 1038, 1042, 29 App. Div. 191.

"Remainder," as used in a will bequeathing certain property to testator's husband for life, with remainder to her legal heirs, should not be construed in its technical sense. *Pett v. Commerce & E. St. Ry. Co.*, 8 S. W. 203, 204, 70 Tex. 522.

#### As estate or land.

See "Estate"; "Land"; "Real Property."

#### Executory devise distinguished.

As distinguished from an executory devise, an estate in remainder is one limited to take effect and be enjoyed after another is determined. No remainder can be limited after the grant of a fee simple, because the tenant in fee has the whole; while the ex-

ecutory devise is such a disposition of lands by will that thereby no estate vests at the testator's death, but only on some future contingency. Another elementary principle applies in cases where it may be doubtful whether an estate is an executory devise or an estate in remainder, namely, that a gift shall not be deemed an executory devise if it can take effect as a remainder, and that no remainder shall be considered contingent if it may, consistently with intention, be deemed vested. *Burleigh v. Clough*, 52 N. H. 267, 273, 13 Am. Rep. 23 (citing *Livingston v. Robins* [N. Y.] 16 Johns. 537; *Blanchard v. Blanchard*, 83 Mass. [1 Allen] 225, 4 Kent, Comm. 202; *Leslie v. Marshall* (N. Y.) 31 Barb. 560, 566; *Poor v. Considine*, 73 U. S. (6 Wall.) 458, 474, 18 L. Ed. 869; *Bristol v. Atwater*, 50 Conn. 402, 406.

#### As a fee.

"A remainder has been said to be the residue of the fee after a less estate has been carved out of it; both these interests being but one estate. *Jac. Law Dict.*; 1 Co. Litt. c. 12, § 215. A fee simple of the land is the largest possible estate. 1 Co. Litt. c. 1, § 11. And, although there may be a remainder or a reversion in fee, it is not the entire property, or, in popular language, the land itself, that is held in fee in such case, but only the reversion or the remainder. A reversion or a remainder is described as such: the quality, value, and sometimes the validity being dependent upon the precedent estate." Therefore a remainder or a reversion is not properly described in the certificate of appraisers in execution, reciting that the debtor holds certain real estate in fee simple. *Stinson v. Rouse*, 52 Me. 261, 266.

#### As created by purchase only.

A remainder is supported and preceded by a particular estate, and is created at the same time and by the same instrument. A remainder can only be acquired by purchase, and never by descent. *Payne v. Payne*, 24 S. W. 781, 782, 119 Mo. 174.

#### REMAINDERMAN.

As assign, see "Assigns."

As owner, see "Owner."

#### REMAINING.

"Remaining," as used in a will providing that if the testator's children, for whom the estate was to be expended in support and education, should die without leaving a child or children who could inherit, the "estate remaining" should go to others named, cannot be construed as used in the legal sense of a remainder, but to cover what was left after the special directions were executed. *Chase v. Cartright*, 14 S. W. 90, 92, 53 Ark. 358, 22 Am. St. Rep. 207.

Acts 1865, c. 37, § 6, provides that, whenever a vacancy shall exist in either the office of city collector or town collector of the taxes of Hartford, the "remaining collector" shall be sufficiently empowered to discharge the duties of said vacancy. B. died May 6, 1894, leaving the office of collector of city taxes for the city of Hartford vacant. At the time of his death, in addition to being a collector of city taxes, he was, by virtue of appointment and his qualification, collector of town taxes for the town of Hartford for the term expiring May 6, 1894. Subsequently F. was appointed by the selectmen of the town to fill the vacancy in the office of collector of town taxes. It was held that F. was not at the death of B. the remaining collector, he not being in office at the time of B.'s death, and by no ordinary use of language can he be said to have been at any time since the remaining collector. *State v. Fowler*, 66 Conn. 294, 300, 32 Atl. 162.

#### REMAINING INTEREST.

A deed of conveyance, conveying the grantor's "remaining interest" in the property, which the conveyance purports to convey, operates only to convey the interest of the grantor which he has not previously conveyed. The grantee purchases nothing further, and the grantor assumes to convey nothing more. *Eaton v. Trowbridge*, 38 Mich. 454, 460.

#### REMAINING PROPERTY.

A will giving to testator's wife all of testator's property, to have and to hold and dispose of as she may see fit while she remains single, and at her death or marriage the "remaining property" to be equally divided between testator's daughters, cannot be regarded as indicating that the testator intended that his wife should have the right to diminish the corpus of the estate. *Russell v. Werntz*, 44 Atl. 219, 220, 88 Md. 210.

#### REMAINING UNPAID.

The words "remaining unpaid" are often used in business transactions as synonymous with "due" or "owing." *Fowler v. Hoffman*, 31 Mich. 215, 219.

#### REMAINING UNTRIED.

Act March 11, 1800, abolishing the circuit courts and transferring to the common pleas of the proper county causes "remaining untried," would include a cause on which an error had been made, but on which judgment had not been entered. A cause was not completely tried, within the spirit of the act, until judgment was pronounced. *Preston v. Englert* (Pa.) 5 Bin. 390, 391.

#### REMAND.

See "Reversed and Remanded."

To state court as final hearing, see "Final Hearing or Trial."

The words "dismiss" and "remand" are not used interchangeably or indiscriminately in Act March 3, 1875, c. 137, § 5, 18 Stat. 472 [U. S. Comp. St. 1901, p. 511], relating to the disposal of cases in the Circuit Courts. The former has reference only to a suit brought in the Circuit Court, and the latter to one removed there from the state court. In the one case, if it appear that the suit is not cognizable in the Circuit Court, it is dismissed, and in the other it is remanded to the state court. Consequently a motion under the jurisdiction of the Circuit Court in regard to an action brought there from the state court would properly have been an action to remand, rather than to dismiss. *Northern Pac. Terminal Co. v. Lowenberg* (U. S.) 18 Fed. 339, 341.

#### REMEDY.

See "Adequate Remedy"; "Concurrent Remedies"; "Cumulative Remedy"; "Domestic Remedy"; "Equitable Remedy"; "Inadequacy of Remedy at Law"; "Judicial Remedy"; "Legal Remedy"; "Provisional Remedy"; "Right or Remedy."

Other remedy, see "Other."

A remedy is a means employed to enforce a right or redress an injury. *Missionary Soc. of M. E. Church v. Ely*, 47 N. E. 537, 539, 56 Ohio St. 405 (citing Bouv. Law Dict.).

A "remedy," as understood in legal phraseology, is a mode prescribed by law to enforce a duty or redress a wrong, and not an obligation to guaranty a right or to indemnify against a wrong. *United States v. Lyman* (U. S.) 26 Fed. Cas. 1024, 1031.

A remedy is simply the means by which the obligation or the corresponding action is effectuated. *Frost v. Witter*, 132 Cal. 421, 426, 64 Pac. 705, 707, 84 Am. St. Rep. 53.

#### As action or special proceeding.

The word "remedy," as used in the Code, is limited to actions and special proceedings. *Linden v. Hepburn*, 5 N. Y. Super. Ct. (3 Sandf.) 668, 671.

"Remedy" means the action or means given by law for the recovery of a right. *Gutierrez v. Pino*, 1 N. M. 392, 394 (citing Jac. Law Dict.).

#### Action required.

A bill to enforce a lien for towage by foreclosure of the lien on a raft of lumber in the complainant's possession, where the suit

is brought against individual defendants, seeking a decree against them, and, in default of the payment thereof, a sale of the property to satisfy it, is not a proceeding in rem, within the exclusive admiralty jurisdiction of the federal courts, but is a suit in personam to enforce a common-law remedy, which may be brought in a state court by virtue of Rev. St. § 563 [U. S. Comp. St. 1901, p. 455], saving the suitor's right of a common-law remedy in all cases where the common law is competent to give it. It was certainly not a common-law action, but a suit in equity; but it will be noticed that the reservation is not of an action at common law, but of a common-law remedy, and a remedy does not necessarily imply an action. "Remedy" is defined by Bouvier as "the means employed to enforce a right or redress an injury." While, as stated by him, remedies for non-fulfillment of contracts are generally by action, they are by no means universally so. Thus a landlord has at common law a remedy by distress for his rent, and a right also given to him for the purpose of exacting compensation for damages resulting from the trespass of cattle. A bailee of property has a remedy for work done upon such property, or for expenses incurred in keeping it, by detention of possession; an innkeeper has a similar remedy upon the goods of his guests to the amount of his charges for their entertainment; and a carrier has a like lien upon the thing carried. There is also a common-law remedy for nuisances by abatement; a right upon the part of a person assaulted to resist the assailant, even to his death; a right of recaption of goods stolen or unlawfully taken; and a public right against disturbers of the peace by compelling them to give sureties for their good behavior. All these remedies are independent of an action. Knapp, Stout & Co. v. McCaffrey, 20 Sup. Ct. 824, 827, 177 U. S. 638, 44 L. Ed. 921.

#### **Application for admission to bar.**

Bouvier defines a remedy to be the means employed to enforce a right or redress an injury. This definition would clearly embrace an application by an attorney for admission to the bar, since every applicant has an absolute constitutional right to admission, provided he is a citizen of the required age, character, and ability, and the object of the application is to enforce this right. Hence it is a remedy, within Code, § 1, dividing remedies in courts of justice into actions and special proceedings. In *Belknap v. Waters*, 11 N. Y. (1 Kern.) 477, it was said: "The Code . . . seems to regard every original application to a court of justice for a judgment or an order as a remedy." In *re Cooper*, 22 N. Y. 67, 87.

#### **Cause of action distinguished.**

See "Cause of Action."

#### **As damages.**

The fathers of the common law, in declaring that for every wrong there should be a remedy, meant by "remedy" damages that courts dealing practically with the practical affairs of life in all cases for personal injuries can find to be certain and measurable from the evidence, the source of which is open to both parties and the nature not transcendental. *Western Union Tel. Co. v. Ferguson*, 60 N. E. 674, 676, 157 Ind. 64, 54 L. R. A. 846.

#### **Mechanic's lien.**

Under a holding that causes of action arising outside the state are not entitled to the special remedies provided by statute for such causes of action arising within the state, a mechanic's lien is not a remedy, but a statutory security, to which the term "remedy" has no more application than it would have to a mortgage. *Atkins v. Little*, 17 Minn. 342, 357 (Gil. 320, 331).

#### **Obligation of contract distinguished.**

The distinction between the obligation of contract and the remedy given by the Legislature to enforce that obligation exists in the nature of things. Without impairing the obligation of the contract, the remedy may certainly be modified as the wisdom of the nation shall direct. *Wood v. Mallin*, 10 N. J. Law (5 Halst.) 208, 209.

#### **As part of contract.**

See "Contract."

#### **As procedure.**

The word "remedy" pertains more properly to those modes of procedure and pleading which lead up to and end in the judgment. *Johnson v. Fletcher*, 54 Miss. 628, 631, 28 Am. Rep. 388.

The word "remedy," as used in the statement that the law of the forum will govern in matters pertaining to the remedy, means such matters as the character and form of action, the admissibility of evidence, procedure, the mode of redress, limitations, execution of judgments, and the like. *Thomas v. Western Union Tel. Co.*, 61 S. W. 501, 502, 25 Tex. Civ. App. 398.

#### **Right distinguished.**

The distinction between "remedy" and "substantive right" is incapable of exact definition. The difference is somewhat a question of degree. The Constitution of Kansas contains the general provision that stockholders shall be liable to creditors of a corporation for an additional amount equal to their stock. Gen. St. Kan. par. 1192, provides that each stockholder shall be liable to each creditor whose execution has been returned nulla bona. This statute does not merely

provide a remedy for the enforcement of rights created by the Constitution, but creates substantive rights, which may be enforced in other jurisdictions in accordance with the forms of remedy there provided. *Dexter v. Edmonds* (U. S.) 89 Fed. 467, 468.

**As result of action.**

The remedy is the particular result to obtain which an action is brought. *Wildman v. Wildman*, 41 Atl. 1, 2, 70 Conn. 700.

**As vested right.**

See "Vested Right."

**Contempt proceedings.**

When instituted for the purpose of punishing for disobedience to an injunction, a contempt proceeding is not remedial in its character, and is not a "remedy," as that word is used in defining a special proceeding, but is purely of a criminal nature; its object being exclusively to vindicate the authority of the court. *State v. Davis*, 51 N. W. 942, 945, 2 N. D. 461.

**REMEDIAL ACT.**

See "Remedial Statute."

**REMEDIAL ACTION.**

"An action is remedial when brought by the party injured, and penal when brought by common informer." *O'Keefe v. Weber*, 12 Pac. 74, 75, 14 Or. 55.

**REMEDIAL CASES.**

"Remedial cases," as used in Const. art. 6, § 2, providing that the Supreme Court shall have original jurisdiction in such "remedial cases as may be prescribed by law," has a limited signification, and cannot extend to all remedies for wrongs, but merely includes those where the remedy is afforded summarily through certain extraordinary rights, such as prohibition, mandamus, certiorari, and quo warranto. *State v. St. Paul & S. C. R. Co.*, 28 N. W. 245, 246, 35 Minn. 222.

Under Const. art. 6, § 2, providing that the Supreme Court shall have original jurisdiction in such remedial cases as may be prescribed by law, an application instituted by a railroad for the appointment of commissioners to appraise land taken for the purpose of the road, is as much a remedial case as any other special proceeding. *Warren v. St. Paul & P. R. Co.*, 18 Minn. 384, 395 (Gil. 345, 357).

**REMEDIAL RIGHT.**

Where a master wrongfully discharges a servant from his service under a contract for a definite period, a new right accrues in fa-

vor of the servant against the master, which right is one to recover damages for the breach of the contract. This right is called by some authors a "remedial or secondary right." *Tiffin Glass Co. v. Stoechr*, 54 Ohio St. 157, 164, 43 N. E. 279.

**REMEDIAL STATUTE.**

A remedial statute has for its object either to redress some existing grievance or to introduce some new regulation or proceeding conducive to the public good. The remedy for the breach of a remedial statute is by an action for damages at the suit of the party injured. *Baylies v. Curry*, 30 Ill. App. 105, 109.

Remedial statutes are made to supply defects or abridge superfluities in the law, and the rule is that they are to be construed liberally for the suppression of the mischief and the advancement of the remedy. The courts follow the reason and spirit of such statutes till they overtake and destroy the mischief which the Legislature intended to suppress. *O'Connor v. State* (Tex.) 71 S. W. 409, 411.

A remedial statute has for its object the redress of some existing grievance or the introduction of some regulation or proceeding conducive to public good, and is either affirmative or negative as it prescribes or prohibits anything in particular to be done or omitted. The remedy for breach of a remedial statute is an action for damages by the party aggrieved, while the remedy for the breach of a penal statute is an action to recover the penalty. *Van Hook v. Whitlock* (N. Y.) 2 Edw. Ch. 304, 310.

A remedial act is one made from time to time to supply defects in the existing law, arising from the inevitable imperfection of legislation, mistake, or other cause, and the words of a remedial statute are to be construed largely and beneficially, so as to suppress mischief. *Buckmaster v. McElroy*, 20 Neb. 557, 564, 31 N. W. 76, 80, 57 Am. St. Rep. 843; *Western Travelers' Acc. Ass'n v. Taylor*, 87 N. W. 950, 953, 62 Neb. 783.

A statute which gives a remedy for an injury against him by whom it is committed to the person injured, and to him alone, and limits the recovery to the mere amount of the loss sustained, belongs to the class of remedial statutes, and not to that of penal statutes. *Boice v. Gibbons*, 8 N. J. Law (3 Halst.) 324, 330.

A remedial statute is one which is required in consequence of error in human judgments or which is rendered necessary by the various changes which are constantly taking place as the community enlarges and its concerns increase. *Gray v. Bennett*, 44 Mass. (3 Metc.) 522, 527.

A statute seeking to supply a public need and to remedy a public evil is a remedial one. *Lovejoy v. Isbell*, 40 Atl. 531, 533, 70 Conn. 537.

A remedial statute is one designed to cure or discharge or remedy a defect in existing laws, common or statutory, however arising. *City of Montpelier v. Senter*, 47 Atl. 392, 393, 72 Vt. 112.

Blackstone says remedial statutes are those which are made to supply such defects and abridge such superfluities in the common law as arise either from the general imperfections in human laws, from change of time and circumstances, or from the mistakes and unadvised determination of unlearned judges, or from other causes whatsoever. *People v. Hays*, 4 Cal. 127, 137.

## REMISE, RELEASE, AND QUITCLAIM.

"Remise, release, and quitclaim," in a deed in which the grantor did remise, release, and quitclaim to the grantee, raise a use in favor of the bargainee, which use the statute of uses transfers into possession. *Lynch v. Livingston*, 6 N. Y. (2 Seld.) 422, 434.

When used in a deed to imply that there is an interest or claim which has been surrendered, the words "remise, release, and quitclaim" are sufficient to pass the estate. In a primary conveyance the words import much more than a mere disclaimer of interest. *Perdue v. Loan Ass'n*, 79 Ala. 478, 480.

"Remise, release, and forever quitclaim," as used in a deed, are sufficient to transfer all and every part of the tract of land designated, of the title to which the grantor had not previously divested himself by a valid transfer duly recorded. *American Mortg. Co. v. Hutchinson*, 24 Pac. 515, 519, 19 Or. 334.

The words "remise, release, and forever quitclaim" are not words of release only, but are operative words of conveyance, though the grantor has no prior estate. Thus in *Wilson v. Albert*, 1 S. W. 209, 89 Mo. 537, the same operative words were used in a deed of quitclaim then under consideration, and it was ruled that the deed contained sufficient operative words of conveyance. The same rule was subsequently announced in *Bray v. Conrad*, 13 S. W. 957, 101 Mo. 331, and must be regarded as the settled law of this state. *McAnaw v. Tiffin*, 45 S. W. 656, 657, 143 Mo. 667.

The words "remise, release, and forever quitclaim," or the words "release" and "assign," as used in a deed, are words of bargain and sale, and are sufficient to raise a trust or use for the benefit of the grantees, which by the statute of uses is transferred to the

grantee's possession as a fee. There are no precise declarations required to raise a use, for by any words used in and to describe a present contract of sale or bargain, a trust is instantly raised, on which the statute operates. *Jackson v. Fish* (N. Y.) 10 Johns. 456, 457.

## REMISSION.

A remission is an act of justice, and cannot be obtained until the entire innocence of the petitioner be established, not by his testimony taken ex parte, but after full notice to the proper officer of the government and to the collector who made the seizure. A pardon, on the other hand, imports an act of mercy and favor, and generally supposes its object guilty. The Secretary of the Treasury has power, under the act for the mitigation and remission of forfeitures, to remit as well the moiety or share allowed to individuals as the part belonging to the government. *United States v. Morris* (U. S.) 26 Fed. Cas. 1336, 1346.

## REMISSNESS.

"Remissness," as used in a contract by a telegraph company exempting it from liability for any delay, error, or remissness, implies a sending or delivering of the message, but in a tardy, negligent, or careless manner, and the company is not liable thereunder for a total failure to send or deliver the message. *Baldwin v. United States Telegraph Co.* (N. Y.) 54 Barb. 505, 515, 6 Abb. Prac. (N. S.) 405, 423.

## REMIT.

Where an agent to whom goods were shipped for sale was instructed to remit the proceeds generally, without any direction as to the mode of remitting, he would be discharged from liability if he remitted in the mode usual in such business; and where the usual mode of remitting was by bill, proof of such usage and of the fact that he did so remit would discharge him from liability, although the bill was dishonored. *Potter v. Morland*, 57 Mass. (3 Cush.) 384, 388.

The power given to the Secretary of the Treasury by Act March 3, 1797, § 1, to "remit" forfeitures for infractions of the revenue laws, may be exercised by him, not only by remitting the whole of a forfeiture, but by remitting any part less than the whole, or on a condition consistent with law. *Jungbluth v. Redfield* (U. S.) 14 Fed. Cas. 52.

Where a principal wrote to an agent, who had loaned money for him, stating that a certain account was due from a third person, and merely said, "Please remit," the agent was authorized to collect and remit

the sum; the authority "to remit" necessarily including the authority to receive. *Shane v. Palmer*, 23 Pac. 594, 595, 43 Kan. 481.

#### As pardoned.

"Remitted," as used in an indictment which stated the former conviction of defendant and then alleged that he had been discharged and remitted of such judgment and conviction, meant pardoned. *Gibson v. People* (N. Y.) 5 Hun, 542, 543.

#### As send by mail.

The word "remit" means to send back, as to remit a check, so that a deposit of a check in a post office was an acceptance of an offer that, "if you remit your check, we will reinstate you." *Colvin v. United States Mut. Acc. Ass'n*, 21 N. Y. Supp. 734, 735, 66 Hun, 543.

"Remit" means to transmit, forward, or send; and where a party transmitted insurance premium money by mail in compliance with a request to "remit," the remittance is at the risk, as to time, of the company. *Hollowell v. Life Ins. Co. of Virginia*, 35 S. E. 616, 617, 126 N. C. 398.

#### As send back for retrial.

"To remit a cause is to send it back to the same court from which it has been removed by appeal or otherwise, for the purpose of retrying the cause when judgment has been reversed, or of issuing execution when it has been affirmed." *Irvine v. Marshall*, 3 Minn. 72, 76 (Gil. 33, 34).

#### REMITTER.

A person procuring a foreign bill of exchange is known technically as the "remitter" of it. *Boston Steel & Iron Co. v. Steuer*, 66 N. E. 646, 648, 183 Mass. 140, 97 Am. St. Rep. 426.

#### REMITTITUR.

A remittitur is in the nature of a discontinuance and is governed by the same rules. Hence it is held that a remittitur entered after the verdict of a jury is rendered in a case in which the matter in dispute exceeds \$2,000 does not cut off defendant's right of appeal from a judgment entered against him. *Gayden v. Louisville, N., N. O. & T. R. Co.*, 1 South. 792, 793, 39 La. Ann. 269.

The filing and docketing of a transcript of a judgment of the Supreme Court in any county of the state, for the purpose of issuing an execution, is not a remittitur, under Supreme Court Rule 29. *La Crosse & M. S. Packet Co. v. Reynolds*, 12 Minn. 213, 215 (Gil. 135, 136).

#### REMNANTS.

"Remnants and surpluses" is a technical term, meaning the remainder of the proceeds from the sale of ships to satisfy claims for seamen's wages, for bottomry bonds, for salvage services, and for supplies of material-men, after the satisfaction of such claims. *China Mut. Ins. Co. v. Force*, 36 N. E. 874, 876, 142 N. Y. 90, 40 Am. St. Rep. 576.

#### REMONSTRATE.

"Remonstrate" is defined as to present and urge reasons in opposition to an act, measure, or any course of proceeding, so that a notice to be served on a city council, stating that the undersigned remonstrates against the acceptance of a certain contract, is sufficient to constitute an appeal from the acceptance of the contract by the council. *Girvin v. Simon*, 59 Pac. 945, 946, 127 Cal. 491.

#### REMONSTRANCE.

A remonstrance or special petition, within the meaning of the liquor license law, is one "for or against a single or particular application." In re *Mercer County License Applications*, 3 Pa. Co. Ct. R. 43, 45.

#### REMOTE.

"Remote," as used in Tariff Act 1883, in enumerating wools of the first class as "wools of merino blood near or remote," means within the limit of merino blood requisite to characterize the wool as possessing merino qualities and adding to its value. *United States v. Midgley* (U. S.) 42 Fed. 668, 669.

All dominion has two causes, proximate and remote. The remote is the title which vests a right to the thing, and gives cause of action against the vendor who has not delivered the thing sold; and the proximate is the obtaining possession by delivery of the thing sold, which, without anything else, being preceded by the title, vests the right in the thing, which is the dominion. The consequence is that the right to the thing gives a personal action, and the right in the thing gives the right of action against any possessor. *Coles v. Perry*, 7 Tex. 109, 136.

#### REMOTE CAUSE.

"Remote cause is improbable cause." *Armour v. Golkowska*, 66 N. E. 1037, 1038, 202 Ill. 144.

It has been found impracticable to prescribe by abstract definition, applicable to all possible states of fact, what is a proximate and what a remote cause. *Cleveland*

*v. City of Bangor*, 32 Atl. 892, 896, 87 Me. 259, 47 Am. St. Rep. 326.

The remote cause of an injury is that cause of which some indefinite force merely took advantage to accomplish something not the probable or natural effect thereof. *Mallen v. Waldowski*, 67 N. E. 409, 410, 203 Ill. 87 (citing *Goodlander Mill Co. v. Standard Oil Co.*, 11 O. C. A. 253, 63 Fed. 400, 27 L. R. A. 583).

Remote cause "means that which may have happened and yet no injury have occurred, notwithstanding that no injury could have occurred if it had not happened." *Troy v. Cape Fear & Y. V. R. Co.*, 6 S. E. 77, 81, 99 N. C. 298, 6 Am. St. Rep. 521.

"Remote cause," in the law of negligence, does not mean remote in point of time, but merely in connection with the primary cause. To illustrate: A farmer along a line of railroad may open the fence maintained by the company for temporary purposes, and while so left open his cattle may stray on the company's track and receive injury by coming in contact with the company's trains without any fault of the company's servants. The direct cause of such injury would be the collision, and the remote cause in point of time would be the act of the farmer; but the remote cause in point of time becomes the proximate cause in producing the injury. *Maryland Steel Co. of Sparrows Point v. Marney*, 42 Atl. 60, 65, 88 Md. 482, 42 L. R. A. 842, 71 Am. St. Rep. 441.

A remote cause is one which is inconclusive in reasoning, because from it no certain conclusion can be legitimately drawn. In other words, a remote cause is a cause the connection between which and the effect is uncertain, vague, or indeterminate. Although the existence of the remote cause is necessary for the effect (for, unless there be a remote cause there can be no effect), still the existence of the remote cause does not necessarily imply the existence of the effect. The remote cause being given, the effect may or may not follow. It differs from a proximate cause, which is one in which is involved the idea of necessity. It is one the connection between which and the effect is plain and intelligible. It is one that can be used as a term by which a proposition can be demonstrated; that is, one that can be reasoned from conclusively. A proximate cause being given, the effect must follow. *Hoey v. Metropolitan St. Ry. Co.*, 74 N. Y. Supp. 1113, 1115, 70 App. Div. 60 (citing *Seifter v. Brooklyn Heights R. Co.*, 169 N. Y. 254, 62 N. E. 349; *Laidlaw v. Sage*, 52 N. E. 679, 158 N. Y. 73, 44 L. R. A. 216); *Marks v. Rochester Ry. Co.*, 58 N. Y. Supp. 210, 216, 41 App. Div. 66.

## REMOTE DAMAGES.

Consequential damages distinguished, see "Consequential Damages."

## REMOVABLE.

In St. 9 & 10 Vict. c. 36, § 1, providing that, where a wife or children have no other settlement than his own, they shall be removable when he is removable, and not removable when he is not removable, means when he is removable by law. When he is not removable has the same meaning, and could not relieve the accidental circumstances of a man having left the parish, so that his removal was a physical impossibility. *Reg. v. Inhabitants of St. Ebbe's*, 12 Q. B. 137, 141.

"Removable fastening," as used in an application for a patent consisting of a contrivance for attaching a metallic top to a lantern by a "removable fastening or spring catch," covers "every conceivable device applicable to lanterns and adapted to connect one edge of the lid with the top of the lantern or guard, or to disconnect it." *Adams v. Belaire Stamping Co.*, 12 Sup. Ct. 66, 141 U. S. 539, 35 L. Ed. 849.

## REMOVE—REMOVAL.

See "Actually Removing"; "Temporary Removal"; "Vexatious Removal."

The word "remove" means to move away from a position occupied; to displace, as to remove a building. *South v. Sinking Fund Com'rs*, 5 S. W. 567, 569, 86 Ky. 186 (citing *Webst. Dict.*).

The word "removed," as employed in Bankr. Act July 1, 1898, c. 541, § 3a, subd. 1, 30 Stat. 546 [U. S. Comp. St. 1901, p. 3422], providing that acts of bankruptcy shall consist in having removed property with intent to hinder creditors, whether taken by itself or viewed in the light of the context, clearly signifies an actual or physical change in the position or locality of the property constituting the subject of the removal. In *re Wilmington Hosiery Co.* (U. S.) 120 Fed. 180, 182.

A debtor who ships his property to consignees without the state for the purpose of raising funds against which he may draw for the payment of debts, which debts are due to persons other than the consignees, is liable to an attachment against his estate on the ground that he has removed his property without the state. *Crow v. Lemon & Gale Co.*, 11 South. 110, 111, 69 Miss. 799.

The words "ejected, expelled, put out, and removed," relating to trespass, may be satisfied under some circumstances by proof that the house was destroyed in the plaintiff's absence, and by their being prevented from returning to it and re-entering it, because finding it existing no longer as a habitable house, but not so where the pulling down and expelling was contemporaneous. *Perry v. Fitzhowe*, 8 Q. B. 757, 779.



It is practicable to remove a building intact, but that is not the only way. It may be removed, within the common understanding, by taking the material and reconstructing or rebuilding it at another locality. *Board of Education of Bath Tp. v. Townsend*, 59 N. E. 223, 224, 63 Ohio St. 514, 52 L. R. A. 868.

"Removal of the goods," as used in a bill of lading, providing that a shipowner is not to be liable for any claim, notice of which is not given before the "removal of the goods," does not necessarily or properly mean the removal from the ship, but removal from the place of deposit of the goods upon the dock or wharf when freed from the ship's tackle. *The St. Hubert (U. S.)* 107 Fed. 727, 734, 46 C. C. A. 603.

#### As change of residence.

"Removal," as used in act of incorporation for certain trust property, providing that, in case of death or removal of any member or members of such corporation, the surviving or removing members may elect others to fill the vacancy, the removal meant was a change of residence, so as to render it inconvenient for the trustees to act, and did not confer the power of amotion on the board. *Fuller v. Trustees of Plainfield Academic School*, 6 Conn. 532, 545.

The word "removal," as used in St. 1785, c. 75, § 4, providing that, in case of the removal of a constable, the office may be supplied by the choice of another, means the removal from the town, not his removal from office by any act of the town. *Inhabitants of Barre v. Inhabitants of Greenwich*, 18 Mass. (1 Pick.) 129, 134.

#### Same—Permanent absence.

"Removal," as used in a trust deed, providing that the title to the premises shall vest in the successor in trust only in case of the trustee's death, removal from the county, permanent inability, or refusal to act, cannot be construed to include the temporary imprisonment of the trustee in a foreign country. The word "removal" contemplates something more. It signifies a permanent absence, or a change of domicile. *Ware v. Schintz*, 60 N. E. 67, 69, 190 Ill. 189.

"Removal," as used in a deed of trust, providing for a successor of a trustee in the event of his death, resignation, or removal from the county, contemplates a change of domicile. The absence of a party from his home, for temporary purposes of business or pleasure, is not a removal. *Barstow v. Stone*, 52 Pac. 48, 51, 10 Colo. App. 396.

The word "removal" means ceasing to be a resident of, as used in Const. art. 3, § 20, providing that all offices created by the Constitution shall become vacant by the death of the incumbent, by removal from the

state, etc. *Prather v. Hart*, 24 N. W. 282, 283, 17 Neb. 598.

To an ordinary mind the term "removal," when applied to the occupant of a dwelling house, does not convey the same, but a widely different, meaning than absence, and according to the common understanding persons leaving their houses on visits, excursions, or other temporary occasions do not remove from or cease to occupy them. *Stone v. Granite State Fire Ins. Co.*, 45 Atl. 235, 236, 69 N. H. 438.

The removal of property, within the meaning of an attachment act authorizing an attachment when the debtor shall be about to remove his property, includes only a permanent removal, when the removal is without any injurious intent or effect in fact; and hence sending a slave across the state line on an errand, expecting his return, is not such a removal of property as that intended by the statute. Nor, for a like reason, if a steamboat employed in transportation between a port in this state and a foreign port is about to pass the local jurisdictional border in that service, can such a purpose of temporary removal subject the boat to attachment, without regard to the animus or the actual effect so far as creditors may be concerned. *Montgomery v. Tilley*, 40 Ky. (1 B. Mon.) 155, 158.

The removal of property which is the ground of attachment does not characterize the shipment of products of an enterprise out of the state in the due course of business, where the removal is not permanent, and the proceeds are brought back within the state. The statute does not mean to designate as cause for attachment every transitory or temporary removal. *Clinch River Mineral Co. v. Harrison*, 21 S. E. 660, 663, 91 Va. 122.

#### Same—Death.

"Removal from the state," as used in Gen. St. c. 30, § 73, providing that sureties of a sheriff may be prosecuted for official misconduct, neglect, or default of the sheriff by an action of debt or scire facias, brought directly upon the recognizance without first bringing a suit against the sheriff, whenever service of process cannot be made on a sheriff by reason of his "removal from the state," etc., means "the change of the domicile of the sheriff, while in life, from this to some other state. The departure of one's soul from his body, which takes place at death, is not a removal of such person from the state. The person consists of both soul and body, and the removal of such person means the removal of the soul and body in life, and not the withdrawal of the former from the latter merely." *Tute v. James*, 46 Vt. 60, 63.

#### As discharge from office.

The term "removal" means a discharge, the act of removing from office, or putting an

end to an employment. *Lethbridge v. City of New York*, 15 N. Y. Supp. 562, 59 Super. Ct. (27 Jones & S.) 486.

Suspension for a specified term without pay is a removal from office pro tanto, within the spirit and meaning of P. L. 1885, p. 63, prohibiting the removal from office of police officers for any other cause than incapacity, misconduct, etc. *Carey v. Board of Police of City of Plainfield*, 21 Atl. 492, 493, 53 N. J. Law (24 Vroom) 311.

The retirement of a fireman on pension is not a "removal," within the meaning of Laws 1899, c. 370, § 21, prohibiting the removal of honorably discharged soldiers from public position or employment, except for incompetency or misconduct after notice and hearing. *People v. Scannell*, 65 N. Y. Supp. 832, 833, 53 App. Div. 161.

The "removal" of a priest of the Catholic Church means the relieving of such priest from the charge of a church. This power is exercised according to the bishop's judgment, and may be so exercised without supposition of wrong. The priest is left in the same position as all other priests who are out of employment, and has recourse to the bishop's superior. *Stack v. O'Hara*, 98 Pa. 213, 232.

#### **As destroy.**

Rev. St. § 3293, as amended by Act Cong. May 28, 1880, c. 108, § 4, 21 Stat. 145 [U. S. Comp. St. 1901, p. 2133], requiring distillers to give a bond conditioned to pay the tax on spirits stored in distillery warehouses before they shall be "removed from the warehouse," and within three years from the date of entry, cannot be construed to include the destruction of such spirits by fire. "Remove" is synonymous with or equivalent to "withdraw." The verb "to remove" bears in common usage two meanings—to cause a thing to change place, or to cause it to cease to exist; and it is used in the first meaning in the statute, rather than in the second, which would include destruction by fire.—*United States v. Peace* (U. S.) 48 Fed. 714.

#### **As leave.**

"Remove from the state," as used in Code Prac. § 214, which requires the creditor to swear that he "verily believes that the defendant is about to remove from the state," in order that bail may be required of such creditor, is synonymous with "leave the state," as used in section 212 of the Code, which authorizes bail to be required when a debtor is about to leave the state. *Florance v. Camp*, 5 La. 280, 281.

#### **Move synonymous.**

Act Feb. 1, 1879, makes it unlawful to "transport or move" cotton in the seed during the nighttime, etc. The indictment un-

der such act used the words "transport or remove." Held, that the words "move" and "remove," as so used, were equivalent in meaning. *Davis v. State*, 68 Ala. 58, 44 Am. Rep. 128.

#### **As place or put out of reach.**

The word "remove," as used in a charge in an action of replevin that, if the jury found the fact to be that there was actually a purpose to remove property beyond the reach of creditors, it would have a bearing upon the motive of the transaction, means the placing or putting of the property out of the reach of the creditors by a pretended transfer.—*Nugent v. Goldsmith*, 28 N. W. 778, 780, 59 Mich. 593.

#### **Remove and sell.**

A chattel mortgage, authorizing the mortgagees, on a breach, to "remove and sell" the property, gives the mortgagees the right to take possession; and hence they may maintain an action for the value of the property, where the same has been unlawfully taken and converted.—*Sandager v. Northern Pac. Elevator Co.*, 48 N. W. 438, 439, 2 N. D. 3.

#### **Remove gate.**

"Remove," as used in Gen. St. c. 24, § 7, imposing a penalty on any person who shall "willfully remove any gate" or bar across pent roads, should be construed to include willfully opening and leaving open such gate. The gate, when shut, was a barrier restraining the cattle in the pasture from the crops in the field. When opened and left open by the defendant, it was as effectually removed as such barrier as though it had been taken from the hinges and carried away, or thrown on the ground. *French v. Holt*, 53 Vt. 364, 367.

#### **Remove incumbrance.**

The phrase "incumbrance be removed," as used in a contract providing that a debt for land should not be paid until a certain incumbrance should be removed, means that the incumbrance should be removed in a manner known to the law, by a deed from the mortgagee, if the incumbrance was a mortgage, or by a discharge on the record according to the statute. *Hoyt v. Swift*, 13 Vt. 129, 131, 37 Am. Dec. 586.

#### **Remove from homestead.**

"Remove," as used in Gen. St. 1878, c. 68, § 8, providing that the "owner of a homestead may remove therefrom," and such removal shall not render such homestead liable or subject to forced sale on execution against the owner, means that the owner may remove from the homestead, if with a temporary purpose and with an intention to return. It does not mean that he may permanently remove from a homestead and ac-

quire another, and still retain the former as exempt. This, in effect, would be saying that a man may have two homesteads at the same time. *Donaldson v. Lamprey*, 11 N. W. 119, 121, 29 Minn. 18.

Gen. St. 1878, c. 68, § 69, providing that the right to a homestead shall cease on the "removal therefrom" of the claimant, means a cessation of actual occupancy and residence on the property as a home or dwelling place, and includes a removal accompanied with an intention to return and resume the occupancy at some future time. *Quehl v. Peterson*, 49 N. W. 390, 391, 47 Minn. 13.

"Removal therefrom," as used in the homestead exemption laws in reference to the effect of a removal therefrom, means "a cessation of such actual occupancy and residence, though accompanied with an intention to return and resume such occupancy." *Quehl v. Peterson*, 49 N. W. 390, 391, 47 Minn. 13.

#### Remove from the land.

2 Gav. & H. St. p. 462, § 14, which declares that any person who shall cut down or remove from any land belonging to another, without license so to do from common authority, any tree, stone, timber, or other valuable article, shall be deemed guilty of a trespass, implies that the article removed should in some sense pertain to the land itself, and hence the statute would not include within its meaning the removal of a wagon, or other manufactured article, or live stock. An allegation, in an indictment under the section above referred to, that certain gravel was removed from the land, would imply a severance therefrom, as gravel is an article pertaining to land and ordinarily forms a part of it. *Bates v. State*, 31 Ind. 72, 73, 75.

#### Removal of a cause.

The phrase "removal of a cause," as used in Rev. St. 1899, p. 2207, § 13, providing for the removal of a criminal trial from Kansas City to the city of Independence on affidavit that defendant cannot get a fair trial because of the prejudice in the minds of the people in the city where the suit is pending, means a change of venue, within the statutory prohibition against a second change of venue. *State ex rel. Vickery v. Wofford*, 24 S. W. 764, 765, 119 Mo. 375.

Change of venue and removal of causes in statutes authorizing the transfer of causes are interchangeable and of the same significance. Change of venue, strictly speaking, means a change of the place of trial to another county; but it is sometimes used to denote the transfer of the cause to another court or judge within the county or district in which it is pending. Thus "removal of a cause," within the meaning of Act April 14, 1834, authorizing either party in a suit

brought by or against canal companies and railroad companies to remove the same to the court of another adjacent county, and the phrase "change of venue" in Act March 30, 1875, entitled "An act relating to and authorizing change of venue in civil cases," have the same meaning. *Felts v. Delaware, L. & W. R. Co.*, 45 Atl. 493, 494, 195 Pa. 21.

#### Removal of the record.

The term "removal of the record" means removal of the cause. Under the old English practice each case was contained in a record by itself, and the very record was sent up for further proceedings to the other court upon certiorari, and there remained nothing in the first court to proceed upon. With us it is not entirely so, since much of the record is kept in dockets, and only copies of them are removed. But this is only a formal difference, since the term "removal of the record" means removal of the cause. *Hughes v. Mine Hill & S. H. R. Co.*, 30 Pa. 517, 519.

#### Removed for sale.

Cigars and tobacco, removed from a tobacco manufactory to a salesroom in a portion of the same building as the manufactory, having a counter at which goods are sold at retail, are not "sold or removed for sale," within the meaning of that expression as used in 13 Stat. 240, providing that all goods or objects on which taxes are imposed by the provisions of the law which shall be found in the custody of any person for the purpose of being "sold or removed for sale" in fraud of the internal revenue acts shall be forfeited to the United States. *Lillienthal v. United States*, 97 U. S. 237, 263, 24 L. Ed. 901.

## RENDER.

See "Duly Rendered."

Rendered account, see "Account Rendered."

The word "render" sometimes means "bestow or provide; furnish; give in answer to requirement of duty or demand." *Dayton v. Ewart*, 72 Pac. 420, 422, 28 Mont. 153, 98 Am. St. Rep. 549 (citing Stand. Dict.).

The word "render" means to furnish; to state; to deliver; as to render an account, etc. As used in a clause in a policy providing that, in case of loss, the insured shall render a statement to the company, it cannot be construed to mean shall render the statements to the company at its home office, thus giving the word a different signification from "forward" or "mail," and so as to require an actual delivery of the proofs to the company at its home office within the specified time; but such provision is complied with where proofs are mailed to the company within the stipulated time, though they are

not received by it until after such period. *Manufacturers' & Merchants' Ins. Co. v. Zeitinger*, 48 N. E. 179, 181, 168 Ill. 286, 61 Am. St. Rep. 105.

—Render," as used in a fire insurance policy providing that the assured should render a statement of loss within 60 days thereafter, means to give, present, state, or deliver. When the insurer does not receive such statement until after the time limited, it is not rendered, though insured mailed it, before the time had expired. *Peabody v. Satterlee*, 59 N. E. 818, 820, 166 N. Y. 174, 52 L. R. A. 956.

The word "rendered," as used in Rev. St. c. 70, § 2, requiring the account of the assignee under an assignment for the benefit of creditors to be rendered to the judge of probate within six months, does not require it to be allowed within that time. *Thomas v. Clark*, 65 Me. 296, 300.

"Rendered," as used in an instrument in writing agreeing to pay a certain person a sum of money on the sale of a mine for services rendered in the sale of such mine, without any qualifying words, necessarily imports that the services had been performed. *Gabb v. King*, 38 Cal. 143, 144.

## RENDITION OF JUDGMENT.

See "From the Rendition of Judgment."

"Rendered," as used by discriminating law writers in speaking of a judgment as being rendered, has reference only to judgments which are not obtained by confession. *Schuster v. Rader*, 22 Pac. 505, 506, 13 Colo. 329.

"Rendered," as used in Code Proc. Colo. c. 23, § 272, giving a defendant in ejectment the right of a new trial upon application therefor and payment of costs within a limited time after judgment is rendered, means rendered in the trial court, rather than the judgment which happens to be rendered on writ of error. *Iron Silver Min. Co. v. Mike & Starr Gold & Silver Min. Co. (U. S.)* 56 Fed. 956, 957, 6 C. C. A. 180.

### As announcement of decision.

A judgment is said to be "rendered" at the time the judgment was in fact pronounced; and a statute providing that the judgment of the justice's court shall be a lien on real property from the time of filing the transcript with the clerk of the district court, and the lien shall extend for five years from the rendition of the judgment, does not make the lien extend five years from the date of the filing of such transcript, nor make the filing of such transcript a judgment of the district court. *Farmers' State Bank v. Bales*, 90 N. W. 945, 946, 64 Neb. 870.

The "rendition of a judgment" is the judicial act of the court in pronouncing the sentence of the law upon the facts in controversy as ascertained by the pleadings and the verdict. *Columbus Waterworks Co. v. City of Columbus*, 26 Pac. 1046, 1049, 46 Kan. 666; *Winstead v. Evans (Tex.)* 33 S. W. 580; *Burns v. Skelton*, 68 S. W. 527, 29 Tex. Civ. App. 453.

Within the meaning of a statute providing that a writ of error shall be brought within two years after the rendering of the judgment or final determination of the court, the import of the expression "rendering of such judgment" is the annunciation or declaring of the decision of the court indicated by the rule for judgment, and not the entry of the judgment upon the record. *Fleet v. Youngs (N. Y.)* 11 Wend. 522, 527, 528.

"Rendered," as used in Code, § 462, relating to a judgment rendered by a justice of the peace, refers to the making up and announcing of the judgment, and not to the clerical act of reducing it to writing. *Ryals v. McArthur*, 17 S. E. 350, 92 Ga. 378.

"Rendering judgment," as used in a statute requiring a writ of error to be brought within two years after rendering judgment, in its more obvious and natural import means the announcing or declaring of the decision of the court, indicated by the rule for judgment. *Fleet v. Youngs (N. Y.)* 11 Wend. 522, 524.

The act, after the trial and final submission of a case, of pronouncing judgment in language which fully determines the rights of the persons to the action and leaves nothing more to be done except the entry of the judgment by the clerk, constitutes the rendition of the judgment. *State ex rel. Green v. Henderson*, 64 S. W. 138, 141, 164 Mo. 347, 86 Am. St. Rep. 618.

"Rendition of the judgment," as used in Code Civ. Proc. § 939, subd. 1, providing that an exception to a decision or verdict on the ground that it is not supported by the evidence cannot be reviewed on appeal, unless the appeal is taken within 60 days after the rendition of the judgment, means its announcement by the court and not its entry in the judgment book. A judgment is rendered when it is announced by the court. *Schurtz v. Romer*, 22 Pac. 657, 81 Cal. 244.

When a referee signs his report and notifies the parties thereof, though the same is not yet filed, the report is "rendered," within the meaning of Code Civ. Proc. § 1023, providing that before the decision or report is rendered either party may submit a statement of facts which he deems established by the evidence and of the rulings and questions of law which he desires the court or referee to make. The decision is rendered when the judgment of the referee, embodied

in a report duly signed, is announced. *Craig v. Craig*, 21 N. Y. Supp. 241, 242, 68 Hun, 452.

#### **Docketed distinguished.**

A judgment of a justice of the peace is not rendered in the county court, when it is docketed there, within the meaning of Code Civ. Proc. § 382, providing that an action on a judgment or decree rendered in a court not of record shall be commenced within six years, and the cause of action in such a case shall be deemed to have accrued when final judgment was rendered. Such a meaning of the word "rendered" is certainly not according to the common understanding. Ordinarily any one would understand that a judgment which had been recovered in a justice's court and subsequently docketed in the county court was in no sense rendered in the county court, and there is no countenance for such a meaning to be found in any statute. The word "rendered," as applied to judgments, is always used in the sense of judgments given by judicial action. *Diefenbach v. Roch*, 20 N. E. 560, 561. 112 N. Y. 621, 2 L. R. A. 829.

#### **As entered.**

"Rendition," as used in Code 1873, § 2883, declaring that a judgment is a lien on lands in the county wherein it is rendered from the date of such rendition, is the act of rendering. To render is to make up; to furnish; to state; to deliver—as to render a judgment. *Webst. Dict.* A judgment is not rendered, so as to be effective and capable of enforcement as a lien, until it is made up, furnished, stated, or delivered in the form and manner as required by statute. It must be entered of record in the books prescribed by statute. The date of rendition of the judgment is when it is completely rendered; i. e., entered on the record books prescribed therefor. *Aetna Life Ins. Co. v. Hesser*, 42 N. W. 325, 328, 77 Iowa, 381, 4 L. R. A. 122, 14 Am. St. Rep. 297.

"Rendition of judgment," as used in a statute relative to the time within which an appeal may be taken, and allowing it within a certain time from the rendition of judgment, means its announcement by the clerk and entry on the minutes by the clerk, or the filing of the findings and order for judgment. *Wood v. Etiwanda Water Co.*, 54 Pac. 726, 728, 122 Cal. 152.

#### **Entered distinguished.**

"Rendition" and "entry," in reference to judgments, are used in different senses, and express the idea that there is a rendition of the judgment before it is actually entered in the judgment book. In *re Cook's Estate*, 19 Pac. 431, 433, 77 Cal. 220, 1 L. R. A. 567, 11 Am. St. Rep. 294.

The "rendition" of a judgment is a purely judicial act of the court alone, and must

be made before the entry thereof. *State v. Brown*, 72 Pac. 86, 87, 31 Wash. 397, 62 L. R. A. 974.

"The rendition of a judgment" is distinct from the entry of a judgment, which is a ministerial act, which consists in spreading upon the record a statement of the final conclusion reached by the court in the matter, thus furnishing external and incontestable evidence of the sentence given, and designed to stand as a perpetual memorial of its action. *Winstead v. Evans (Tex.)* 33 S. W. 580 (citing 1 Black, *Judgm.* § 106).

The rendition of a judgment is the act of the court in pronouncing its judgment, and differs from the entry of a judgment, in that the latter act required its actual entry in the judgment book of the court. *Gray v. Palmer*, 28 Cal. 416, 418; *McLaughlin v. Doherty*, 54 Cal. 519; In *re Cook's Estate*, 19 Pac. 431, 433, 77 Cal. 220, 1 L. R. A. 567, 11 Am. St. Rep. 267 (cited in *Schurtz v. Romer*, 22 Pac. 657, 81 Cal. 244).

The rendition of the judgment is a judicial act, and differs from the entry thereof, which is the ministerial act of making a record of the judgment. *Martin v. Pifer*, 96 Ind. 245, 248.

"The rendition of a judgment and the entry of such judgment are different and distinct each from the other. The former is the act of the court, while the latter is the act of the clerk of the court." *Vigo County Com'rs v. City of Terre Haute*, 46 N. E. 350, 351, 147 Ind. 134 (quoting *Smith v. State*, 71 Ind. 250, citing, also, *Chamberlain v. City of Evansville*, 77 Ind. 542, 548, and following *Chissom v. Barbour*, 100 Ind. 1, and *Mayer v. Haggerty*, 138 Ind. 628, 38 N. E. 42).

"Rendition of the judgment," as used in Code Civ. Proc. § 939, providing that an exception to the decision or verdict, because not supported by the evidence, cannot be reviewed unless the appeal is taken within 60 days after "the rendition of the judgment," does not mean the same as "entry of the judgment," but means either the announcement from the bench entered in the minutes, or the filing of findings, if there are findings, or both. In *re Rose's Estate (Cal.)* 20 Pac. 712, 713.

It is true that the two words "rendered" and "entered," in their strict sense, bear a clear difference in meaning and intent. Giving to these words such signification, a judgment may be said to be rendered by a declaration from the bench; but to enter it requires the act of the clerk in writing it upon the journal. It is true, also, that for some purposes a judgment may be regarded as rendered so soon as it is pronounced. In order to create a judgment lien upon the lands of a judgment debtor, as of the first day of the term at which a judgment against

such debtor is rendered, under Rev. St. § 5375, providing that such lands and tenements within the county where the judgment is entered shall be bound for the satisfaction thereof from the first day of the term at which judgment is rendered, the judgment must not only be pronounced during the term, but an entry of such judgment must be made on the journal during the term. *Coe v. Erb*, 52 N. E. 640, 641, 59 Ohio St. 259, 69 Am. St. Rep. 764.

#### As ordered.

A judgment is rendered when the court makes an order therefor. *State v. Biesman*, 29 Pac. 534, 536, 12 Mont. 11.

"Rendered," as used in a complaint alleging that a judgment was rendered, is not equivalent to "duly given or made," as used in Code Civ. Proc. § 103, requiring the allegation to be that the judgment was duly given or made. A judgment is duly rendered when it is duly pronounced and ordered to be entered, but a judgment duly made or given is a complete judgment properly entered in the judgment book, so that it may be pleaded in bar of another action. *Harmon v. Comstock Horse & Cattle Co.*, 23 Pac. 470, 471, 9 Mont. 243.

#### Taxation of costs required.

A judgment in ejectment is not rendered, within the meaning of Rev. St. § 3092, requiring the application for a new trial to be made within one year from the rendition of the judgment, until the costs are taxed and inserted therein. *Haseltine v. Simpson*, 21 N. W. 299, 300, 61 Wis. 427.

## RENEW.

"To renew," in its popular sense, is to refresh, revive, or rehabilitate an expiring or declining subject; but it is not appropriate to describe the making of a new contract or the creation of a new existence. *Carter v. Brooklyn Life Ins. Co.*, 110 N. Y. 15, 22, 17 N. E. 396, 399 (citing *Webst. Dict.*; *Worc. Dict.*).

An act providing that building and loan associations might bring and maintain suits after the expiration of their charter, for the sole purpose of enabling them to wind up their affairs, is not in violation of article 1, § 25, of the Constitution, declaring that no law shall "create, renew, or extend the charter of more than one corporation." The act neither created charters, nor did it renew or extend the time of its existence, within the meaning of the Constitution. *Cooper v. Oriental Savings & Loan Ass'n*, 100 Pa. 402, 406.

Though it is held that a policy of insurance requiring the payment of annual pre-

miums is renewed by the payment of each annual premium, a statute requiring notice to the insured as a condition precedent to the forfeiture of the policy for nonpayment of the premium, which is in force at the time of the issuance of the policy, but after its payment, does not cease to be applicable and require the notice, by the payment of subsequent premiums, on the ground that such payment constitutes a renewal of the policy and is in effect a new contract, so as to render the statute inapplicable. *Germania Life Ins. Co. v. Peetz (Tex.)* 47 S. W. 687, 689.

Within the meaning of Laws 1876, c. 341, providing that "no life insurance company doing business in the state of New York shall have power to declare forfeited or lapsed any policy thereafter issued or renewed, by reason of nonpayment of any annual premiums or interest, unless a notice in writing," etc., was sent to the policy holder, the payment of each annual premium constituted a renewal of the policy; and where a policy provided that it should continue for the term of the natural life of the insured, on condition that he should pay the annual premiums as they become due, and that a failure to pay such premiums in any year should render the policy void, but, when paid, it continued, by force of such payment, the policy in existence for the period of another year, this process each year revived or renewed the policy as it approached the period of its agreed termination. It is not according to the popular notion of the meaning of the word "renewal" that it can take place only after the death or expiration of the subject to which it is applied. Thus, to renew a note, a lease, or a contract, it is not essential to wait until they have respectively expired; for after that time it would be practically impossible to renew them. A new note or lease may be made, or contract created; but they would have force and effect from the new creation, and not from the original agreement. To renew in its popular sense is to refresh, revive, or rehabilitate an expiring or declining subject, but is not appropriate to describe the making of a new contract or the creation of a new existence, and the claim made by the insurance company that a policy could not be said to have been renewed, within the meaning of the act, unless it had become forfeited or lapsed, and afterwards restored or reinstated by the company, was not in accordance with the meaning of the act. *Carter v. Brooklyn Life Ins. Co.*, 110 N. Y. 15, 22, 17 N. E. 396, 398.

#### As establish for another period.

The word "renewed," or "renewal," as applied to promissory notes in commercial and legal parlance, means something more than the substitution of another obligation for the old one. It means to re-establish a

particular contract for another period of time, to restore to its former conditions an obligation on which the time of payment has been extended. *Kedey v. Petty*, 54 N. E. 798, 800, 153 Ind. 179.

The word "renewed," as indorsed on a note, may be considered as meaning received the interest for a renewal, and may be properly regarded as an agreement to consider the note to be the same as if made in the same terms anew from that date. *Lime Rock Bank v. Mallett*, 34 Me. 547, 549, 56 Am. Dec. 673.

A renewal of a patent renovates a patent which has become void, and restores it to the same condition in which it was when it became void and for the same period of duration. An extension differs from this. It operates upon the franchise at the expiration of the 14 years, and extends it 7 years. *Wilson v. Rousseau* (U. S.) 30 Fed. Cas. 162, 168.

#### **As extended.**

Where a bill of exchange drawn November 28, 1836, payable 42 months after date, was accepted on the condition of its being renewed until November 28, 1844, payable without interest, the word "renewed" meant "extended," and intended nothing more than an extension of time, and the acceptance was good. *Russell v. Phillips*, 14 Q. B. 891, 901.

The indorsement of the words "Renewed for three months" on notes by the payee at the time when they became due does not make such words a part of the original contract, but at most can only be construed as a collateral contract not to sue until the time for which they are to be renewed. Such an indorsement constitutes no legal defense to an action commenced on the note before the expiration of the three months. *Central Bank v. Willard*, 34 Mass. (17 Pick.) 150, 153, 28 Am. Dec. 284.

#### **As substitution of new obligation.**

"Renew" means specifically to substitute for an old obligation a new one of the same nature. Thus, in a contract providing that plaintiff shall procure and pay for all insurance for the period of three years, and shall from time to time as the same expire renew all the policies, means to renew the policies for the same term as the original policies. *Tannenbaum v. Bloomingdale*, 58 N. Y. Supp. 235, 237, 27 Misc. Rep. 532.

#### **New promise imported.**

A memorandum on the back of a promissory note, stating that "I hereby renew the within note," means something more than the words, "I admit the within note to be due." It imports a new promise to pay the old note. *Daggett v. Daggett*, 124 Mass. 149, 151.

#### **As repair.**

A contract by which the plaintiff agreed to "repair and renew," so far as necessary, the gutter of a mill, only meant that the plaintiff was to make such repairs and renewals as was necessary in order that the existing gutter should do all that it was capable of doing when in good condition, according to its original construction, and did not require of the plaintiff that he build a new gutter of a different construction, even though the original plan was defective. *Dwight v. Ludlow Mfg. Co.*, 128 Mass. 280, 282.

#### **Same conditions imported.**

Where plaintiff's last insurance was had with the defendant insurance company through the same agent, the word "renew," in an oral contract with such agent to renew the insurance, sufficiently designates the company, as well as the property to be insured, and the terms of the policy. *Abel v. Phoenix Ins. Co.*, 62 N. Y. Supp. 218, 219, 47 App. Div. 81.

A clause in a lease giving the lessee the "first privilege of a renewal" gives the prior right to a lease for the same term as the first lease, and upon terms the same, providing the property is relet at the expiration of the first lease. *Holloway v. Schmidt*, 67 N. Y. Supp. 169, 33 Misc. Rep. 747.

Each renewal of a policy of insurance is a new contract, subject to the local laws in force at the time of the renewal. *Jenkins v. Covenant Mut. Life Ins. Co.*, 71 S. W. 688, 690, 171 Mo. 375 (citing *Brady v. Northwestern Insurance Co.*, 11 Mich. 425; *Hartford Fire Ins. Co. v. Walsh*, 54 Ill. 164, 5 Am. Rep. 115).

### **RENEWAL**

"Renewals of licenses," as used in P. L. 1891, p. 12, providing that under a license to sell liquors or keep a victualing house, which has been once granted, it should not be requisite, in order to give the board of excise jurisdiction to grant renewals of such licenses, that a new application recommended by freeholders should be first signed and presented to such board, does not indicate a purpose to permit more than one renewal, though, if the phrase were "renewal of a license," it might indicate such a purpose. *Tross v. Board of Excise of City of Elizabeth*, 35 Atl. 646, 59 N. J. Law, 97.

#### **As confirmation of infant's contract.**

"Renewal," is the proper designation of the conduct of an infant or a person of unsound mind in reference to the confirmation of a contract. *Minnich v. Darling*, 36 N. E. 173, 175, 8 Ind. App. 539.

**As extension.**

A renewal of an indemnity bond given to insure a merchant against loss through the insolvency of debtors would be simply an extension of it, with all of its terms and conditions. *Strouse v. American Credit Indemnity Co.*, 46 Atl. 328, 333, 91 Md. 244.

The word "renewal," as used in a lease providing that the lessee has the privilege of a renewal for a certain number of years more from the expiration of the lease, implies nothing more than the extension of the term. *Insurance & Law Bldg. Co. v. National Bank of Missouri*, 71 Mo. 58, 60.

"Renewal," as used in an agreement by a patentee with a person that in case of the renewal of the patent, after the expiration of the patent then existing, such person should have a certain interest in the rights secured by the further or renewed letters patent, refers to and provides for an extension of the patent under the general patent law. *Pitts v. Hall* (U. S.) 19 Fed. Cas. 758, 759.

"Renewals," as contained in a contract executed by a patentee transferring the exclusive right under his patent for the unexpired term of all "patents or renewals of patents owned by him or in which he may have an interest, issued or to be issued," is synonymous with "extensions," and carries with it the right to extensions of such patents, including extensions of patents issued to the patentee. *Goodyear v. Cary* (U. S.) 10 Fed. Cas. 649.

The renewal of a negotiable bill or note is regarded simply as a prolongation of the original contract. *Koehler v. Hussey* (Ky.) 57 S. W. 241, 244.

**As prevention of forfeiture of insurance.**

The office of a "renewal," as it is termed, of a life policy, is to prevent discontinuance or forfeiture. *Heusser v. Continental Life Ins. Co.* (U. S.) 20 Fed. 222, 225.

**As payment.**

The general rule is that the renewal of notes does not amount to payment. *Savings Bank of San Diego County v. Central Market Co.*, 122 Cal. 28, 54 Pac. 273. The presumption is that they were not so taken. *Sather Banking Co. v. Arthur R. Briggs Co.*, 72 Pac. 352, 355, 138 Cal. 724.

**Proximate succession.**

Where a mortgage was given to secure the payment of certain promissory notes made by the mortgagee for the accommodation of the mortgagor, and the renewals of those notes from time to time until the whole should be finally paid, it was held that it was not necessary, in order to constitute notes subsequently issued renewals of such

original notes, that they should have been issued for the same amounts and that each successive note should have been applied to take up its immediate predecessor. The court said "renew," and, of course, "renewal," is not a word of art. It has no legal or technical signification. "Renew," says Webster, "is to grant a new loan on a new note for the amount of a former one; renewal, a loan on a new note given." This applies clearly to the relation of creditor and debtor, and may call for a strict construction when the debtor claims the benefit of an agreement which is to delay the person to whom he is indebted. This is clearly not the meaning of the word when applied to the present case, where this relation did not exist, and where the transaction is simply a reloan of the name. This case was a continuing loan of credit through a series of years, forming but one transaction, of course, secured by the mortgage, which was given for this very object. *Gault v. McGrath*, 32 Pa. (8 Casey) 392, 397, 398.

**As re-establishment of contract.**

The word "renewed" or "renewal," as applied to promissory notes, in commercial and legal parlance means something more than the substitution of another obligation for the old one. It means to re-establish a particular contract for another period of time, to restore to its former conditions an obligation on which the time of payment has been extended. *Kedey v. Petty*, 54 N. E. 798, 800, 153 Ind. 179.

**New instrument required.**

"Renewal," as used in a lease giving the privilege of renewal, means that a new lease must be executed; and hence an extension of the lease without a new lease being given does not comply with the provision. *Kollock v. Scribner*, 73 N. W. 776, 779, 98 Wis. 104.

A "renewal" is the substitution of a new right or obligation for another of the same nature; the word being not a word of art, nor having any legal or technical signification. Another definition is that it is a change of something old for something new. *Sponhaur v. Malloy*, 52 N. E. 245, 247, 21 Ind. App. 287.

**RENOUNCE.**

"Waive" and "renounce," as used in a lease whereby the lessee waives and renounces all claim to title of any kind, other than the leasehold interest created in the lease, are not words of conveyance, and the lessee is not thereby estopped from claiming any interest which he may have had in the premises. *Davis v. McGrew*, 23 Pac. 41, 42, 82 Cal. 135.



## RENOVATED BUTTER.

The term "renovated butter," as used in an act relating to oleomargarine, is defined to mean butter which has been subjected to any process by which it is melted, clarified, or refined, and made to resemble genuine butter, always excepting adulterated butter. Supp. U. S. Comp. St. 1903, p. 267.

## RENT.

See "Ancient Rents"; "Certain Rent"; "Fee Farm Rent"; "Grain Rent"; "Ground Rent"; "Net Rent and Profits"; "Water Rents."

Rents or otherwise, see "Otherwise."

Rent to become due, see "Become Due."

Rent is a compensation paid for real estate. *Linton v. Lucy Cobb Institute*, 45 S. E. 53, 55, 117 Ga. 678.

"Rents" is a term which is peculiarly and fitly applicable to income to be derived only from real estate. *Lombard v. Boyden*, 87 Mass. (5 Allen) 249, 254.

Rent is the price agreed to be paid for land. *Bledsoe v. Nixon*, 60 N. C. 89, 91.

Rent is a corporeal hereditament. It is certain profit issuing yearly out of lands and tenements. *Brown v. Brown*, 33 N. J. Eq. (6 Stew.) 650, 659.

Rent is a species of incorporeal hereditament. It is defined to be a certain profit issuing yearly out of lands and tenements corporeal. It issues out of the thing granted, and is no part of the thing or land itself. It is collateral to a corporeal hereditament, and a thing unconnected with and independent of the possession or enjoyment of any real or corporeal property. *Payn v. Beal* (N. Y.) 4 Denio, 405, 412.

Rent is a right to profit, usually, though not necessarily, money; for it frequently consists of a part of the products of the land, labor, etc. It is the compensation, either in money, provisions, chattels, or labor, which is received by the owner of the soil, or the person entitled to the possession of the premises leased, for the use and occupation thereof. *Fisk v. Brayman*, 42 Atl. 878, 880, 21 R. I. 195.

"It is well settled as a general rule of law that the devise of the rents, issues, and profits of land is equivalent to a devise of the land itself." In *re France's Estate*, 75 Pa. (25 P. F. Smith) 220, 224.

Rent is a profit in money, goods, or labor, issuing out of lands and tenements, in retribution for the use. *Rummel v. New York, L. & W. Ry. Co.*, 9 N. Y. Supp. 404, 407 (citing 3 Kent, Comm. [12th Ed.] 460); *Thorn v. De Breteuil*, 83 N. Y. Supp. 849, 856, 86

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App. Div. 405; *Gugel v. Isaacs*, 21 App. Div. 503, 506, 48 N. Y. Supp. 594.

A rent is a compensation paid for the use of land. It need not be money. Any chattels or products of the soil serve the purpose equally as well. *Clarke v. Cobb*, 121 Cal. 595, 600, 54 Pac. 74; *Bloodworth v. Stevens*, 51 Miss. 475, 480.

The term "rent" is used in different senses. In its largest sense it means all the profit issuing yearly out of lands in return for their use. *Schuricht v. Broadwell*, 4 Mo. App. 160, 161.

Rent is a sum of money or other consideration issuing yearly out of lands and tenements. It must be a profit, but it is not necessary that it should be money; and the profit must be certain or capable of being reduced to a certainty. *Parsell v. Stryker*, 41 N. Y. 480, 483.

"Rent" is defined to be a certain profit issuing yearly out of lands, and is a return to the landlord for their own use. Where there is no covenant to pay at any particular time, the end of the year is the period which the law assigns for the annual reditus to the landlord. *Boyd v. McCombs*, 4 Pa. (4 Barr) 146, 147.

Rent is that which is to be paid for the use of land, whether in money, labor, or other thing agreed upon. It is not due until the year is out when the renting is by the year, nor in arrears until after it is due. If not in arrears, it passes with the sale of the reversion, without regard to the time of the year it was made, unless there has been some stipulation to the contrary. *Hudson v. Fuller* (Tenn.) 35 S. W. 575, 576.

Technically rent is something which a tenant renders out of the profits of the land which he enjoys. Equitably it is a charge upon the estate, and the lessee in good conscience ought not to take the products thereof without a due discharge of the rent. *Otis v. Conway*, 114 N. Y. 13, 16, 20 N. E. 628, 629.

The definition of "rent" given in 2 Bl. Comm. 41, as "a certain profit issuing yearly out of lands and tenements corporeal," includes every species of rent which can constitute a debt, without regard to the nature of the contract under which it is reserved. It is equally rent, whether reserved on a lease under seal or by parol. *Chappell v. Brown* (S. C.) 1 Bailey, 528, 529.

"Rent" is defined by Bouvier and other writers as a return or compensation for the possession of some corporeal inheritance, and is a profit issuing out of lands or tenements in return for their use. *Armstrong v. Cummings* (N. Y.) 58 How. Prac. 331, 332. Though rent is usually paid in money, yet there is a species called "rent service," which Chief Baron Gilbert defines as an annual rent.

paid by the tenant either in labor, money, or provisions, in retribution for the land that passes; the return in money being a substitute for the service originally required. Gilbert further says, when the services are expressed in the contract, the quantum must be certainly mentioned, or be such as by reference to something else may be reduced to a certainty; and he cites as sufficiently certain a contract to shear all the landlord's sheep in a designated manor. This degree of certainty is one of the properties of rent at common law. *Ocean Grove Camp Meeting Ass'n v. Sanders*, 50 Atl. 449, 450, 67 N. J. Law, 1.

A rent is said to be a sum of money or other consideration issuing yearly out of lands or tenements. Blackstone defines "rent" or "reditus" as a compensation or return, it being in the nature of an acknowledgment given for the possession of some corporeal inheritance; and it is defined to be a yearly profit issuing out of lands. It must be a profit, but it is not necessary that it should be in money; for spurs, capons, horses, corn, and other matters are frequently rendered for rent. This profit must be certain, or capable of being reduced to a certainty. It must also issue yearly. *Wegner v. Lubenow* (N. D.) 95 N. W. 442, 445.

Rent (originally rendered "reditus") signifies a compensation or return, it being in the nature of an acknowledgment or recompense given for the possession of some corporeal hereditament. It must be a certain profit issuing out of lands and tenements corporeal; that is, from some inheritance whereunto the owner or grantee of the rent might have recourse to distrain. Unless specially reserved, rent follows an estate of reversion. It is an incident to the reversion, though not inseparably so. *Van Wicklen v. Paulson* (N. Y.) 14 Barb. 654, 655.

#### **Annuity distinguished.**

A covenant in a deed to pay the grantor a certain sum on each and every year during the lifetime of the grantor, such payment to be made a lien on the land, was a covenant to pay an annuity, and not rent. *Nehls v. Sauer*, 93 N. W. 346, 119 Iowa, 440.

#### **Any charge.**

Revision, p. 320, § 2, provides that, until a widow's dower is assigned to her, she shall hold and enjoy the mansion house of her husband without being liable to pay any rent for the same. Held, that it was the legislative intent to merely make temporary provision pending the assignment of the dower, and that, while the word "rent" was used, it is evidently the intention that she should hold without being subject to any charge whatever, such as, for example, interest on incumbrances, or taxes, or necessary annual

repairs. *Spinning v. Spinning*, 5 Atl. 278, 280, 41 N. J. Eq. (14 Stew.) 427.

#### **Price of conditional sale.**

Where goods were delivered under an agreement that the party receiving them was to pay a certain sum as rent, and that on default his right to retain the goods should cease, and the title to the goods should vest in him only on performance of the conditions of the agreement, the payment constituted the agreed price of the goods, and it was a misnomer to call it rent. *Bailey v. Hervey*, 135 Mass. 172, 174.

#### **Compensation for the use of chattels.**

While "rent" is defined as the recompense for the use and occupancy of lands, it is not confined solely to compensation for the use of the land; for chattels are often demised with the land and form a portion of the consideration for which the rent is paid. The statute giving a lien for rent of "any residence, storehouse, or other building" does not change the above proposition of law, and the fact that the rent of a house might be increased by the furniture contained therein would not demand separation of the rent of the house unfurnished from the increase by reason of the use of the furniture. *Stein v. Stely* (Tex.) 32 S. W. 782, 783.

The ordinary definition of "rent" as a profit issuing yearly out of lands and tenements corporeal is defective, in overlooking some of the cases that belong to the class, as where a furnished house or a stock farm is leased, which are common instances. In such cases the personal property is really part of the consideration of the rent, and it is only by a fictitious accommodation of the case to the defective definition that it can be said that the rent issues exclusively out of the land. *Mickle's Adm'r v. Miles* (Pa.) 1 Grant, Cas. 320, 328.

Rent is a profit out of lands and tenants. To rent is to grant the right to occupy lands, paying a certain sum therefor. The term "rent" does not apply to vessels. *Rouse v. Catskill & N. Y. Steamboat Co.*, 13 N. Y. Supp. 126, 128.

#### **Crop rent.**

Rent is a yearly profit issuing out of land. It must be a profit, but it is not necessary that it should be money; for spurs, horses, corn, and other matters are frequently rendered for rent. *Stephens v. Reynolds*, 6 N. Y. (2 Seld.) 454, 458.

The word "rent" is comprehensive, and embraces a compensation either in money, provisions, chattels, or labor received by the owner of soil from the occupant thereof. Under Code, § 5549, giving the purchaser of real estate at a mortgage foreclosure sale the right to receive from the agent in pos-

session the rents of the property sold, or the value of the use and occupation thereof, from the date of his purchase until redemption is made, the purchaser is not limited to the recovery of money rent alone, but may recover a portion of crops agreed to be paid as rent. *Whitted v. St. Anthony & D. Elevator Co.*, 83 N. W. 238, 240, 9 N. D. 224, 50 L. R. A. 254, 81 Am. St. Rep. 562; *Little v. Worner*, 92 N. W. 456, 457, 11 N. D. 382.

#### **As debt.**

See "Debt."

#### **As arising from actual enjoyment.**

A rent, says Baron Gilbert in his treatise on Rents (page 145), as quoted by Justice Paxson in *Hoever v. Fleming*, 91 Pa. 322, 324, "is something given by way of retribution to the lessor of the land demised to him by the tenant; and consequently the lessor's title to the rent is founded upon this: that the land demised is enjoyed by the tenant during the term included in the contract; for the tenant can make no return for a thing he has not." If, therefore, the tenant be deprived of the thing let the obligation to pay the rent ceases; for the obligation has its force only from the consideration which was the enjoyment of the thing demised. *Wayne v. Lapp*, 36 Atl. 723, 180 Pa. 278.

Rent is a sum stipulated to be paid for the actual use and enjoyment of another's land, and is supposed to come out of the profits of the estate. The actual enjoyment of the land is the consideration for the rent which is to be paid. *Marsh v. Butterworth*, 4 Mich. 575, 577.

Rent is compensation for the use of land, and what the tenant pays rent for is quiet possession or beneficial enjoyment. When, therefore, the use or possession ceases, the consideration for the payment ceases. *Grommes v. St. Paul Trust Co.*, 35 N. E. 820, 821, 147 Ill. 634, 37 Am. St. Rep. 248.

Rent is the compensation for the use and enjoyment of the thing rented, and is ordinarily demandable, whether the tenant actually enjoy the use and possession of the subject of the rent or not, unless the failure is due to some fault of the lessor. *Lamson Consol. Store Service Co. v. Bowland* (U. S.) 114 Fed. 639, 641, 52 C. C. A. 335.

Rent is something given by way of retribution to the lessor for the land leased by him to the tenant, and consequently the lessor's title to the rent is founded on the fact that the land leased is enjoyed by the tenant during the term included in the contract; for a tenant can make no return for a thing he has not. Legal eviction of a tenant by a third person, therefore, excuses the payment of rent. So in eviction by the lessor, and if the eviction be partial by a third person, the

rent will be apportioned; but a partial eviction by the lessor excuses the tenant from a payment of the whole rent. *Dyatt v. Pendleton* (N. Y.) 8 Cow. 727, 730.

#### **As sums due.**

"Rents," as used in an administrator's bond conditioned that he would well and truly make a proper distribution of any surplus money, effects, and rents which may come to him, or any one for him, by color of his office, means rents which belonged to the intestate, and not the rents of land leased by the administrator and collected by him after the death of the intestate. *Wilson v. Unselt's Adm'r*, 75 Ky. (12 Bush) 215, 219.

#### **Exception distinguished.**

A rent cannot be part of the profits demised, as the herbage or vesture of the land; for that would be an exception out of the grant, and not a rent reserved. *Moulton v. Robinson*, 27 N. H. (7 Fost.) 550, 554.

#### **Land presupposed.**

The existence of rent presupposes land, and a possible usufruct. *Coogan v. Parker*, 2 S. C. (2 Rich.) 255, 266, 16 Am. Rep. 659.

Rent is defined to be a yearly profit in retribution for the use. The existence of a rent, therefore, presupposes land, and a possible usufruct; for there can be no just demand for retribution or compensation for that which does not exist. An agreement to pay rent, whether a simple contract or a covenant in form, is controlled by the nature of rent. *Taylor v. Hart*, 18 South. 546, 549, 73 Miss. 22, 30 L. R. A. 716.

#### **Fixed sum implied.**

Rent is defined as the right to the periodical receipt of money or money's worth in respect of land held in possession, reversion, or remainder by him from whom the payment is due. 2 Washb. Real Prop. (5th Ed.) 284. This definition implies a fixed sum, or property amounting to a fixed sum, to be paid at stated times. A rent is regarded as an interest or estate in land which may be the subject of a grant, and which may be created in fee, for life, or for years. If it be in fee, or fee tail, it is subject to the incidents of curtesy and dower. *Dodge v. Hogan*, 31 Atl. 268, 269, 19 R. I. 4.

Rent is the return, whether of money, services, or specified property, which the tenant makes to the landlord as compensation for the use of the premises. It is not necessary that it should be a great sum. The word "rent," in Gen. St. c. 46, § 25, by which the plaintiff's right of recovery of rents before a justice of the peace is limited to \$30, does not necessarily mean the rents stipulated in the lease. Under this section,

and under section 27 of the same chapter, requiring a defendant, on appealing a case to the county court, to give security "to pay all the rent then due, and all the intervening rent, damages, and costs," the plaintiff is not restricted, in an action to recover possession of the premises against one holding over the same after the expiration of his lease, to a recovery computed at the rate of the rent reserved in the defendant's lease, but may recover a fair and reasonable compensation for the use of the premises during the time of their detention. *Baldwin v. Skeels*, 51 Vt. 121, 124.

#### **Payment for franchise.**

In its strict sense the word "rent" can be applied only to lands and tenements corporeal, and it would not apply to a franchise. The word, in the charter of the city of Laredo, by which it was "authorized and empowered to establish ferries across the Rio Grande, and fix the rates, fees, and rents therefor," is not used in such a restricted sense, but means that the city shall have the power to fix the sum which shall be paid, not only for the use of the land on or contiguous to which ferries are established, but also the sum which shall be paid for the appurtenances to the ferry and the franchise of operating one or more. *Macdonell v. International & G. N. Ry. Co.*, 60 Tex. 590, 595.

#### **As hire.**

Rent is a profit out of lands and tenements, and to rent is to grant the right to occupy lands, paying a certain sum therefor. While in a loose way "renting" may be used for "hiring." It certainly would be extending the meaning of the word as used in the New York civil damage act (Laws 1873, c. 643), providing that any person "owning or renting or permitting the occupation of any building or premises, and having knowledge that intoxicating liquors are to be sold therein," shall be liable "for damages sustained in means of support by any wife, child," etc., "of a person to whom such liquors are sold, by reason of the sale," to make it applicable to vessels. *Rouse v. Catskill & N. Y. Steamboat Co.*, 13 N. Y. Supp. 126, 128, 59 Hun, 80.

#### **Payment for improvements.**

"Rent," as used in a contract by a landlord, who had demised premises for a term of years at a certain sum per year, by which he agreed with his tenant to lay out a certain sum in making improvements upon the premises, the tenant undertaking to pay an increased rent of a certain sum per year during the remainder of the term, does not mean rent in the legal sense and understanding of the word "rent," but is merely a personal contract to pay the additional

sum per year. *Donellan v. Read*, 3 Barn. & Adol. 899, 905.

A stipulation in a coal lease for the repayment of an improvement fund by "an additional rent of ten cents per ton on all coal taken out" is a provision for the repayment of a loan merely, and the amount due thereunder is not "rent," properly so called. *Miners' Bank of Pottsville v. Hellner*, 47 Pa. (11 Wright) 452, 459.

#### **As income.**

See "Income."

#### **As an incident to land.**

An assignment of rent must be in writing under the statute of frauds, rent being an incident to the ownership of real estate. *King v. Kaiser*, 3 Misc. Rep. 523, 524, 23 N. Y. Supp. 21.

Rent "is defined as a certain profit issuing yearly out of land. Rent arrear is a chose in action, and would be taxable as a credit; but rent to become due is a part of the land, is an incident to it, and passes as such to a grantee by a grant of the land." *Scully v. People*, 104 Ill. 349, 351.

Rent is a "right to a certain profit issuing periodically out of land. The rent of land is incident to it, a right connected with it, and is not a part of the land. The reservation, in order to come within the definition of rent, must be a profit, whether in labor, provisions, part of the annual product, money, or other things." *Hayden v. McMillan*, 23 S. W. 430, 432, 4 Tex. Civ. App. 479 (citing 2 Minor, Inst. p. 32).

#### **Payment under indefinite oral contract.**

In a Massachusetts case it is said that by statute, as well as by usage, in this commonwealth, the word "rent" may include the compensation to be paid for the occupation of the land by a tenant, whether he holds under a written lease, or at will, or at sufferance, and whether the amount to be paid has been defined by agreement of the parties or has been left indefinite. *Kites v. Church*, 8 N. E. 743, 745, 142 Mass. 586.

#### **As rent of inheritance.**

"Rent," as used in St. 3 & 4 Wm. IV, c. 27, § 2, providing that no person shall make an entry or distress, or bring an action to recover any land or rent, but within 20 years next after the time at which the right to make such entry or distress, or to bring such action, shall have first accrued, means rent of inheritance, and does not mean rent reserved by a lease, for example, or rent in the common and ordinary form of a render of rent for property. *Dean of Ely v. Bliss*, 19 Eng. Law & Eq. 190, 197.

**As issues.**

In a will by which a husband devised to trustees certain property, to collect the income, issues, and profits thereof, and, after paying all necessary expenses and repairs, pay the income to his wife, the omission of the word "rents" in the gift to the life tenant has no special signification, for the reason that "income, issues, and profits" include the rents of the whole estate. The word "issues" is an apt term to indicate the rents and profits derived from realty. Appeal of Lindley (Pa.) 40 Leg. Int. 303; Appeal of Perot, Id.

**Royalty for mining privilege.**

"Rent" is an annual profit issuing yearly out of lands and tenements. A contract provided that the party of the first part leased a tract of land to the party of the second part, and that the party of the second part should have the exclusive right to mine and sell all the coal in the tract, and that he should open the mines, etc., and pay a royalty of a certain amount per ton. Such royalty could not in any sense be considered rent, nor could the contract be considered a lease. It was a sale of a portion of the real estate. Appeal of Duff (Pa.) 14 Atl. 364, 367.

Rent has been defined to be a certain profit issuing yearly out of lands and tenements. An agreement whereby a party had the exclusive right to mine coal under certain land for 20 years, unless the coal should give out, and to use in connection with the mine 5 acres of the surface of the land to erect buildings thereon, and to build and operate railroads and flow water thereover, for a certain royalty per ton of coal mined, not to fall below a fixed amount per annum, payable as rent for all the privileges, created the relation of landlord and tenant, within Code 1873, § 2017, giving a landlord a lien for rent. Lacey v. Newcomb, 63 N. W. 704, 706, 95 Iowa, 287.

**As profits.**

The word "profits," as used in the phrase "rents, issues, and profits," is synonymous with "rents." In re Vedder, 15 N. Y. Supp. 798, 805, 2 Con. Sur. 548, 561.

"Rents," as used in Act April 8, 1801 (1 Kent & R. St. p. 562), declaring that the people will not sue for lands by reason of any right or title of the people to the same which shall not have accrued within the space of 40 years, unless the people or those under whom they claim shall have received the rents and profits, is equivalent to the term "profits," though rent is a tribute which issues out of land as a part of its actual or supposed profits, and the word "profits" means yearly profits. People v. Van Rensselaer (N. Y.) 8 Barb. 189, 199 (citing Ivy v.

Gilbert, 2 P. Wms. 13, 2 Ves. Jr. 480, 1 Atk. 506).

The rent of land or buildings is such a sum as may be paid and realized from their occupation by tenants, and is fixed and certain; while profits are the result of trade, which is fluctuating and uncertain, and dependent on skill, care, and the nature and amount of the business transacted. Bennett v. Austin, 81 N. Y. 308, 319.

**Payments by tenant at will or at sufferance.**

According to usage in Massachusetts the word "rent" applies as well to payments made by a tenant at will or at sufferance as to those made by a tenant for years. Rice v. Loomis, 1 N. E. 548, 139 Mass. 302.

**Taxes, insurance, etc.**

The character of "rent," which is a certain yearly return, reserved to the landlord in money, or coin, or services, for the enjoyment of the freehold, does not embrace taxes. Garner v. Hannah, 13 N. Y. Super. Ct. (6 Duer) 262, 266.

Under Code, § 2256, giving a dispossessed tenant the right to redeem the demised premises on paying or tendering to the landlord the rent in arrears, and the costs and charges incurred, the term "rent" does not include taxes, insurance, and cost of repairs, although the covenants of the lease require the tenant to pay them. The term "rent," when used in relation to summary proceedings, has a limited meaning, and does not import the entire consideration which the tenant pays to the landlord for the use of the demised premises, whether directly, as rent proper, or indirectly for his benefit, in the form of taxes and assessments. Bien v. Bixby, 41 N. Y. Supp. 433, 435, 18 Misc. Rep. 415.

The term "rent," in its largest signification, may mean all the property issuing yearly out of the lands in return for their use; but it does not ordinarily include taxes, which are generally paid under a separate covenant. Schuricht v. Broadwell, 4 Mo. App. 160, 161.

**As value of use and occupation.**

The word "rent," as used in Laws 1849, c. 193, authorizing an appeal from judgments in certain cases, is to be construed as meaning, when the proceedings are between a judgment debtor and the purchaser of land on execution, the value of the use and occupation. Spraker v. Cook, 16 N. Y. 567, 568.

**RENT CHARGE.**

A rent charge is a burden imposed on and issuing out of lands. Wagstaff v. Low-erre (N. Y.) 23 Barb. 209, 217.

A rent charge was a holding under a lease containing a clause reserving the right to distrain. *Herr v. Johnson*, 18 Pac. 342, 343, 11 Colo. 393.

"Rent charge" is where a man seised of lands grants by a deed poll or indenture a yearly rent to issue out of the same land in fee, in tail, for life, or for years, with a clause of distress, because the lands are charged with the distress by the express grant or provision of the parties, which otherwise they would not be; and hence a "rent charge" is any rent granted out of lands by deed with a clause of distress. *Horner v. Dellinger* (U. S.) 18 Fed. 495, 499.

A yearly rent, issuing out of land held by another in fee with a clause of distress, is a "rent charge," because the lands are charged with a distress by the express grant or provision of the parties. *Main v. Feathers* (N. Y.) 21 Barb. 646, 648.

"Rent charge" is where the owner of the rent has no future interest or reversion expectant in the land, as where a man by deed makes over his whole estate in fee simple, with a certain rent payable thereout, and adds a clause of distress. *People v. Haskins* (N. Y.) 7 Wend. 463, 467.

A rent charge arises where "a man, by deed indented at this day, maketh a feoffment in fee, and by the same indenture reserveth to him and to his heirs a certain rent, and that if the rent be behind it shall be lawful for him and his heirs to distrain," because "such lands or tenements are charged with such distress by force of the writing only, and not of common right." Co. Litt. § 217.

An annual rent, reserved by deed with a clause of distress upon a grant in fee, is valid as a rent charge, notwithstanding there is no reversion in the person entitled to it. Such rent is a hereditament, descendible and devisable forever. *Van Rensselaer v. Hays*, 19 N. Y. 68, 76, 75 Am. Dec. 278.

Where the right of distress was reserved or given with the rent, the payment might be enforced by distress of the case of any one in possession under the grantee. Such a rent was termed a rent charge. *Rochester Lodge*, No. 21, A. F. & A. M., v. *Graham*, 65 Minn. 457, 460, 68 N. W. 79, 80, 37 L. R. A. 404.

A "rent charge," strictly speaking, arises where a man, being seised in fee of lands, grants a rent in fee or for life out of them, with a power to the grantee to distrain; and since the passage of the statute *quia emptores terrarum* of 18 Edw. I, if the owner of lands in fee makes a feoffment of them in fee, reserving a rent to be paid to himself and his heirs, with the right of distress, it has been considered in England a "rent charge" also. Nevertheless, these rents dif-

fer from each other; the payment of the first being founded on a consideration actually paid to the grantor of the land at or before the time of granting the rent charge. The rent is not extinguished, but must be paid, though the title of the grantor to the land upon which it is charged proved defective, and he is evicted by title paramount. But in the second case the continuance of the rent and the payment of it depend entirely on the right of the grantee to the future enjoyment of the land under the title conveyed to him by the grantor, to whom the rent is to be paid, so that if the grantee of the land, his heirs or assigns, be evicted by any one having a title paramount, the rent ceases and becomes extinct. The latter bears a strong analogy to a grant of land from A. to B., his heirs and assigns, under a certain annual rent payable forever to the grantor and his heirs, which in this country is designated as a "ground rent." *Franciscus v. Reigart* (Pa.) 4 Watts, 98, 116.

"Rent charge" is any rent granted out of lands by deed with a clause of distress, whence it derives its name, because the land is charged with distress by the express provision of the parties, which it would not otherwise be. 1 Crabb, Real Prop. 44; Law Library (3d Series) 129. See, also, *Corne*, v. *Lamb* (N. Y.) 2 Cow. 659; *People v. Haskins* (N. Y.) 7 Wend. 464; *Van Rensselaer v. Hays*, 19 N. Y. 68, 75 Am. Dec. 278; *Farley v. Craig*, 11 N. J. Law (6 Halst.) 262. It is a rule of the common law that a rent charge, being an entire thing, and issuing out of every part of the estate, cannot be apportioned. It is entire and indivisible, so that, if any part of the land out of which a rent charge issued is released from the charge by the owner of the rent, either by an express deed of release or virtually by his purchasing part of the land, all the rest of the land will enjoy the same benefit, and be released also. *Horner v. Dellinger* (U. S.) 18 Fed. 495.

"Rent charge" arises where a man, being seised of lands, made a gift in tail by deed indented, or by deed poll, the remainder over in fee, or a lease for life, with such remainder over, or a feoffment in fee, and by the same deed reserved to himself and his heirs a certain rent, and that, if the rent should be unpaid, he and his heirs might distrain, or where, being so seised, he granted a rent in fee or for life out of the lands, with a power to the grantee to distrain. Rent so reserved or granted was a rent charge, because the lands were charged with such distress by force of the deed only, and not of common right. *Van Rensselaer v. Jewett*, 2 N. Y. (2 Comst.) 141, 151.

#### Annuity distinguished.

An annuity is a yearly sum of money granted by one party to another in fee, for

life, or for years, charging the person of the grantor only; while a rent charge is a burden imposed on and issuing out of lands. *Wagstaff v. Lowerre* (N. Y.) 23 Barb. 209, 216.

### RENT IN ARREAR.

Rent in arrear is a chose in action, and does not pass by a conveyance of the reversion. *Damren v. American Light & Power Co.*, 40 Atl. 63, 64, 91 Me. 334.

### RENT OF NOT LESS THAN FIFTY POUNDS.

A tenant who holds under two different landlords two different sets of premises, the rent of each being less than £50 a year, though together they amount to more than that sum, will not be deemed a tenant who pays a "yearly rent of not less than £50," within St. 2 Wm. iv, c. 45, § 20, entitling those to vote who "shall be entitled either as lessee or assignee to any lands or tenements, whether of freehold or of any other tenure whatever, \* \* \* of the clear yearly value of not less than £10 over and above all rents and charges payable out of or in respect of the same." *Gadsby v. Barrow*, 7 Man. & G. 21, 27.

### RENT SECK.

"Rent seck" is a rent reserved by deed, but without any clause of distress. *People v. Haskins* (N. Y.) 7 Wend. 463, 467.

"Rent seck" is the same as "rent charge"—i. e., a rent reserved where the landlord has no reversionary interests—except that there is no right to distrain reserved. *Cornell v. Lamb* (N. Y.) 2 Cow. 652, 659.

"Rent seck" arose where a man had granted a rent by deed without a clause of distress; and for this rent, if in arrear, there was no distress at the common law. *Van Rensselaer v. Jewett*, 2 N. Y. (2 Comst.) 141, 151.

"Rent seck," or "barren rent," is in effect nothing more than a rent for the recovery of which no power of distress is given, either by rule of the common law or by agreement of the parties. *Wallace v. Harmstad*, 44 Pa. (8 Wright) 492, 501.

Where no right of distress was reserved in a lease, there was no remedy for its collection, except the personal liability of him who made the covenant to pay rent. This was termed a "rent seck." *Rochester Lodge, No. 21, A. F. & A. M., v. Graham*, 65 Minn. 457, 460, 68 N. W. 79, 37 L. R. A. 404.

### RENT SERVICE.

"Rent service" is not a debt, and a covenant to pay it is not a covenant to pay a debt; but it is a security for the performance of a collateral act. The annual payments spring into existence, and for the first time become debts, when they are demandable. A ground rent coming due after the discharge of a debtor as a bankrupt is not extinguished by the certificate of his discharge. *Bosler v. Kuhn* (Pa.) 8 Watts & S. 183, 186.

A rent service arose where the tenant held by fealty or homage, as well as a certain rent. *Herr v. Johnson*, 18 Pac. 342, 343, 11 Colo. 393.

"Rent service," says Littleton, "is where the tenant holdeth the land of his lord by a fealty and certain rent, or by other services and certain rent." *Ingersoll v. Sergeant* (Pa.) 1 Whart. 337, 347.

Rent service was the only kind of rent originally known to the common law; and a right of distress was inseparably incident to it so long as it was payable to the lord who was entitled to the fealty. It was called "rent service," because it was given as compensation for military or other service, for which the land was originally liable. *Wallace v. Harmstad*, 44 Pa. (8 Wright) 492, 501.

Rent service is defined to be "where the tenant holdeth his land of his lord by fealty and certain rent, or by homage, fealty and certain rent, or by other services and certain rent." Co. Litt. § 213. Where a lessee surrenders a part of the land to the lessor, the rent for the remainder is not extinguished, but apportioned. *Ehrman v. Mayer*, 57 Md. 612, 622.

Rent service arose where the tenant held his land by fealty and certain rent, or by a certain rent, together with homage, fealty, or other services. It was called "rent service," because it had some corporal service, as fealty, at least, belonging to it (Co. Litt. § 215); and to this rent distress was incident, provided that the reversion were in the landlord or lessor making the distress. *Van Rensselaer v. Jewett*, 2 N. Y. (2 Comst.) 141, 151; *Cornell v. Lamb* (N. Y.) 2 Cow. 652, 659.

### RENTAL.

The term "rental," as defined by Webster, is "a sum total of rents; as an estate that yields a rental of \$10,000 a year." *Fremont, E. & M. V. R. Co. v. Bates*, 58 N. W. 959, 963, 40 Neb. 381.

#### Charge for use of streets by telegraph.

The term "rental" is properly applied to the charge imposed by a city on a telegraph

company for the privilege of using the streets, alleys, and public places of the city, graduated by the amount of such use; for it is not a privilege or license tax, the amount paid not being graduated by the amount of the business, nor a sum fixed for the privilege of doing business, but is more in the nature of a charge for the use of property belonging to the city. *City of St. Louis v. Western Union Tel. Co.*, 13 Sup. Ct. 485, 487, 148 U. S. 92, 37 L. Ed. 380.

#### **Royalty distinguished.**

"Royalties" are commonly understood as meaning something proportionate to the use of a patented device; in other words, a kind of excise. *Bouv. Law Dict.* In its more ordinary meaning it would not literally include the shares of stock in a corporation for which an accounting is demanded. In some of its uses it is a broader word than "rentals," and yet in other aspects "rentals" is a broader word than "royalties." Rentals, in their ordinary signification, are not limited, as royalties, in their ordinary signification; that is, to something proportionate to the use of a patented device. *Western Union Tel. Co. v. American Bell Telephone Co.* (U. S.) 125 Fed. 342, 348, 60 C. C. A. 220.

#### **RENTAL AGENT.**

A mere rental agent is ordinarily one who rents premises and collects rents thereon, and in the absence of definite proof it cannot be said that such agent is in all respects, so far as the control of the property is concerned, the representative of the owner. *City of St. Paul v. Clark*, 86 N. W. 893, 894, 84 Minn. 138.

#### **RENTAL VALUE.**

The terms "rental value" and "value of the use" of the premises, means substantially the same thing. *Alexander v. Bishop*, 13 N. W. 714, 717, 59 Iowa, 572.

The term "rental value," as applied to realty, is but another form of saying the value of the use, and means simply the value of the use of the land for any purpose for which it is adapted in the hands of a prudent and discreet occupant upon a judicious system of husbandry. *Nelson v. Minneapolis & St. L. Ry. Co.*, 42 N. W. 788, 789, 41 Minn. 131.

The term "rental value" of an article is said in *Wood v. State*, 66 Md. 61, 67, 5 Atl. 476, to be the value and use of the same. If, therefore, the cost of working a machine remains the same, its rental value must necessarily vary from time to time, as it is more or less available for existing needs. For instance, the summer of 1890 was preceded by a winter so mild that but little natural

ice was produced, and in consequence the market of Baltimore, being almost bare of this commodity, was dependent for its supply entirely upon the artificial product, or ice transported from points far north, with freights that largely increased its cost. In fact, during the summer of that year, the price of ice in that market arose to a figure at least double that which is usual in ordinary seasons. If the hire of an article depends not only upon its cost, but upon its capacity to supply an existing demand, it is not unreasonable to conclude that an ice machine in the city of Baltimore in the summer of 1890 was more valuable than in an ordinary year, and its rental value correspondingly greater; and this would be so, not upon the basis of speculative profits that might possibly be made from its use, but because, as a business proposition, the peculiar conditions of the market had created an unusual demand for such machinery growing out of its capacity to produce on profitable terms a commodity of such high price, and so essential to the health, comfort, and convenience of the people. It is a fact that cannot be controverted that, though the hire of an article of personal property for a series of years may be estimated upon an average at a given sum, yet, by reason of the existence of peculiar circumstances, an unusual demand for the use for which it is available will sometimes arise, and when such exists, there will be an increase in the sum for which it can be hired. *Maryland Ice Co. v. Arctic Ice Machine Mfg. Co.*, 29 Atl. 69, 70, 79 Md. 103.

Rental value or hire of a saw mill with a known capacity is the value of the use of the same. *Wood v. State*, 5 Atl. 476, 478, 66 Md. 61.

#### **RENTED.**

"Rented," as used in Rev. St. § 1038, subd. 3, providing that the parsonages, whether of local churches or districts, whether occupied by the pastor permanently or rented for his benefit, shall be exempt from taxation, according to its common and authorized use, refers as well to the act of a lessee as to that of a lessor. The lessor rents land to the lessee; the lessee rents land of the lessor. The word "rented" may mean a renting of a parsonage by a church association as lessee, as well as a renting to a lessee by the association of a parsonage owned by it. "Rented" is, or at least may be, a word of broader signification than "leased," which is an act that cannot be done by the lessee, but by the lessor only. *Gray v. La Fayette County*, 27 N. W. 311, 65 Wis. 567.

The word "rented," aside from the qualification of it by words with which it stands connected, naturally means that the tenant to whom the property is rented has the ex-



clusive possession for the time. *Noyes v. Stillman*, 24 Conn. 15, 24.

"The word 'rented' may be used in two senses. It is said that a landlord rented his lands to his tenant, and with almost equal propriety it may be said that the tenant rented an estate from his landlord." *Zink v. Grant*, 25 Ohio St. 352, 354.

## RENTS AND PROFITS.

All rents and profits, see "All."

"Rents and profits of real estate mean the sum annually yielded by the same." In *re Vedder's Will*, 15 N. Y. Supp. 798, 805, 2 Con. Sur. 548.

Generally speaking, the interpretation of the words "rents and profits" of land or estate is "annual rents and profits." *Delaney v. Van Aulen*, 84 N. Y. 16, 19.

"Rents and profits," as applied to real estate, means the sum annually yielded by the same. In *re Vedder*, 2 Con. Sur. 548, 561, 15 N. Y. Supp. 798.

The words "rents and profits," in a devise, may be so construed as to authorize a sale of land, when necessary, to raise a sum so as to effect the object of testator, as where testator devises all of his estate to his wife for life, and after her death to his son in fee, on condition that he shall comfortably maintain a daughter of testator during life; and therefore, if the son fails to maintain the daughter, then the executors are authorized to take possession of the land, "and lease, or by any other means, out of the profits thereof arising, support and maintain" the daughter. The words "rents and profits" include the whole estate. "The word 'profits,'" says Sir Thomas Plumer in *Allan v. Backhouse*, 2 Ves. & B. 65, "does ex vi termini include the whole interest," as a devise of the profits would pass the land itself; and it was held in that case that the words "rents and profits" extended beyond their natural meaning by a technical, artificial, but liberal, construction, established by a long train of decisions, and were held to mean, not merely only rents and profits, but a mortgage and sale, when the same was necessary to raise a gross sum and thereby effect the testator's object. This extension of the word "profits" is supported by a series of authorities from the case of *Backhouse v. Middleton*, as early as 22 Car. II (1 Ch. Cas. 173), down to the present time. Lord Hardwicke observed that, if there be no other words to restrain the meaning of "rents and profits" and confine them to the receipt of rents and profits as they accrue, the court, to obtain the end which the party intended by raising the money, has by the liberal construction of the words taken them to amount to a di-

rection to sell. *Schermerhorne v. Schermerhorne* (N. Y.) 6 Johns. Ch. 70, 73.

A devise of the rents and profits of land passes the land itself. It has the same effect as a devise of the land. The "rents and profits" of an estate, the "income," or the "net income" of it, are all equivalent expressions. "Net" is a term used among merchants to designate the quantity, amount, or value of an article or a commodity after all tare and charges are deducted. The income of an estate means nothing more than the profit it will yield after deducting the charges of management or the rent which may be obtained for the use of it. *Andrews v. Boyd*, 5 Me. (5 Greenl.) 199, 202.

It is well settled that in an action to recover mesne profits the plaintiff must show in the best way he can what those profits are, and there are two modes of doing so, to either of which he may resort. He may either prove the profits actually received, or the annual rental value of the land. *West v. Hughes* (Md.) 1 Har. & J. 574, 576, 2 Am. Dec. 539; *Mitchell v. Mitchell*, 10 Md. 234. The latter is the mode usually adopted. Where there is occupation of a farm or land used only for agricultural purposes, and the income and profits are of necessity the produce of the soil, the owner may have an account of the proceeds of the crops and other products sold or raised thereon, deducting the expense of cultivation. These are necessarily rents and profits in such cases; but even there it is more usual to arrive at the same result by charging the occupier, as tenant, with a fair annual money rent. *McLaughlin v. Barnum*, 31 Md. 452. But the proprietor of city lots, with improvements upon them, can only derive therefrom, as owner, a fair occupation rent for the purposes for which the premises are adapted. This constitutes the "rents and profits," in the legal sense of the term, of such property, and is all the owner can justly claim in this shape from the occupier. *Worthington v. Hiss*, 16 Atl. 534, 536, 70 Md. 172.

## RENTS, ISSUES, AND PROFITS.

### Increase of live stock.

Under a statute providing that either a husband or wife may hold separate property acquired by gift, devise, or descent, with the "rents, issues, and profits" thereof, cattle given to a wife as her separate property, together with the increase thereof, belong to her separate estate. *Harris v. Van De Vanter*, 50 Pac. 50, 17 Wash. 489.

### Land included.

"It is well settled as a general rule of law that the devise of the rents, issues, and profits of land is equivalent to a devise of

the land itself." *In re France's Estate*, 75 Pa. 220, 224.

#### As net income.

A testator devised all his real and personal estate to his only son J., to hold the same in trust for J.'s children. The will required that the son should be "held responsible and legally bound to his children for the 'rents, issues, and profits' of the estate devised to him," etc. Held, that the phrase "rents, issues, and profits" should be construed to mean such income as arises after the taxes, as well as the necessary expenses of cultivating the farm and managing the trust, were paid. *Burroughs v. Gaither*, 7 Atl. 243, 251, 66 Md. 171.

#### Products of land.

"Rents, issues, and profits," as used in Comp. St. p. 403, § 15, providing that the rents, issues, and profits of the real estate of any married woman and the interest of the husband in her right in any real estate shall during coverture be exempt from attachment or levy of execution for the sole debt of the husband, cannot be construed to include annual products of the wife's land. The words have no very marked fitness to express the yearly products of land, which are the joint results of labor and the use of the land. Rents, issues, and profits more commonly signify a chattel real interest in land, a kind of estate growing out of the land for life or years, producing an annual or other rent. Rents, issues, and profits apply only to net profits, and such as are of the nature of rent, which is, as every one understands, a "reditus" or return by some one holding the land of another for which he owes such return. *Bruce v. Thompson*, 26 Vt. 741, 746.

## RENUNCIATION.

Renunciation, as executor, is an act whereby a person named in a will as executor declines to take on himself the burden of that office. The act is therefore predicated of an existing office. *In re Maxwell*, 3 N. J. Eq. (2 H. W. Green) 611, 614.

"Renunciation" is simply the giving up of a right; but, if the person who renounces chooses to withdraw his renunciation and to resume the exercise of his right before any rights inconsistent with his retraction have been acquired, there is no rule of law or equity which would require him to persevere in his renunciation. *Codding v. Newman* (N. Y.) 3 Thomp. & C. 364, 365.

To constitute a "renunciation of a trust" there must be an express rejection or a tacit refusal to act; for there can be no renunciation where the trustee is ignorant of the existence of the paper creating the trust. *Read v. Robinson* (Pa.) 6 Watts & S. 329, 333.

Dereliction or renunciation properly require both the intention to abandon and external action to do so. The casting overboard of articles in a tempest to lighten a ship is not dereliction, as there is no intention of abandoning the property in the case of salvage. *Livermore v. White*, 74 Me. 452, 455, 43 Am. Rep. 600.

A renunciation does not create a breach of a contract. There must be an adoption of the renunciation. *Wells v. Hartford Manganese Co.* (Conn.) 55 Atl. 599, 602.

## REORGANIZATION.

"The term 'reorganization' is commonly applied to the formation of a new company by the creditors and shareholders of a corporation which is in financial difficulties, for the purpose of purchasing the company's works and other property after the foreclosure of a mortgage or judicial sale. The result of a transaction of this kind is to form a new corporation to carry on the business of the old company upon a new basis, free from its debts and obligations, except to the extent that they have been expressly assumed." *Symmes v. Union Trust Co.* (C. C.) 60 Fed. 830, 870 (quoting *Morawetz, Priv. Corp.* § 812).

## REPAIR—REPAIRS.

See "Good Repair"; "Necessary Repairs"; "Ordinary Repairs"; "Sufficient Repair."

All repairs, see "All."

Keep in repair, see "Keep."

"Repair" means to mend, add to, or make over; restoration in a sound or good state after decay, waste, injury, or partial destruction. *Farragher v. City of Keokuk*, 111 Iowa, 310, 313, 82 N. W. 773; *Martinez v. Thompson*, 80 Tex. 568, 571, 16 S. W. 334, 335.

#### Change of grade of street.

A city charter, conferring the power to "repair and regulate" streets of the city upon the commissioners of highways, should be construed to mean that they had the power to change the grade of a street after it had once been established. *Waddell v. City of New York* (N. Y.) 8 Barb. 95, 97.

"Repair," as used in St. 1786, c. 81, § 1, providing that all highways within any town shall be kept in repair from time to time, that the same may be safe and convenient for travelers and for their horses, teams, carts, carriages, etc., means to replace or remake, to restore what has been impaired or injured; and hence such word would not include the cutting down of the street to reduce the grade, which was so steep as to render it difficult to pass up and down the street with

carts and carriages. *Callender v. Marsh*, 18 Mass. (1 Pick.) 418, 429.

Where a road was in good repair, but was built at such a level that it was liable temporarily to be flooded more or less with water, and the only way to avoid that trouble was to make a new roadbed about seven feet above the old one, involving a radical change of level, it was not the repair of an existing roadbed, within the statute providing that, if a town fails to keep a road in good repair, the county commissioners may order such repair. *Appeal of Goodspeed*, 53 Atl. 728, 729, 75 Conn. 271.

#### **As construction.**

"Construct and repair," as used in Act Nov. 18, 1883, § 8, giving the city of Olympia power to "construct and repair" sidewalks, and to levy and collect a special tax or assessment on the lots fronting on such street sufficient to pay the expenses of construction of said sidewalks, construed as synonymous with the word "construction" as used in the statute. *McNair v. Ostrander*, 23 Pac. 414, 415, 1 Wash. St. 110.

#### **Efficient maintenance required.**

The duty imposed on a railroad to keep its right of way fences in repair has been construed to require it to keep gates constituting part of such fences securely closed. *West v. Missouri Pac. Ry. Co.*, 26 Mo. App. 344, 348.

#### **Existence of thing repaired implied.**

"Repair," as defined by Webster, means to restore to a sound or good state after decay, injury, dilapidation, or partial destruction, and the phrase "in good repair" means in such state of reparation, and implies existence of thing to be repaired. *Gulf City St. Ry. & Real Estate Co. v. City of Galveston*, 7 S. W. 520, 521, 69 Tex. 660.

#### **Future repairs.**

Gen. Laws, c. 72, § 4, providing for an apportionment of the expense of "rebuilding or repairing a highway" in one town to other towns benefited thereby, fairly means keeping a highway in repair, in view of its continuing interests and the continuing duty of the town benefited by it; and therefore "rebuilding or repairing" is not to be construed as limited to one point of time, but as including the future as well as the present. *Town of Campton v. Town of Plymouth & Holderness*, 8 Atl. 824, 825, 64 N. H. 304.

#### **As maintain.**

To repair means to restore to a sound or good state after decay, injury, dilapidation, or partial destruction. *Webst. Dict.*; *Gulf City St. Ry. & Real Estate Co. v. City of Galveston*, 69 Tex. 663, 7 S. W. 520; *Pittsburg & B. Pass. Ry. Co. v. City of Pittsburg*,

80 Pa. 72, 76. The words "maintain" and "repair" practically mean one and the same thing. *Verdin v. City of St. Louis (Mo.)* 27 S. W. 447, 451; *Id.*, 33 S. W. 480, 494, 131 Mo. 28.

"Permission to repair" a dam in a navigable stream is to be construed as permission to repair and maintain such dam at its legal height, and no liability is on the one granting such permission if the dam is illegally maintained. *Arpin v. Bowman*, 53 N. W. 151, 83 Wis. 54.

"Maintenance" and "repair," when applied to a street, practically mean one and the same thing. To repair means to restore to a sound or good state after decay, injury, dilapidation, or partial destruction. *Webst. Dict.* The word "maintain" does not mean to provide or construct, but means to keep up, to keep from change, to preserve. *Worcester. Dict.* To hold or keep in any particular state or condition; to keep up. *Webst. Dict.* In *Moon v. Durden*, 2 Exch. 21, it was said: "The verb 'to maintain' signifies to support what has already been brought into existence." *Barber-Asphalt Co. v. Hezel*, 56 S. W. 449, 451, 155 Mo. 391, 48 L. R. A. 285.

"Repairs," as used in a city charter requiring contracts for making repairs on streets to be let to the lowest bidder, signifies the restoration of a street already defective from use and decay, and is not synonymous with "maintenance," so as to render invalid a provision of a paving contract providing that the contractor shall pay the cost of maintenance of the streets paved; the requirement of maintenance being imposed as a mere guaranty of the perfection of the work when completed and the duty to preserve from decay and ordinary use. *Seaboard Nat. Bank v. Woesten*, 48 S. W. 939, 944, 147 Mo. 467, 48 L. R. A. 279.

"Repair," as used in a contract by which the plaintiff agreed to "repair and renew," so far as necessary, the gutter of a mill, only meant that the plaintiff was to make such repairs and renewals as were necessary in order that the existing gutter should do all that it was capable of doing when in good condition, according to its original construction, and did not require of the plaintiff that he build a new gutter of a different construction, even though the original plan was defective. *Dwight v. Ludlow Mfg. Co.*, 128 Mass. 280, 282.

In a will directing the executor to collect the income of certain real estate, and, after paying the taxes, repairs, assessments, and insurance, to apply the remainder of the income to certain specified purposes, the term "repairs" included new roofing, new plumbing, and whatever was reasonably necessary to keep up the house. *Steven's Ex'rs v. Milnor*, 24 N. J. Eq. (9 C. E. Green) 358, 373.

**New or additional structure.**

"Repair," as used in Pub. St. c. 34, § 5, providing that towns may appropriate money for repairing bridges, means a restoration to a sound state of what had gone into a decayed or dilapidated condition, or the bettering of what had been destroyed in part. "Repair" means to restore to its former condition, not to change either the form or the material, so that building a new bridge is not a repair of the highway. *State v. White*, 18 Atl. 179, 180, 16 R. I. 591.

"Repair," as used in Gen. St. c. 44, §§ 12, 14, 15, requiring a surveyor of highways to disburse the whole sum allowed to him for the repair of the highways within his district, and authorizing him to repair the ways within his district so that the same shall be safe and convenient, when the town neglects to vote a sufficient sum for such purposes, does not mean to make a new thing, but to refit, make good, or restore an existing one. The surveyor cannot make new structures and additions to the roads. *Todd v. Inhabitants of Rowley*, 90 Mass. (8 Allen) 51, 56.

"Repair," as used in Elliott's Supp. § 1193, empowering a county surveyor to levy assessments to keep public ditches in repair, by its own force and vigor repels the implication that there is authority to construct new drains. *Romack v. Hobbs* (Ind.) 32 N. E. 307.

"Altering, repairing, or ornamenting a building," as used in the Illinois mechanic's lien law, does not include putting a lightning rod on a house. *Drew v. Mason*, 81 Ill. 498, 499, 25 Am. Rep. 288.

"Repair a building" means to replace it as it was, or to restore it after dilapidation; not to enlarge or elevate it, by raising it from one to two or more stories, nor to extend its sides. *Douglass v. Commonwealth* (Pa.) 2 Rawle, 262, 264.

"Repair," as used in a statute giving a mechanic's lien for materials furnished and services rendered in the repair of any building, will not be construed to include putting in certain fixed machinery for the manufacture of paper into a building erected for a paper mill. *Rose v. Persee & Brooks Paper Works*, 29 Conn. 256, 268.

A lease providing that the premises should at all times be open to the inspection of the lessor or his agents, to applicants for purchase or lease, and for necessary repairs, means ordinary repairs, but does not include the substitution of one system of heating for another, or for a new heater, unless the old one was worn out. *Gulliver v. Fowler*, 30 Atl. 852, 854, 64 Conn. 556.

"Repair" means to restore to sound and good condition after injury or partial destruction. *Pittsburg & B. Pass. R. Co. v.*

*City of Pittsburg*, 80 Pa. 72. To repair a building is to replace it as it was, or to restore after injury or dilapidation. *Douglass v. Commonwealth* (Pa.) 2 Rawle, 262, 264. The erection or maintenance of a guard rail, loose slat door, hurdle, or other device is not a matter of repair, falling upon the tenant, in the absence of an agreement to the contrary. *City of Reading v. Reiner*, 31 Atl. 357, 107 Pa. 41.

The inherent power in the circuit court to order repairs for the courtroom is confined to repairs in the sense of the necessity out of which the power springs, and does not include practically rebuilding the courthouse, or the construction of permanent improvements, such as extensions and additions. *White County Com'rs v. Gwin*, 38 N. E. 237, 244, 136 Ind. 562, 22 L. R. A. 402.

A covenant to repair will not make a lessee liable for the expense of laying a new floor. *Soward v. Leggatt*, 7 Car. & P. 613.

The authority to repair public drains, given to the township trustees by Drainage Act 1883, § 7, does not authorize the enlargement of the drains. Under authority to repair there can be no enlargement and improvement, except in so far as the work of repairing necessarily enlarges and improves. "Repair," says the Supreme Court of Pennsylvania, "means to restore to a sound or good condition after injury or partial destruction." *Weaver v. Templin*, 14 N. E. 600, 602, 113 Ind. 298 (citing *Pittsburg & B. Pass. Ry. Co. v. City of Pittsburg*, 80 Pa. 72).

"Repairs," as used in Sp. Acts 1883, c. 348, authorizing the assessment of a sum to reimburse a town for money paid out for making repairs on school houses, does not include building a schoolhouse. *Carlton v. Newman*, 1 Atl. 194, 199, 77 Me. 408.

A covenant in a lease of a farm requiring the tenant to make repairs cannot be construed to require him to construct fences around lands not inclosed at the time of the execution of the lease. *Hazlewood v. Pennybacker* (Tex.) 50 S. W. 199, 202.

**As requiring repair of damage committed by public enemy.**

A covenant in a lease of a house to deliver up the premises at the end of the term in good repair cannot be construed to require the tenant to repair a waste committed on the premises by an alien military force, who invades the city and takes possession of the premises during the term. *Pollard v. Shaaffer* (Pa.) 1 Dall. 210, 213, 1 L. Ed. 104, 1 Am. Dec. 239.

**As rebuilding.**

The word "repair" means to renew or restore an existing thing, not to make a new one. A covenant to repair ordinarily does

not bind the landlord to rebuild, though there are cases in which the word "repair," aided by the context, has been held to mean "rebuild." Where the contract requires the tenant to keep the premises in repair and return them in the same condition as when received, or other language is employed showing an intention to make either party rebuild, such duty will be imposed, even though the word "rebuild" is not used. *Meyers v. Myrrell*, 57 Ga. 516. Usually, however, an agreement to repair would only include ordinary repairs, and the provision of Civ. Code 1895, § 3123, making landlords liable for repairs, does not require them to rebuild in case of the destruction of the tenement. *Gaven v. Norcross*, 43 S. E. 771, 772, 117 Ga. 356.

As used in reference to authority of an administrator to expend money for the repair of buildings belonging to the estate, "repair" extends to the erection of new buildings, in cases where the building has been destroyed by fire, or damaged so as to be no longer available, and where a new building could be paid for in a short time out of the rental. In *re Freud's Estate*, 63 Pac. 1080, 1081, 131 Cal. 667, 82 Am. St. Rep. 407.

"Repair" ordinarily means to mend, to restore to a sound state what has been partially destroyed, to make good an existing thing, and as used in Civ. Code, § 3123, requiring a tenant to "keep \* \* \* in repair" the leased premises, does not require him to replace a gin house entirely destroyed by fire. *Mayer v. Morehead*, 32 S. E. 349, 350, 106 Ga. 434.

"Repair," as used in P. & L. Laws 1866, c. 474, providing that the work of constructing any crosswalk, culvert, or sewer, or the keeping in repair of cross-walks, sewers, streets, etc., after the same had been constructed, graded, planked, or paved in a city, the expense thereof should be paid out of the road fund, refers to the ordinary repairs which are necessary to keep the street in a good condition, when there has been a partial waste or destruction of existing material, but does not import the rebuilding in case of total loss or destruction. *Blount v. City of Janesville*, 31 Wis. 648, 654.

The word "repair," as used in a lease stipulating that the lessee shall keep the leased premises in good repair, is not used in any technical sense, but should receive its ordinary interpretation; and "to repair" as it is ordinarily used means to amend, not to make a new thing, but to refit, make good, or restore an existing thing. Therefore it does not include the rebuilding of buildings destroyed without the fault of the lessee. *Wattles v. South Omaha Ice & Coal Co.*, 69 N. W. 785, 787, 50 Neb. 251, 36 L. R. A. 424, 61 Am. St. Rep. 554.

As used in a lease in which the lessee promises to keep the building in repair, the word "repair" will be held to mean amend, not to make a new thing, but to refit, make good, or restore an existing thing; and when we speak of repairing a thing, the very expression presupposes something in existence to be repaired, and hence, where the building leased is destroyed, the lessee is not under obligations to rebuild under such a promise. *Wattles v. South Omaha Ice & Coal Co.*, 69 N. W. 785, 787, 50 Neb. 251, 36 L. R. A. 424, 61 Am. St. Rep. 554 (citing *Todd v. Inhabitants of Rowley*, 90 Mass. [8 Allen] 51; *Stevens' Ex'rs v. Milnor*, 24 N. J. Eq. [9 C. E. Green] 358).

"Repair," as used in Rev. St. 1893, c. 121, § 21, declaring that towns shall build and repair bridges at their expense over streams on roads on town lines, should be construed as including in its meaning to restore or to renew, so that towns are bound to rebuild worn-out bridges. *People v. Highway Com'rs of Towns of Dover and Ohio*, 41 N. E. 1105, 1107, 158 Ill. 197.

The replacing of an old bridge by a new one is within the meaning of the word "repairs," and the cost of it was properly chargeable to the ordinary expense account of the company building the same. *Hartford & N. H. R. Co. v. Grant* (U. S.) 11 Fed. Cas. 699, 701.

A covenant in a lease in which the lessee binds himself to keep the leased premises in repair, and to return them in as good condition as when he received them, makes the lessee liable to rebuild buildings destroyed by fire. *Abby v. Billups*, 35 Miss. 618, 632, 72 Am. Dec. 143.

Plaintiff sold to defendants his timber on a certain tract of land, with the privilege of a quarter steam sawmill belonging to plaintiff on the premises for the purpose of manufacturing said timber. Defendants covenanted to put said sawmill in good repair, and the same so keep, and to deliver the same to plaintiff in reasonably good condition and repair. Before the timber was sawed the mill was burned without defendants' fault. The court held that the covenant to keep and deliver the mill in good repair required them to replace the mill or make it good. *Hoy v. Holt*, 91 Pa. 88, 90, 36 Am. Rep. 659.

A covenant in a lease to repair, uphold, and support, or to well and sufficiently repair, or to keep in repair and leave as found, or to repair and keep in repair, or to keep in good repair, natural wear and tear excepted, or to make all necessary repairs, or to deliver up in tenantable repair, or to deliver up the premises in as good a condition as they now are, all impose upon the covenantor the duty of rebuilding or restoring

the premises destroyed or injured by the elements. *Armstrong v. Maybee*, 48 Pac. 737, 738, 17 Wash. 24, 61 Am. St. Rep. 898.

#### **Reconstruct distinguished.**

See, also, "Reconstruct — Reconstruction."

"Repair" means to mend, add to, or make over, and differs from "reconstruct," which means to construct again, or rebuild; so that, where a sidewalk was reconstructed, rather than repaired, and such reconstruction, under a notice to the owner to repair or that the same shall be repaired by the city, does not authorize the city to recover for such reconstruction. *Farragher v. City of Keokuk*, 82 N. W. 773, 774, 111 Iowa, 310; *State ex rel. Kansas City v. Corrigan Consol. St. Ry. Co.*, 85 Mo. 263, 55 Am. Rep. 361; *Western Paving & Supply Co. v. Citizens' St. R. Co.*, 26 N. E. 188, 191, 128 Ind. 525, 10 L. R. A. 770, 25 Am. St. Rep. 462.

Repair is restoration to a sound, good, or complete state after decay, injury, dilapidation, or partial destruction, and it has such meaning in the rule that a purchaser may repair, but not reconstruct or reproduce, a patented device or machine. *Goodyear Shoe Machinery Co. v. Jackson* (U. S.) 112 Fed. 146, 150, 50 C. C. A. 159, 55 L. R. A. 692.

The use of a coupling head or knuckle, which is the peculiar and unique feature of a certain combination constituting an improved car coupler, to supply the place of knuckles worn out or broken in actual use, amounts to a reconstruction, and not repairs. *St. Louis Car Coupler Co. v. Shickle, Harrison & Howard Iron Co.* (U. S.) 70 Fed. 783, 785.

To repair a building means simply to reconstruct it to a sound condition. *First Nat. Bank v. Sarlls*, 28 N. E. 434, 437, 129 Ind. 201, 13 L. R. A. 481, 28 Am. St. Rep. 185.

#### **Removal of building.**

Gen. St. c. 150, § 1, giving a mechanic's lien for labor or materials in the "erection, alteration, or repair" of any building, cannot be construed to mean labor performed in the removal of a building from one place to another. *Trask v. Searle*, 121 Mass. 229, 230.

#### **As rendering suitable for use.**

"Repair," as used in reference to the right of a grantee of a right of way to keep the road in repair, is not limited to making good the defects in the original soil by subsidence or washing away; but it includes the right of making the road such that it can be used for the purpose for which it was granted. *United States Pipe Line Co. v. Delaware, L. & W. R. Co.*, 41 Atl. 759, 767, 62 N. J. Law, 254, 42 L. R. A. 572 (citing *Newcomen v. Coulson*, 5 Ch. Div. 133).

#### **Repavement of street.**

"Repair," as used in a city charter, giving the city authority to repair streets, does not include the right to repave. *Hurley v. Inhabitants of City of Trenton*, 49 Atl. 518, 66 N. J. Law, 538.

"Repair," as used in a city ordinance requiring a street railway to keep and maintain a portion of the street inside its rails and for two feet outside of them in good and sufficient repair, cannot be construed to mean repave with a new and different material selected by the city. *Dean v. City of Paterson*, 50 Atl. 620, 621, 67 N. J. Law, 199.

Webster defines the word "repair" to mean to restore to a sound or good state after decay, injury, dilapidation, or partial destruction, as to repair a house, a wall, or a ship. He defines "reconstruction" to mean to construct again, to rebuild. Where a brick pavement was taken up, the grade changed, new sand used, and part of the bricks used were new ones, it was not a repair of the pavement, but a reconstruction, within Ky. St. § 2835, apportioning the cost of reconstruction of sidewalks to the front foot of the adjoining property. *Levi v. Coyne* (Ky.) 57 S. W. 790, 791.

A street railway company, under a charter requiring it to keep in repair the grounds between its tracks, is not liable for repaving of such space. *City of Williamsport v. Williamsport Pass. R. Co.*, 52 Atl. 51, 203 Pa. 1.

The removal of the whole of an existing pavement on each side of a railroad track, and the substitution for it of another of an entirely different character, when for aught it appears the existing pavement was at the time in good repair, and the object was not to make it better, but to remove it altogether, and to substitute for it one of a better kind, thus improving the street by making the carriageway better than it could have been made by any repairs or alterations that could have been made in the existing pavement, was not a repair of the street, but an improvement thereof. The demolition of a structure, and its replacement by one of a different character, cannot be considered a repair of that structure. In re *Repaving of Fulton St., Brooklyn* (N. Y.) 29 How. Prac. 429, 431.

#### **As restoration to original condition.**

A building is properly said to be repaired when it is restored to its original condition after having been damaged. *Vincent v. Frelich*, 23 South. 373, 375, 50 La. Ann. 378, 69 Am. St. Rep. 436.

A mere covenant in a lease to repair may be construed to embrace only the making good of what may be damaged *ad interim*; but a covenant to deliver the premises at the expiration of a term "in good tolera-

ble repair in every respect" binds the covenantor to restore the premises in tenable condition, without any reference to the condition in which he received them. *Brash-ear v. Chandler*, 22 Ky. (6 T. B. Mon.) 150, 151.

"Repairs," as used in a covenant to make all necessary repairs to a gate, includes the replacing of the gate if removed. *Beach v. Crain*, 2 N. Y. (2 Comst.) 86, 93, 49 Am. Dec. 369.

"Repairs," as used in Laws 1850, p. 264, conferring upon the common council of the city of Brooklyn the general power to make such improvements in and about the streets as the public need and convenience may require, and providing that the expense of such improvements, except for repairs, shall be assessed upon the property benefited thereby, includes the substitution of new curbstones and gutters for old ones. The interpretations of the term "repair" given by Walker are "reparation; supply of loss; restoration after dilapidation." The last definition would seem to include whatever might be requisite to restore the positive usefulness of a depressed street. When a street has been once put in a condition conformable to what is required at the time, whatever is subsequently done to it for the purpose of a street, whether in improving an existing constituent or substituting a new one, or in adding some material required by a new regulation, comes appropriately under the head of repairs. *People v. City of Brooklyn* (N. Y.) 21 Barb. 484, 488.

#### Sewer.

The putting in of a sewer connection does not come within the meaning of the word "repairs," as contained in a lease. It is the furnishing of a new improvement or addition of an original character. *Torreson v. Walla*, 92 N. W. 834, 836, 11 N. D. 481.

#### Street paving.

An obligation to repair a street is not an obligation to construct thereon a new pavement. *State ex rel. Kansas City v. Corrigan Consol. St. Ry. Co.*, 85 Mo. 263, 264, 55 Am. Rep. 361.

"Repair," as used in Act March 18, 1885, § 25, authorizing the county commissioners to keep streets in repair after certain work had been done on them, will not be held to include power to cause such streets to be paved, when they have not been paved before. *Santa Cruz Rock Pavement Co. v. Broderick*, 45 Pac. 863, 865, 113 Cal. 628.

A statute giving a lien for labor and materials furnished for building, altering, repairing, or ornamenting any house or other building, or appurtenance thereto, does not give a lien on a lot for curbing, grading,

and paving the street in front of the same *Smith v. Kennedy*, 89 Ill. 485.

#### Removal of obstructions from street.

"Repair," as used in a city ordinance giving a railroad company the right to use a city street providing the company should keep the street in a good and sufficient state of repair, means to restore to sound or good condition after injury or partial destruction. Where a street had been rendered impassable or obstructed by rocks, stone, gravel, and earth deposited on the street by washing from a ravine, to repair it or restore it to its former condition required the removal of the deposit thrown upon it. *Pittsburg & B. Pass. Ry. Co. v. City of Pittsburg*, 80 Pa. 72, 74.

In the case of *Gibson v. City of Huntington*, 38 W. Va. 177, 18 S. E. 447, 22 L. R. A. 561, 45 Am. St. Rep. 873, the holding that a municipal corporation is absolutely liable for injuries caused by its failure to keep in repair the streets, sidewalks, alleys, roads, and bridges, and that the word "repair" was recognized to mean obstructions on the highway, as well as defects in it, was approved. *Arthur v. City of Charleston*, 41 S. E. 171, 51 W. Va. 132.

#### Repair of vessel.

A statute giving a materialman a lien for materials, etc., furnished in the repair of a vessel, included the labor and materials furnished in enlarging or extending the promenade deck of the steamer, taking off and replacing the hurricane deck, and sheathing her inside, a considerable part of which work was done for the purpose of adapting the steamer to new use and services. *Donnell v. The Starlight*, 103 Mass. 227, 232.

The term "repairs," within the rule that the master of a vessel while in a foreign port may bind the owner for repairs and supplies, is not confined to such as are absolutely or indispensably necessary, but includes all such as are reasonably fit and proper for the ship and the voyage. Such necessity for repairs and supplies is proved, where such circumstances of exigency are shown as would induce a prudent owner, if present, to order them, or to provide funds for the cost of them on the security of the ship. *The Lulu*, 77 U. S. (10 Wall.) 192, 200, 19 L. Ed. 906.

#### Use of same material implied.

"Repair" means to restore to its former condition, not to change either the form or the material. "If you are to repair a wooden building, you are not to make it brick, stone, or iron; but you are to repair wood with wood." Where a lessee of an oil tank, made with iron sides and a wooden bottom, who covenanted to repair the tank and return it in good repair, made it as tight and secure as it could be made with a wooden bottom,

the covenant was complied with. *Ardesco Oil Co. v. Richardson*, 63 Pa. 162, 166.

### REPAIR TRACK.

A "repair track" is one on which cars needing repairs are put, and upon which it is not customary for the shifting engine to come without notice to the overhaulers at work there. With such a track, overhaulers can do their work without being subjected to unnecessary danger. *Richmond & D. R. Co. v. Norment*, 84 Va. 167, 175, 4 S. E. 211, 215, 10 Am. St. Rep. 827.

### REPAIRS NECESSARY FROM ANY IMPERFECTION.

A provision in a paving contract requiring the contractor to bear the entire expense of all the repairs which may become necessary from any imperfection in the work or material, does not cover usual or ordinary repairs, or the expenses incident to the natural wear of the pavement, or its destruction by flood or other cause, other than those resulting from the defect of workmanship or material. "Manifestly such paragraph is merely a guaranty on the part of the contractor for the faithful performance of his contract, requiring him merely to make good any defects arising from bad materials or the improper manner in which the work was performed." *Robertson v. City of Omaha*, 76 N. W. 442, 444, 55 Neb. 718, 44 L. R. A. 534.

### REPAVE—REPAVEMENT.

Repaving occurs when a pavement is replaced by another one. *Ten Eyck v. Rector*, 65 Hun, 194, 197, 20 N. Y. Supp. 157.

Repairs to a pavement, which has become so worn and dilapidated that a reconstruction with new materials is essential, amount to a repaving, within the proviso of an ordinance requiring a street railway company to keep certain surface of the street in good order and repair, providing that upon the paved portion of such streets the materials for repaving shall be supplied at the city's expense. *Ft. Wayne & E. R. Co. v. City of Detroit*, 34 Mich. 78, 79.

The flagging and reflagging of sidewalks, and the setting of curb and gutter stones, is not a repavement, within the meaning of the acts of 1872 and 1874, relative to the vacating of assessments for repavements in the city of New York. *In re Fay* (N. Y.) 12 Hun, 490.

Where, after a street has been regulated, graded, curbed, guttered and flagged, the grade thereof is lawfully changed, thereby necessitating the replacing of the flagging and the curb and gutter stones, such repla-

cing is not a "repavement," within the meaning of that term as used in a city charter requiring the expense of a "repavement" to be imposed upon the city generally. *In re Roberts* (N. Y.) 25 Hun, 371, 375.

Under Detroit City Charter (Loc. Acts 1887, p. 874) § 35, providing that the expense of paving a street may be assessed on adjoining property, but that the cost of repaving shall be paid by the city out of the repaving fund, the removal of the pavement 40 feet in width through the center of a street 200 feet wide, and the paving of a roadway 25 feet wide along each side of the street instead, constitute a repavement of the street, the cost of which cannot, therefore, be charged on the abutting property. *Dickinson v. Detroit*, 111 Mich. 480, 481, 69 N. W. 728.

### REPAY.

"Repay," as used in Act April 4, 1864, making a grant in aid of a railroad and requiring the railroad company to enter into an agreement promising to comply with the terms and conditions set forth in the act, and providing that, in case the company failed or refused to perform any of such conditions, it should be liable to repay to the state the amount which should have been paid by the state under the act, imports a payment to the state of the moneys granted by the state, but does not itself necessarily imply a promise to repay the moneys as moneys advanced by way of loan to the defendant. *People v. Central Pac. Ry. Co.*, 18 Pac. 90, 93, 76 Cal. 29.

"Repay," as used in an order reading, "Let plaintiff and family have whatever they want for their support, and I will repay you for the same," does not necessarily mean to pay money. It has also the meaning of return, restore, etc.; and to hold that the party making the order had the right to repay any kind of articles furnished for the support of plaintiff and family would not be at variance with the language of the order. *Grant v. Dabney*, 19 Kan. 388, 389, 27 Am. Rep. 125.

### REPEAL

A repeal signifies the abrogation of one statute by another. *Butte & B. Consol. Min. Co. v. Montana Ore Purchasing Co.*, 60 Pac. 1039, 1042, 24 Mont. 125.

The primary meaning of the word "repealed," as used in speaking of the repeal of a statute, is, as its etymology imports, that the statute has been recalled or revoked. *Oakland Pav. Co. v. Hilton*, 11 Pac. 3, 6, 69 Cal. 479.

A repealing clause is such an express enactment as necessarily divests all inchoate



rights which have arisen under the statute which it destroys. These rights are but an incident of the statute, and fall with it, unless saved by express words in the repealing clause. *Duffus v. Howard Furnace Co.*, 40 N. Y. Supp. 925, 930, 8 App. Div. 567.

#### **Suspension distinguished.**

There is a material difference between the repeal and the suspension of a statute. A repeal removes the law entirely; but, when suspended, it still exists, and has operation in every respect, except wherein it has been suspended. *Mernaugh v. City of Orlando*, 27 South. 34, 36, 41 Fla. 433.

The difference between a repealed and a suspended law is this: A repeal puts an end to the law. A suspension holds it in abeyance. *Hienssen v. State*, 23 Pac. 995, 997, 14 Colo. 228.

A repealing ordinance is a total abrogation of the law repealed. The suspension of an act or an ordinance cannot be construed to be the repeal of it. The Rochester city charter gives the city council the sole power to order street improvements when the expenses are to be defrayed by local assessments, and provides that the executive board shall have power to let all contracts to be made in pursuance of any ordinance, and shall have superintendence and control of all work ordered by the council. Under this provision an ordinance directing the improvement of a street may be repealed by the council before the contract has been awarded by the executive board. *Ashton v. City of Rochester*, 60 Hun, 372, 376, 14 N. Y. Supp. 855.

#### **Re-enactment.**

The term "repeal," in Const. art. 3, § 11, declaring that no law shall be amended unless the new act contains the section or sections amended, and the section or sections amended shall be repealed, was employed in the sense in which the term was understood at the time the Constitution was adopted. It had before that time been definitely settled as a rule of construction that the simultaneous repeal and re-enactment of the same statute in terms or in substance is a mere affirmance of the original act, and not a repeal in the strict and constitutional sense of the term. Where the re-enactment is in the words of the old statute, and was evidently intended to continue the uninterrupted operation of such statute, the new act or amendment is a mere continuation of the former act, and not in a proper sense a repeal. *State v. Bemis*, 64 N. W. 348, 350, 45 Neb. 724.

#### **REPEAL BY IMPLICATION.**

To constitute a repeal by implication there must be such repugnance or conflict between the positive and material provisions

of the different acts that they cannot stand together. *Hunter v. City of Memphis*, 28 S. W. 828, 829, 93 Tenn. (9 Pickle) 571.

A repeal by implication must be by necessary implication. It is not sufficient to establish that the subsequent law or laws cover some, or even all, of the cases provided for by it; for they may be merely affirmative, or cumulative, or auxiliary. But there must be a positive repugnance between the provisions of the new law and those of the old, and even then the old law is repealed by implication only pro tanto, to the extent of the repugnancy. *Hornaday v. State*, 65 Pac. 656, 657, 63 Kan. 499.

To repeal a statute by implication there must be such a positive repugnancy between the provisions of the new law and the old that they cannot stand together or be consistently reconciled. There should be a manifest and total repugnancy in the new law, to lead to the conclusion that the new law abrogated or was designed to abrogate the former law. A later statute, which is general and affirmative, does not abrogate a former one which is particular, unless negative words are used, or unless the acts are irreconcilably inconsistent. *Pacific R. Co. v. Cass County*, 53 Mo. 17, 18.

#### **REPEATED.**

"Repeated," as used in a printed statement that a telegraph company will only be responsible for error or delay in transmission of a message when it is repeated, etc., means telegraphed back to the originating office for comparison, and does not include the repeating of the message by the operator at the office where the message was received to the person to whom it was sent at the latter's request. *Bennett v. Western Union Tel. Co.*, 2 N. Y. Supp. 365, 367, 50 Hun, 600.

#### **REPEATED AND EXTREME CRUELTY.**

Repeated and extreme cruelty, within the meaning of the divorce statute, making such cruelty a ground for divorce, characterizes the act of a husband in first striking his wife twice in anger, and again striking her a year later, and two years thereafter knocking her down. *Abbott v. Abbott*, 61 N. E. 350, 351, 192 Ill. 439.

#### **REPLENISH.**

"Replenish," as used in a chattel mortgage, covering a stock of goods and any of the goods that may be bought by the mortgagor from time to time to replenish the stock, necessarily includes or implies a power to sell. "Replenish," from the Latin word "re" (again) and "plenus" (full), means liter-

ally to fill again, to fill up. Nothing can be filled again that is already full. If the goods would remain in the hands of the mortgagor, to be kept in statu quo until the mortgage was due, there would be nothing to replenish. To replenish a thing necessarily implies exhaustion, reduction, or diminution in the quantity of the commodity. There could have been no other mode of reduction in the quantity of these goods in the contemplation of the parties than by sale. *Bynum v. Miller*, 89 N. C. 393, 395.

## REPLEVIN.

Replevin lies to recover possession of goods or chattels wrongfully taken or detained. *McJunkin v. Mathers*, 27 Atl. 873, 158 Pa. 137.

Replevin is a possessory action, and can only be maintained by one entitled to the possession of the property claimed at the time of the commencement of the action. *Eldridge v. Sherman*, 38 N. W. 255, 256, 70 Mich. 266.

Replevin is an action to recover the possession of personal property. The right to recover possession in an action of replevin depends upon the question who has the right of possession. *Parllman v. Young*, 4 N. W. 139, 146, 2 Dak. 175.

"A mere naked possessory right, without any title to or right of possession of the property, will not maintain replevin, if the plaintiff's title or right of exclusive possession is put in issue by the defendant's plea." *Chambers v. Hunt*, 18 N. J. Law (3 Har.) 339, 343.

Primarily the action of replevin is possessory in its character, and unless the title to the property is distinctly put in issue a judgment determines nothing more than the right of possession. *Consolidated Tank Line Co. v. Bronson*, 2 Ind. App. 1, 5, 28 N. E. 155, 156; *Riggenberg v. Hartman*, 124 Ind. 186, 190, 24 N. E. 987.

Replevin is a possessory action, and the issue to be determined by it is the right of the parties litigant to possession of the subject-matter at the time the action was commenced. *Fischer v. Cohen*, 48 N. Y. Supp. 775, 776, 22 Misc. Rep. 117; *Hancock v. Shockman* (Ind. T.) 69 S. W. 826, 828; *Boruff v. Stipp*, 126 Ind. 32, 33, 25 N. E. 865; *Hall v. Durham*, 113 Ind. 327, 330, 15 N. E. 529, 531.

Replevin lies for him who has the general or special property in goods against him who has wrongfully taken them. The remedy in this form, even if it did not originally extend to the recovery of chattels in the custody of the law, is now given by statute to all persons whose goods are attached on

mesne process or taken on execution, except the defendant in the suit. *Tracy v. Warren*, 104 Mass. 376, 377.

Replevin "is an action at law which lies for all goods and chattels unlawfully taken or detained, and may be brought whenever one person claims personal property in the possession of another; and this, whether the claimant has ever had possession or not, and whether his property be absolute or not, providing he has the right of possession." *Lazard v. Wheeler*, 22 Cal. 139, 142 (quoting *Morris*, Repl. 37).

Replevin, under our statute, is peculiarly a possessory action, and its object is to enable the plaintiff to obtain the actual possession of property wrongfully detained. *Stevenson v. Taylor*, 2 Mich. N. P. 95, 96 (citing *Hickey v. Hinsdale*, 12 Mich. 99, 100; *Comp. Laws*, § 5005).

Replevin is an action which lies for the recovery of the special articles which have been taken or detained by a person whom the claimant holds has no right to them. Under this special form of action the value of the articles may be recovered in money if the property itself cannot be found, or the property may be recovered if the possession thereof can be had. Replevin lies for all goods and chattels unlawfully taken or detained and personal property in the possession of another; and this, whether the claimant has ever had possession or not, and whether his property in the goods be absolute or qualified, providing he has the right to possession. Therefore the question of possession enters into and becomes the very gist of the action of replevin. *Maclary v. Turner* (Del.) 32 Atl. 325, 326, 9 Houst. 281.

Replevin is a summary proceeding whereby, upon proper security, the pledge is redelivered, where property is pledged as security, and the question of right is to be subsequently determined. *Hewitson v. Hunt* (S. C.) 8 Rich. Law, 106, 110, 111.

Replevin is for a particular thing. The action of replevin is sui generis, and governed by its own provisions, as found in the Code. *Ellison v. Lewis*, 57 Miss. 588, 590.

Replevin, strictly speaking, is a possessory action. Its primary object is to enable the plaintiff to obtain the actual possession of the personal property wrongfully detained by the defendant at the time the suit is begun. Often, in actions of replevin, the right to the possession of the property is the only matter in controversy, and the only question that can be tried and determined. It is so far a possessory action that a mere right of possession may prevail against the absolute legal title to the property, where the right of possession and the title have been separated, or are held by different parties.

*Melser v. Smith*, 2 Ind. App. 37, 39, 27 N. E. 871.

A replevin is a justicial writ to the sheriff, complaining of an unjust taking and detention of goods or chattels, commanding the sheriff to deliver back the same to the owner on security given to make out the justice of such taking, or else to return the goods and chattels. *Gilb. Repl.* 58. Replevin is a remedy granted upon a distress. 2 Sell. Prac. p. 153. Replevin is an action founded on a taking, and the right which the party from whom the goods were taken has to have them restored to him until the question of title to the goods is determined. *Shannon v. Shannon*, 1 Schoales & L. 327. The action of replevin is granted on tortious taking, and sounds in damages, like an action of trespass, to which it is extremely analogous, if the sheriff has already made a return (of the goods) and the plaintiff sues only for damages for the caption. Replevin will lie for the goods of a stranger taken on execution as the goods of the debtor, if taken out of the actual or constructive possession of the plaintiff. *Williamson v. Ringgold* (U. S.) 30 Fed. Cas. 19, 20.

At common law an action in replevin tested only the right of possession of the replevied property at the time of the commencement of the action, and provided no method whereby the defendant might have judgment for the value of the property in case the adjudged return thereof could not be had, but left the successful defendant to another action in another forum to procure such relief. But under our statute, as is the case under most statutes of replevin, an additional or cumulative remedy to that found in the common law has been provided. *Johnson v. Boehme*, 71 Pac. 243, 244, 66 Kan. 72, 97 Am. St. Rep. 357.

An action in replevin is a possessory action, and will lie only in cases where the plaintiff is entitled to the immediate possession of the property in controversy. While it may be said that the question of ownership is in some instances involved also in the trial of such cases, it does not follow that in every case of replevin the title to the property is in issue. On the contrary, a man may be entitled to the possession of the property as bailee, pawnee, or in many other cases, without having the ultimate legal title to the property. *Whitehead v. Coyle*, 1 Ind. App. 450, 452, 27 N. E. 716.

Replevin is an action at law for the recovery of specific personal chattels wrongfully taken and detained, or wrongfully detained, with damages which the wrongful taking or detention has occasioned. It is what it usually termed a mixed action, being partly in rem and partly in personam—in rem so far as the specific recovery of the chattels is concerned, and in personam as to the dam-

ages. *Fredericks v. Tracy*, 33 Pac. 750, 751, 98 Cal. 658.

Originally at common law the action of replevin lay to recover the possession of goods illegally restrained by the landlord. The primary object of the action was to recover possession of specific chattels. The form of action was so useful that the action was extended to nearly all cases of unlawful caption or detention of chattels, where it was sought to recover the chattels in specie. In many cases, where the plaintiff was unable to obtain the return of the chattels, he could recover in the action their value. Still the action remains essentially to recover possession of chattels, as distinguished from actions for trespass or trover, to recover damages for the seizure of or for value of the property. *Sinnott v. Felock*, 59 N. E. 265, 165 N. Y. 444, 53 L. R. A. 565, 80 Am. St. Rep. 736.

Replevin is essentially a possessory action, and does not lie against one who is not either actually or constructively in possession of the property described in the complaint. In replevin, therefore, parties cannot with any propriety be made defendants merely because they claim some interest in the property in controversy, but have none; and a general denial by such defendants makes no issue to try. *Van Gorder v. Smith*, 99 Ind. 404, 407.

An action for the recovery of the possession of personal property, or, in case possession thereof cannot be had, then for the value thereof, is an action in replevin. At common law this was a local action. It is made local likewise by most of the statutes of the states. *Healey v. Humphrey* (U. S.) 81 Fed. 990, 991, 27 C. C. A. 39.

#### Demand required.

"The gist of the action of replevin being the wrongful detention, we apprehend that, if a person rightfully comes into possession of personal property of which he is not the owner, his possession is not wrongful until a demand is made on him for a return of it, but that if a person comes into the possession of personalty by his own wrong, and against the will of the owner, or without his consent, no demand is necessary in order to maintain replevin." *Jordan v. Johnson*, 42 Pac. 415, 416, 1 Kan. App. 656.

#### Detinue distinguished.

See "Detinue."

#### As a substitute for trespass and trover.

Replevin is a substitute for trespass and trover, and in the case of property subject to a lien where the leaseholder is either in, or entitled to, the immediate possession of the property, it seems that a levy on the whole of it, in defiance of his rights, is unauthor-

ized by law, and is a trespass on account of which he may maintain replevin. *Lowe v. Wing*, 13 N. W. 892, 893, 56 Wis. 31.

The use of the writ of replevin and the relief afforded by it are not limited to the taking of goods and chattels by way of distress. Where goods or chattels are unlawfully taken, where they are so taken as to entitle the owner or possessor to an action of trespass, an action of replevin may be maintained. *Bruen v. Ogden*, 11 N. J. Law (6 Halst.) 370, 378, 20 Am. Dec. 593.

#### Unlawful taking required.

At common law a writ of replevin never lies unless there has been an unlawful taking, either originally or by construction of law, by some act which makes the party a trespasser ab initio. In case of a bailment or rightful possession of the property, replevin is certainly not the proper remedy at common law. *Meany v. Head* (U. S.) 16 Fed. Cas. 1302, 1303.

#### REPLEVIN BOND.

A replevin bond operates as a guaranty for the delivery of the chattels taken under the writ. *Ward v. Hood*, 27 South. 245, 246, 124 Ala. 570.

A replevin bond is a bond executed to indemnify the officer who executed the replevin writ, and to indemnify the defendant or person from whose custody the property is taken for such damages as he may sustain. *Imel v. Van Deren*, 5 Pac. 803, 807, 8 Colo. 90.

A replevin bond is an indemnity, not only for the costs that the defendant in replevin may recover, but for damages to the value of the property replevied. *Walker v. Kennison*, 34 N. H. 257, 259.

The liabilities of the securities on a replevin bond are similar, or nearly so, to the liabilities of bail. The security in the one case is no more a substitute for the goods than that in the other is a substitute for the person. *Badlam v. Tucker*, 18 Mass. (1 Pick.) 284, 287.

#### REPLEVY.

The term "replevy" means to redeliver goods which have been distrained. *Kirk v. Morris*, 40 Ala. 225, 229 (citing *Bouv. Law Dict.*).

A replevy is intended merely as an inexpensive method of preserving the property until it is wanted for the payment of the judgment that may be rendered. *Humes v. Scott*, 30 South. 788, 789, 130 Ala. 281.

The word "replevied," as used in the rule that it is the duty of the officer, when property described in the writ is pointed out to him, to immediately take it in his pos-

session for the purpose of having it appraised and ready to be replevied as soon as the bond is given, is used in its technical sense, and means "delivered to the owner." *Steuer v. Maguire*, 66 N. E. 706, 707, 182 Mass. 575.

#### REPLICATION.

See "General Replication"; "Special Replication."

A replication in equity is the plaintiff's answer or reply to the defendant's plea or answer. *Appeal of Worthington* (Pa.) 9 Kulp, 132, 133.

#### REPLY.

As answer, see "Answer."

#### REPORT.

A report or finding of a referee is not a final judgment from which an appeal may be taken, but may more properly be deemed a finding upon the law and facts submitted to him for the information of the court appointing him, upon which the court may properly act, as upon the verdict of a jury or an award of arbitrators, and pronounce judgment. *Chambers v. Savage*, 13 Fla. 585, 586, 589.

Mailing a letter prepaid and properly addressed to an insurance company, if done by general direction of their agent, satisfies a condition in a policy that the facts stated in the letter shall be "reported" to the company. *Edwards v. Mississippi Valley Ins. Co.*, 1 Mo. App. 192, 198.

"Report" is one of the synonyms of "rumor," which is defined by Webster to be "flying or popular report; a current story passing from one person to another, without any known authority for the truth of it." *State v. Culler*, 82 Mo. 623, 627.

"Reported at the custom house," as used in a charter party providing that a vessel was to be reported at the custom house by a certain firm, is equivalent to "entered at the custom house," and does not include the right to collect the freights and do the other business in connection with the inward voyage. *Mignano v. MacAndrews* (U. S.) 49 Fed. 376, 377.

A "report" to be made by a guardian on citation, which does not require of him to file a final account, though not precisely equivalent to "account," includes it. *Heisen v. Smith*, 71 Pac. 180, 181, 138 Cal. 216, 94 Am. St. Rep. 39.

The word "report," when used in connection with a trial or other inquiry, or a judgment, means a referee's report. *Code Civ. Proc. N. Y.* 1899, § 3343, subd. 5.

**"Report" and "comment" are two separate and distinct things.** A report is the mechanical reproduction of what actually took place. Comment is the judgment passed on the circumstances by one who has applied his mind to them. Fair reports are privileged, while fair comments are no libel at all. Blending the report and comment together does not make the article libelous, if it would not be such if the one were separated from the other. *Jones v. Press Pub. Co.*, 61 N. Y. Super. Ct. (29 Jones & S.) 207, 209, 19 N. Y. Supp. 3, 5.

The report of a referee is simply the response of an officer of the court to the order of the court to find the law and facts involved in the controversy. It is then before the court, to be dealt with in the sound discretion invested in it in reference to such matters, but is not of any juridical force. *Citizens' Bank of Humphrey v. Stockslager*, 96 N. W. 591, 593, 1 Neb. (Unof.) 799.

The expression "report the same to Congress," as used in Act Cong. July 8, 1886, providing that the claims of certain persons for property claimed to have been taken and impressed into the service of the United States, but referred to the Court of Claims for adjudication according to law, and requiring the court to report the same to Congress, means no more than that the court is to report the result of the adjudication directed by Congress to be made. The court is not to certify its opinion to Congress, nor is it to report it to any other department of the government; but the judgment must in due course be reported to Congress, as other judgments. *Irwin v. United States*, 23 Ct. Cl. 149, 155.

## REPORT THEIR CONCLUSIONS.

See "Conclusion."

## REPORTER.

A reporter of a newspaper is a person employed "in reporting proceedings of courts, public meetings, legislative assemblies, and other services of a kindred character for the newspaper," and is a laborer or servant, within the act imposing individual liability for debts of companies for services of laborers and servants. *Harris v. Norvell* (N. Y.) 1 Abb. N. C. 127, 131. See, also, *Michigan Trust Co. v. Grand Rapids Democrat*, 71 N. W. 1102, 1103, 113 Mich. 615, 67 Am. St. Rep. 486.

## REPOSITORY.

A repository is a place where things are or may be deposited for safety or preservation; a depository; a storehouse; a magazine; "a place where things are kept for sale; a shop, as a carriage repository." *State v. Sprague*, 50 S. W. 901, 903, 149 Mo. 409.

## REPRESENT.

### As act on stage.

Act Aug. 18, 1856 (11 Stat. 138), confers on the author or proprietor of a copyrighted dramatic composition, suited for public representation, the sole right to act, perform, or represent it on the stage. Held, that the words "act, perform, or represent" means representation in dialogue and actions by persons who represent the composition as real, by performing or going through the various parts or characters severally assigned to them. *Daly v. Palmer* (U. S.) 6 Fed. Cas. 1132, 1136.

### As showing agency.

"Representing," as used in a petition stating that "the undersigned, representing a majority of the taxpayers of a town," etc., should be construed to mean that the petitioners were themselves such majority; the word "representing" not qualifying the phrase, so as to import that such majority did not themselves subscribe the petition, but did it only through the instrumentality of others and in the relation of agents for the other taxpayers. *Town of Solon v. Williamsburgh Sav. Bank*, 114 N. Y. 122, 130, 21 N. E. 168.

### As conduct legal proceeding.

"Represent," as used in Code Civ. Proc. § 372, authorizing appointment of a guardian ad litem to represent an infant in an action or proceeding, means that he is to conduct and control the proceeding on behalf of the infant. *Carpenter v. Superior Court of San Joaquin County*, 19 Pac. 174, 176, 75 Cal. 596.

### As occupied or developed.

"Represented," as used in St. 1861, § 11, relating to lode claims, and protecting the locations of soldiers in the army from forfeiture because not "represented," means occupied or developed. *Consolidated Republican Mountain Min. Co. v. Lebanon Min. Co.*, 12 Pac. 212, 213, 9 Colo. 343.

### A promise indicated.

"Represented," as used in an allegation that a person falsely represented, should not be construed to mean that a promise was imported, and to give notice to the opposite party that a mere promise is relied on, but rather alleges fraud. *Cooper v. Landon*, 102 Mass. 58, 60.

### As stand in place of.

To represent a person is to stand in his place, to act his part, to exercise his right, or to take his share. *Plummer v. Brown*, 1 Pac. 703, 704, 64 Cal. 429.

To represent means to stand in the place of; and so insurance money represents the property insured, so that, where the property

is exempt from execution, the insurance money is also. *Chase v. Swayne*, 30 S. W. 1049, 1051, 88 Tex. 218, 53 Am. St. Rep. 742.

The word "representing," in a petition by taxpayers which states that "the undersigned, representing a majority of the taxpayers, desire the town to issue its bonds," etc., means that the undersigned stand for or are a majority of the taxpayers of the town. It cannot be construed to mean that the undersigned represent, as agent or otherwise, a majority of the taxpayers. *Town of Solon v. Williamsburgh Sav. Bank (N. Y.)* 35 Hun, 1, 7.

"Represent," as used in Act March 2, 1895, c. 191, § 1, 28 Stat. 963 [U. S. Comp. St. 1901, p. 3178], making it an offense to cause to be carried from one state to another any instrument purporting to represent a ticket in a lottery, means represent to the purchaser. It means stand as the representation of title to the indicated thing, and policy slips retained by a customer to indicate his choice of numbers, and delivered by him to an agent of the policy game, to be forwarded to another state, as little represent the purchaser's chance as the stubs in a check book represent the sums coming to the payees of the checks, and are not within the statute. *Francis v. United States*, 23 Sup. Ct. 334, 335, 188 U. S. 375, 47 L. Ed. 508.

#### As state.

"Represented," as used in a question on a trial for selling beer to a minor, as to whether at the time of the sale the purchaser had not "represented" himself to be over 21 years of age, should be construed in the sense of "stated." *Peterson v. State*, 34 Atl. 834, 835, 83 Md. 194.

"Represent" means to describe or portray in words; to declare; to set forth; to exhibit to another mind in language. In *Butts v. Long*, 68 S. W. 754, 755, 94 Mo. App. 687, which was an action for slander of title, the petition declared that the defendants did represent and state in the presence and hearing of certain persons that plaintiff was not the owner of certain property described in the petition, etc., and it was held that the allegations charged that the defendants spoke the language charged, the words "represent" and "state" imply the utterance of the language mentioned in connection with these words. *Butts v. Long*, 68 S. W. 754, 756, 94 Mo. App. 687.

#### REPRESENTATION.

See "Affirmative Representations"; "By Right of Representation"; "False Representation"; "Fraudulent Representation"; "Material Representation"; "Promissory Representation"; "Public Representations."

Representation is a fiction of the law, the effect of which is to put the representative in the place, degree, and rights of the person represented. Civ. Code La. 1900, art. 894.

The right of representation invests the representative with the place, degree, and rights of the person represented. It was recognized both in the civil and common law as existing ad infinitum in the direct descending line. *Gaines v. Strong's Estate*, 40 Vt. 354, 356.

#### Heirship distinguished.

"Representation" and "heirship," though they may produce the same result, are not the same thing; and it is not necessary that a person should be the heir of another, in order to be his representative. "Heirship" is the result, while "representation" is but a process through which that result is produced. Representation is not predicated of the person dying seised, but of the next line of takers from him, and the very nature of the right implies that those should be considered as the representatives of the deceased person who would have inherited of him, if he had died seised of the estate at the time when the descent was cast. *Gaines v. Strong's Estate*, 40 Vt. 354, 362.

#### Implied statements.

A representation may arise, not only by way of concealment of part of the truth in regard to a whole fact, but from total and misleading silence. With knowledge or passive conduct, joined with a duty to speak, an estoppel will arise. The case must be such that it would be fair to interpret the silence into a declaration of the party that he has, e. g., no interest in the transaction. *Watson v. Prather (Ky.)* 65 S. W. 439 (citing *Bigelow, Estop.*).

The term "representation" is used for convenience as including both express and implied statements. It is not necessary that there should be an express statement. Whatever word, action, or conduct conveys a clear impression as of a fact is embraced in the term. Indeed, the term "representation" includes silence in certain cases; for silence, where one is bound to speak, is ordinarily equivalent to an admission of fact. *Foster v. McAlester*, 58 S. W. 679, 684, 3 Ind. T. 307.

#### In insurance.

A "representation," as the term is used in insurance, is an affirmation or denial of some fact, or an allegation which would plainly lead the mind to the same conclusion. *Livingston v. Maryland Ins. Co.*, 11 U. S. (7 Cranch) 506, 507, 3 L. Ed. 421.

A representation in insurance law is an assertion by the insured of some fact, but the validity of the policy does not de-

pend on the literal truth of the assertion. *Ætna Life Ins. Co. v. Rehlaender* (Neb.) 94 N. W. 129, 132 (citing *Ætna Ins. Co. v. Simmons*, 49 Neb. 811, 69 N. W. 125).

"Representation," as used in the law of insurance, is a statement in regard to a material fact, made by the applicant for insurance to the insurer with reference to the proposed contract, but which is not a part of such contract. *Price v. Phoenix Mut. Life Ins. Co.*, 17 Minn. 497, 503 (Gil. 473, 480), 10 Am. Rep. 166.

"Representations," in the law of insurance, in their usual significance precede the policy, and refer to the character, ownership, use, and other particulars of the subject insured, whether material or not. If they are made part of the policy, and are false, they are treated also as warranties, and the misrepresentation avoids the policy. *Goldman v. North British Mercantile Ins. Co.*, 19 South. 132, 133, 48 La. Ann. 223 (citing *Wood, Ins.* § 150).

"Representation" is defined in *May, Ins.* § 181, as "a statement, incidental to a contract, relative to some fact having reference thereto, and upon the faith of which the contract is entered into. If false, and material to the risk, the contract is avoided. Such false statement is termed in insurance a 'misrepresentation,' which has been well defined to be a statement of something as a fact which is untrue in effect, and which the insured states, knowing it to be untrue, with the intent to deceive the insurers, or which he states positively as true, without knowing it to be true, and which has a tendency to mislead." An application for insurance provided that, if any misrepresentation or fraudulent or untrue answers were given, the policy should be void. Untrue statements did not avoid the policy, unless they were fraudulently made. *Fitzgerald v. Supreme Council Catholic Mut. Ben. Ass'n*, 56 N. Y. Supp. 1005, 1009, 39 App. Div. 251.

"Representation," in the law of insurance, is defined to be a collateral statement, either by parol or in writing, of such facts or circumstances relative to the proposed adventure, and not inserted in the policy, as are necessary for the information of the assurer to enable him to form a just estimate of the risk. If the fact or circumstances appear on the face of the policy, it becomes a warranty, and not a representation. It is essential, therefore, that it be of some matter out of and collateral to the contract, and makes no part of the policy. *Vandervoort v. Smith* (N. Y.) 2 Caines, 155, 160.

A representation in insurance is not, strictly speaking, a part of the contract of insurance, or of the essence of it, but rather something collateral and preliminary, and

in the nature of an inducement to it. A false representation will not operate to violate the contract or avoid the policy, unless it relates to a fact actually material, or clearly intended to be made material by the agreement of the parties. It is sufficient if representations be substantially true. A misrepresentation renders the policy void on the ground of fraud. *Alabama Gold Life Ins. Co. v. Johnston*, 80 Ala. 467, 2 South. 125, 59 Am. Rep. 816.

In insurance, "representations" are no part of the contract of insurance, but are collateral or preliminary to it. When made to the insurer, at or before the contract is entered into, they form a basis upon which the risks proposed to be assumed can be estimated. They operate as the inducement to the contract. Unlike a false warranty, they will not invalidate the contract, because they are untrue, unless they are material to the risk, and need only be substantially true. They render the policy void on the ground of fraud, while a noncompliance with the warranty operates as an express breach of contract. *Providence Life Assur. Soc. v. Reutlinger*, 25 S. W. 835, 836, 58 Ark. 528.

In the law of insurance, a representation to the insurer, before or at the time of making a contract of insurance, is a presentation of the elements upon which to estimate the risk proposed to be assumed. They are the basis of the contract, its foundation, on the faith of which it is entered into. If wrongly represented in any respect material to the risk, the policy that may be issued thereupon will not take effect. To enforce it would be to apply the insurance to a risk never presented. *Davis v. Ætna Mut. Fire Ins. Co.*, 39 Atl. 902, 903, 67 N. H. 335 (citing *Campbell v. New England Mut. Life Ins. Co.*, 98 Mass. 381, 390; *Kimball v. Ætna Ins. Co.*, 91 Mass. [9 Allen] 540, 85 Am. Dec. 786; *Eastern R. Co. v. Relief Fire Ins. Co.*, 98 Mass. 420).

In insurance, a representation is a statement by the applicant to the insurer regarding a fact material to the proposed insurance, and it must be not only false, but fraudulent, to defeat the policy. While a warranty in the law of insurance is a binding agreement that the facts stated by the applicant are true, and is a part of the contract, a condition precedent to a recovery upon it, and its falsity in any particular is fatal to an action on the policy, a representation is a mere declaration of a fact; but it is neither a condition precedent, nor a part of the contract, like a warranty. The crucial distinction between a representation and a warranty is that the one is not, and the other is, a part of the contract between the parties, and that the truth of the one is not, and the truth of the other is, a condition precedent to a recovery upon the policy.

*Rice v. Fidelity & Deposit Co. of Maryland* (U. S.) 103 Fed. 427, 430, 43 C. C. A. 270.

In the law of insurance, representations are of two classes, affirmative and promissory. The former are those which affirm the existence of a particular state of things at the time the contract of insurance is made and becomes operative. The latter are those which are made by the insured concerning what is to happen during the term of the insurance, stated as matters of expectation, or, it may be, of contract. The one is an affirmation of a fact existing when the contract begins. The other is a promise to be performed after the contract has come into existence. *New Jersey Rubber Co. v. Commercial Union Assur. Co. of London*, 46 Atl. 777, 778, 64 N. J. Law, 580.

"Representations," in connection with an application for an insurance policy, have not always been confined to representations of fact existing at the time of the making of the policy, but to the future; not to facts which any person knows, or can know, but to matters of expectation or belief. Such statements, when not expressed in the form of a distinct warranty, are sometimes called promissory representations, to distinguish them from those relating to facts or affirmative representations, and these words express the distinction: The one is an affirmation of a fact existing when the contract begins; the other is a promise to be performed after the contract has come into existence. *Kimball v. Aetna Ins. Co.*, 91 Mass. (9 Allen) 540, 543, 85 Am. Dec. 786.

"Representation," as the term is used in the law of insurance, "is a verbal or written statement made by the assured to the underwriter, before the subscription of the policy, as to the existence of some fact or state of facts tending to induce the underwriter more readily to assume the risk by diminishing the estimate he would otherwise have formed of it." *Aetna Ins. Co. v. Grube*, 6 Minn. 82, 87 (Gil. 32, 36) (citing Ang. Ins. § 147; *Byers v. Farmers' Ins. Co.*, 35 Ohio St. 606, 620, 35 Am. Rep. 623).

**Same—Warranty distinguished.**

See "Warranty."

**REPRESENTATIVE.**

See "Lawful Representatives"; "Legal Representative"; "Personal Representative"; "Proper Representative."

A representative is one who stands in the place of another as heir, or in the right of succeeding to an estate of inheritance; one who takes by representation; one who occupies another's place, or succeeds to his rights and liabilities. *Lee v. Dill* (N. Y.) 39 Barb. 516, 520.

The terms "representatives," "legal representatives," and "personal representatives" of deceased persons were used interchangeably, and primarily meant those artificial representatives, the executors and administrators, who by law represented the deceased, in distinction from the heirs, who were the natural representatives; but as, under statutes of distribution, executors and administrators are no longer the sole representatives of the deceased as to personal property, these words have lost much of their original distinctive force, and are now used to describe either executors and administrators, children or descendants, next of kin or distributees, and, when not applied to those who represent deceased persons, they may mean trustees in insolvency and receivers. *Staples v. Lewis*, 41 Atl. 815, 71 Conn. 238.

**As one having authority to act for another.**

In construing a paving contract with a city, which referred to a former contract made by the contractors with the owners of the property, and reciting that, "whereas, the owners and representatives of three-fourths of the property fronting on the street," etc., the court said: "Representatives," we must therefore assume, means legally, and when here used was intended to mean, what the term imports; that is, one having legal authority to act in behalf of the property and bind the owner of record thereof—not merely one not having such authority, but assuming to have it." *City of Chicago v. Sherwood*, 104 Ill. 549, 554.

**Assignees in bankruptcy.**

The assignees of a bankrupt are to be considered as the representatives of the bankrupt, within the meaning of an act for enlarging the term granted to a patentee for the enjoyment of his patent, declaring that in case the authority granted by the letters patent should at any time become vested in, or in trust for, more than the number of five persons or their representatives at any one time, otherwise than by devise or succession, all liberties vested in the patentees should become void. *Bloxam v. Elsee*, 6 Barn. & C. 169, 177.

**Beneficiary of insurance policy.**

The articles of association of the Odd Fellows' Mutual Benefit Society, organized under Gen. St. 1878, tit. 3, c. 34, state that "the general nature of its business and its general purpose is insuring the lives of the members on the plan of paying to the representatives of every deceased member a certain sum to be assessed on and received by the other members of said association," there being nothing in the statute or elsewhere in the articles of association or by-laws limiting the beneficiaries of such insurance to



any particular classes of persons. Held, that the word "representatives," as here used, is to be construed, not in any limited or technical sense, but as meaning and including any person whom the principal may designate, or, if he fail to designate, the person whom the by-laws designate. *Walter v. Odd Fellows' Mut. Ben. Soc.*, 44 N. W. 57, 58, 42 Minn. 204.

### Children.

The children of a deceased child of the testator are the representatives of the child, within the meaning of a trust devise providing for the division of a trust estate between the testator's children and the legal representatives of such as may have died. *Merrell v. Curtis*, 39 Atl. 973, 69 N. H. 206.

Where testator gave the whole of his residuary estate to two brothers, "who, or whose representatives, are to be entitled to possession and enjoyment," such words refer to those who would stand in the place of the brother of the testator; or, in other words, there is a gift by substitution, not dependent upon a precedent estate, but in the nature of an original gift, to take effect if the brother died before the testator. A representative is one who stands in the place of another, of real estate as heir, of personality as next of kin. He is one, also, who takes by representation; and in wills and settlements the terms "representative" and "legal representative" are frequently held to mean heirs and next of kin, and not executors and administrators; and it was so used by testator as to create a substituted gift to the children of his brother or brothers, if one or both died before him. *Jones v. Hand*, 79 N. Y. Supp. 556, 559, 78 App. Div. 56.

### Executor suing individually.

Where promissory notes payable to a foreign executor, as such, are indorsed by him as executor to himself in his individual capacity, and he sues thereon in his own name, he is not to be deemed the representative of a deceased person, so as to exclude the defendant from being a witness in his own favor, under Code, § 399, prohibiting the defendant from testifying in respect to any transactions had personally between deceased and defendant. *Buckingham v. Andrews* (N. Y.) 34 Barb. 434, 436.

### Executor or administrator.

The word "representative" naturally signifies a personal representative—an executor or administrator. In *re Phillips' Estate*, 55 Atl. 210, 211, 205 Pa. 504, 97 Am. St. Rep. 743.

The term "representative," when applied to those who represent a decedent, includes executors and administrators, unless the context implies heirs and distributees. *Shannon's Code Tenn.* 1896, § 68.

It is settled that if an inference can be drawn from a will that a testator used the words "personal or legal representatives" to designate individuals answering the description, though not in the strict legal sense of the terms, those persons will be entitled in preference to executors and administrators. *Albert v. Albert*, 12 Atl. 11, 16, 68 Md. 352 (citing 1 *Rop. Leg.* 128; *Williams, Ex'rs* [6th Am. Ed.] 1217-1225).

The "representative" of a deceased person is his executor or administrator, and in that sense alone is the word used in *Rev. St.* 1881, § 2442, authorizing a suit against heirs, etc., where there has been administration of the intestate debtor's estate, and the defendants have received assets therefrom. *Rinard v. West*, 92 Ind. 359, 364.

In construing wills, courts have held that the words "representative," "legal representative," and "personal representative" may mean the next of kin or heirs; but the same courts have also held that those words in their ordinary sense are to be understood as synonymous with executors and administrators. *Williams* says: "The ordinary legal sense of the term 'representatives,' without the addition of 'legal' or 'personal,' is executors or administrators." 2 *Williams, Ex'rs* (5th Am. Ed.) 1015. In the provision of section 399 of the Code of Procedure allowing parties to be examined as witnesses, except that parties shall not be examined against parties who are representatives of a deceased person in respect to transactions between such deceased person and the witness, the words "representatives of a deceased person" mean executors or administrators. *McCray v. McCray* (N. Y.) 12 Abb. Prac. 1, 8.

A limitation of a deed to her and her representatives can only mean to her executors and administrators. *McLaurin v. Fairly*, 59 N. C. 375, 377.

The word "representative," in a policy of insurance effected by the assured on his life, and expressed to be payable on his death to his heirs or representatives, does not embrace a third person; but the policy is payable to the administrator as administrator of the estate of the deceased, and oral declarations of the assured, after receiving the policy, that he intended it for the benefit of a son, are inadmissible. *Wason v. Colburn*, 99 Mass. 342, 343.

The expression "legal representatives," as used in the statute of 1788 authorizing a remedy by motion by a surety against the legal representatives of a deceased co-surety, may mean, if taken in its more general signification, as synonymous with "lawful," either the lawful representatives of the real estate, or the lawful representatives of the personal estate of the deceased; but since the undertaking between sureties to make contribution is an implied assumpsit, which prop-

erly applies to and devolves upon the executor or administrator, but does not devolve upon the heir, it seems more proper to render this expression in the statute according to the subject-matter, and to refer the phrase to the executors and administrators, who lawfully represent and are bound by the implied assumption of the deceased, than to the heirs. *Lansdale's Adm'rs v. Cox*, 23 Ky. (7 T. B. Mon.) 401, 405.

The primary sense of the word "representatives," when used in a bequest of personal property, is the same as that of "legal representatives" or "personal representatives," and each of them is equivalent to executors or administrators. *Brent v. Washington (Va.)* 18 Grat. 526, 533.

#### Grantee.

The word "representatives" has no technical meaning in law. It may signify heirs or executors, or a representative may mean one who is substituted for another in any business; but the word never signifies a grantee. A partition, under the statute of March 16, 1785 (1 Jones & V. Laws, p. 201), in which the commissioners awarded certain lands in severalty to B.'s representatives, without naming them, was void for uncertainty of the persons who were to take. *Jackson v. Tibbits (N. Y.)* 9 Cow. 241, 252.

#### Heirs not equivalent.

"Representatives," as used in a deed providing that, in case the grantee should survive the grantor, the premises should go to the children and their representatives of the grantee, cannot be construed as equivalent to "heirs." *Mattocks v. Brown*, 103 Pa. 16, 21, 13 Wkly. Notes Cas. 365, 366.

A deed provided that on certain contingencies the land should "go to and be vested in the five children and their representatives of the said C." Held, that the word "representatives," so used, is not equivalent to the word "heirs," and that the deed passed nothing to the children but an estate for life. *Brown v. Mattocks*, 103 Pa. 16, 21.

A reservation by the grantor of land to himself and his "representatives, forever," of the right of passage over the land conveyed, should be construed to reserve only a life easement, and not an estate in fee. A reservation to himself and "representatives, forever," is not equivalent to a reservation to himself and his heirs, since the word "heirs" is required by statute to create an estate in fee. *Claffin v. Boston & A. R. Co.*, 32 N. E. 659, 660, 157 Mass. 489, 20 L. R. A. 638.

#### As heir, devisee, or administrator.

"Representatives of deceased persons," as used in Gen. St. 1888, § 1094, making the declarations of deceased persons relevant to the matter in issue admissible in evidence in

actions against their representatives, refers to either executors, administrators, or some person who takes a portion of the estate of the deceased in consequence of his death either as devisee or heir. *Lockwood v. Lockwood*, 14 Atl. 293, 295, 56 Conn. 106.

Gen. St. 1888, § 1094, provides that in actions by or against the representative of a deceased person, the entries, memoranda, and declarations of deceased may be received as evidence. Held that, to constitute one a representative of a deceased person within the meaning of the statute, he must take some portion of his estate in consequence of his death, either as heir or devisee, or else he must be strictly a personal representative, as executor or administrator. Had the statute used the word "personal" before the word "representative," the admission of such evidence would be confined to suits by or against such administrator. *Pixley v. Eddy*, 15 Atl. 758, 760, 56 Conn. 336.

A representative is one that stands in the place of another, as heir, or in the right of succeeding to the estate by inheritance; one who takes by representation; one who occupies another's place and succeeds to his rights and liabilities. Representatives of a deceased person are real or personal; the former being the heirs at law, and the latter being ordinarily the executors or administrators. The term "representatives" includes both classes. When the personal representatives at law are intended in a statute, they are so named; and there is no expression of an intent to limit the protection and benefit of this exception to the personal representatives. The words "representatives of a deceased person," in Code, § 399, as it stood prior to the amendment of 1862, allowing parties to be examined as witnesses, except against parties who are representatives of a deceased person and the witness, includes both real and personal representatives. *Lee v. Dill (N. Y.)* 16 Abb. Prac. 92, 96 (citing *Webst. Dict.*).

"Representative" means in law one who represents or stands in place of another. It is frequently used to denote the personal representative—in other words, the administrator or executor—of a deceased person; but it has also a broader meaning, and as used in Sand. & H. Dig. § 5934, relative to the revival of an action against the representatives of a defendant, the term includes both the heirs and administrator or executor of a defendant. *State Fair Ass'n v. Townsend*, 63 S. W. 65, 66, 69 Ark. 215.

A representative is one who stands in the place of another as heir, or in the right of succeeding to an estate of inheritance; one who takes by representation; one who occupies another's place and succeeds to his rights and liabilities. Executors and administrators represent, in all matters in which

the personal estate is concerned, the person of the testator or intestate, as the heir does that of his ancestor. Representatives of a deceased person are real or personal; the former being the heirs at law, and the latter ordinarily the executors or administrators. The term "representative" includes both classes. When the personal representatives alone are intended in the statute, they are so named. Laws 1839-40 provided that, where one jointly bound with another for the payment of a debt should die in the lifetime of his co-obligor, the representative of the deceased might be charged by virtue of the obligation. The heirs of a deceased co-obligor were held liable on such an obligation; the word "representative" including heirs, as well as executors and administrators. *Allen v. Stovall*, 63 S. W. 863, 866, 94 Tex. 618.

**As heir or next of kin.**

A representative is one who stands in the place of another as heir, or in the right of succeeding to an estate of inheritance. The term as used in the statutes of New York, as well as when it is used in wills and settlements, frequently means heirs or the next of kin, and not necessarily executors and administrators. *Lee v. Dill* (N. Y.) 39 Barb. 516, 520.

In no known judicial sense can the heir or next of kin be the representative of a deceased, until the administration has been committed to him. *Alexander v. Barfield*, 6 Tex. 400, 403.

**As issue.**

"Representatives," as used by a testator in making a bequest to certain legatees "and their representatives," means "issue." *Bronson v. Phelps' Estate*, 5 Atl. 552, 554, 58 Vt. 612. See, also, *Horsepool v. Watson*, 3 Ves. 383, 384.

**Judgment creditor.**

The word "representatives," as used in Ballinger's Ann. Codes & St. § 5291, providing that the sheriff shall pay over moneys collected on executions to the clerk of the court issuing the writ, and if, after the satisfaction of the judgment, any proceeds of sale remain, the clerk shall pay such proceeds to the judgment debtor or his representatives, is broad enough to include judgment creditors having a lien on the surplus. *Mayer v. Morgan*, 66 Pac. 128, 130, 26 Wash. 71.

**Lineal descendants.**

"Representatives," within the meaning of the statute of distributions, where children and the legal representatives of any of them who may be dead are spoken of, means neither heirs generally, nor executors and administrators, but lineal descendants, taking by representation per stirpes, and not according to their number. *Ketchum v. Corse*, 31 Atl. 486, 487, 65 Conn. 85.

**As next of kin.**

"Representative," as used in a will providing that the remainder of the property should be distributed and go to the personal representatives of a certain person, who shall be entitled to his personal estate according to law, means those entitled by right of consanguinity; that is, who would be entitled by natural right, by relationship, by being next of kin. *Davies v. Davies*, 11 Atl. 500, 503, 55 Conn. 319.

In a gift of personal property, where the substitutes of the primary legatee are described by the word "representatives," those will take who have the right to represent the primary legatee as next of kin under the statute of distributions, and not his executors or administrators. *Brokaw v. Hudson's Ex'rs*, 27 N. J. Eq. (12 C. E. Green) 135.

The word "representatives," as used in a will devising and bequeathing property to the testator's children for life, and providing for the distribution thereof to his grandchildren and the representatives of any deceased grandchild, means those distributees of a deceased grandchild living at the time fixed for distribution. *In re Bates*, 34 N. E. 266, 267, 159 Mass. 252.

"Representatives," as used in a policy of life insurance, providing that, in case of death, the sum insured shall be paid to the "heirs or representatives" of the party insured, will be construed to mean "heirs or next of kin," if it appears from the context that the object of the assured was to make provision for his family, and not that the money should go to his executors or administrators, to be administered as ordinary assets of his estate. "Legal representatives and personal representatives, in the general or professional sense, means simply executors or administrators. Though this is the primary legal meaning, they are often construed differently, if it is clear that the intention was to vest the estate in a different class of persons." *Loos v. John Hancock Mut Life Ins. Co.*, 41 Mo. 538, 541.

**President of corporation.**

The president of a corporation having the powers usually incident to that office is a "representative" of the corporation, in the sense in which that term is used in Rev. St. 1895, art. 1194, § 23, authorizing suits against a corporation to be commenced in any county in which such corporation has an agency or representative. *Sharp v. Damon Mound Oil Co.*, 72 S. W. 1043, 1044, 31 Tex. Civ. App. 562.

**Proponents of will.**

The proponents of a will are the legal representatives of the testator. *Appeal of Barber*, 27 Atl. 973, 981, 63 Conn. 393, 22 L. R. A. 90.

**Special agent.**

A representative is one chosen by a principal to exercise for him a power or perform for him a trust. In that sense the mayor of a city is a representative for some purposes, the members of the common council for others, and the members of the board of education for still others. The idea of a representative implies, not merely a person chosen for some purpose, but a person chosen for a particular purpose, and confided in to represent his principal therein. One person may be thought suited to one duty, and another to another, and the right to be represented implies a right, not merely to name the person, but also to designate the trust that shall be confided to him. *People v. Common Council of Detroit*, 28 Mich. 223, 245, 15 Am. Rep. 202.

**Substituted trustee.**

A person appointed by the court as a substitute for a deceased trustee is not a representative of the deceased. *Guery v. Kinsler*, 3 S. C. 423, 426.

**As successor in interest.**

The word "representative," in Prac. Act, § 393, as amended by Laws 1863, c. 70, providing that no person shall be allowed to testify when the adverse party, or the party for whose immediate benefit the action is prosecuted or defended, is the representative of a deceased person, when the facts to be proved transpire before the death of such deceased person, applies to the executor or administrator of the estate of a deceased person, and also to the person or party who has succeeded to the right of deceased, whether by purchase, or descent, or operation of law. *Davis v. Davis*, 26 Cal. 23, 36, 35 Am. Dec. 157.

The word "representative," as used in Gen. St. 1894, § 5171, providing that an action does not abate by the death of a party, if the cause of action survives, but may be continued, on motion, against his representatives or successors in interest, is not necessarily limited to the executors or administrators of the deceased person. The usual meaning of the term "personal representative" should include, not only executors and administrators, but also all who occupy a position held by the deceased party, succeeding to his rights and liabilities. *Willoughby v. St. Paul German Ins. Co.*, 83 N. W. 377, 378, 80 Minn. 432.

Code Civ. Proc. § 329, excludes as incompetent, with certain specified exceptions, the testimony of one having a direct legal interest in the event of the suit concerning transactions where conversations occurring between the witness and the deceased person, as against the representative of the latter. Held, that the word "representative" includes

any person or party who has succeeded to the rights of the decedent, whether by purchase, descent, or operation of law. *Kroh v. Heins*, 67 N. W. 771, 773, 48 Neb. 691.

The word "representative," in Code, § 324, providing that "no person having a direct legal interest in the result of any civil cause or proceeding shall be a competent witness therein when the adverse party is an executor, administrator, or legal representative of a deceased person," etc., is used to designate the person who succeeds to the rights of the deceased, whether by purchase, descent, or operation of law. *Magemau v. Bell*, 13 N. W. 277, 278, 13 Neb. 247.

"Representative," as used in Code, § 329, providing that no person having a direct legal interest in the result of any civil action or proceeding, when the adverse party is the representative of a deceased person, shall be permitted to testify to any transaction or conversation had between the deceased person and the witness, includes any person or party who has succeeded to the rights of the decedent, whether by purchase, descent, or by operation of law. Of course, the question is whether he represents the deceased in the litigation in which the evidence is offered. The fact that he may be the general representative of the deceased will make no difference, unless he represents him in the question which is in dispute in the litigation. If an executor or administrator is engaged in litigating some matter which is entirely foreign to the interests of the estate which he represents, the statute, of course, has no application. *McCoy v. Conrad*, 89 N. W. 665, 666, 64 Neb. 150.

A representative is one who exercises power derived from another, and, as used in a statute prohibiting a party to a suit from giving evidence in an action against the representative of a decedent, it is held that the word "representative" was intended by the lawgivers to designate the party who succeeds to the rights of the deceased, either by purchase, descent, or operation of law, and hence includes an heir. *Brown v. Forbes*, 96 N. W. 52, 54, 1 Neb. (Unof.) 888.

Prac. Act, § 376, provides that no person shall be allowed to testify when the other party to the transaction, or opposite party in the action, or the party for whose benefit the action is prosecuted or defended, is the representative of a deceased person, when the facts to be proved transpired before the death of the deceased person. A person was employed by another to work at a quartz mill for an association, to whom the latter person had assigned a lease thereof. After the death of the assignor, the employé sued the association for the work and labor done. It was held that none of the association was sued as the representative of deceased, and hence there was nothing in the section of the prac-

tice act to prevent plaintiff from testifying as to the conversation and employment by deceased. *Fulton v. Day*, 8 Nev. 80, 83.

One who has possession of personal property cast on him by the death of the owner is entitled to defend such possession, and, when sued therefor, becomes such a representative of the deceased that plaintiff cannot testify to matters equally within the knowledge of deceased, under 3 How. Ann. St. § 7545, excluding such testimony in actions by or against the representative of a deceased person. *Burke v. Dunn*, 117 Mich. 430, 431, 75 N. W. 931.

#### Surviving coplaintiff.

Code Civ. Proc. § 45, declares that, in case of the death of a party to an action, the court may allow an action to continue by or against his personal representative or his successor in interest. Held, that the term "representative," as there used, was not necessarily limited to a deceased party's administrator, but included as well a joint plaintiff, in whose sole name the court ordered the action to proceed as survivor, on the death of the other plaintiff. *Mead v. Weaver*, 60 N. W. 385, 387, 42 Neb. 149.

#### Surviving partner.

Surviving partners are not "representatives of a deceased person," within the meaning of a statute making parties to an action by or against the representatives of a deceased person incompetent as witnesses. *Crane v. Gloster*, 13 Nev. 279, 280.

### REPRESENTATIVE CAPACITY.

The term "representative capacity" is a well-understood term, and only applies to a party acting for and in behalf of some other party or estate, and not for himself personally. When a party sues or is sued in such capacity, it is necessary that the capacity in which he sues or is sued appear in the title to show the relation between the party and the estate, and that he is in court, not for himself, but for the estate that he represents. Partners occupy no such position. In suing or being sued they represent themselves only. *Van Brunt & Davis Co. v. Harrigan*, 65 N. W. 421, 422, 8 S. D. 96.

Where a creditor of an insolvent estate purchased property at an executor's sale on credit, the executor, in bringing suit for the purchase price, was the real party in interest, inasmuch as the contract was made with him, and the promise to pay ran to him, and he was personally accountable for the price of the assets which he has sold. For the same reason it is held that the debt did not belong to him in his representative capacity, within the meaning of the statute requiring that, when an action or special proceeding is commenced by an executor upon a

cause of action belonging to him in his representative capacity, it must be brought in that capacity. "The phrase 'representative capacity,'" says the court, "relates to debts which belong to the testator, and come to the executor through his representation of the deceased, rather than as a result of his own action." *Thompson v. Whitmarsh*, 2 N. E. 273, 274, 100 N. Y. 35.

Section 1814, Code Civ. Proc., requires that an action be brought by an executor or administrator "upon a cause of action belonging to him in his representative capacity." Held, that an action by an administrator with the will annexed to recover possession of certain notes, bonds, and mortgages alleged to belong to the estate, but made payable to a former executrix personally, and delivered by her to defendant for safekeeping, was not an action "belonging" to the administrator "in his representative capacity," and should not have been brought in such capacity. *Buckland v. Gallup*, 11 N. E. 843, 845, 105 N. Y. 453.

An action is brought in a "representative capacity," within Code, § 3246, when the plaintiff, as administrator, having paid a mortgage executed by the decedent, sues certain grantees of the land, claiming that by such payment the estate is entitled to be subrogated to the rights of the mortgagee. *Weeks v. Garvey*, 4 N. Y. Supp. 891, 892, 56 N. Y. Super. Ct. (24 Jones & S.) 562.

### REPRESENTATIVE IN CONGRESS.

"Representative in Congress" is a phrase synonymous with "member of Congress." *Butler v. Hopper* (U. S.) 4 Fed. Cas. 904, 905.

### REPRIEVE.

"A reprieve," says Mr. Bishop, "signifies the suspension for a time of the execution of a sentence which has been pronounced." Blackstone says that a "reprieve is the withdrawing of a sentence for an interval of time, and that the word is from 'reprendre,' meaning to take back." Webster defines the word "reprieve" as "the temporary suspension of the execution of a sentence, especially the sentence of death." *Butler v. State*, 97 Ind. 373, 374.

"A reprieve, from 'reprendre,' to take back, is the withdrawing of a sentence for an interval of time, whereby the execution is suspended." 4 Bl. Comm. 394. It operates only in capital cases, and is granted either by the favor of his majesty himself, or the judge or justices before whom the prisoner was tried, in his behalf, or from the regular operation of law, in circumstances which render an immediate execution inconsistent with humanity or justice. *Sterling v. Drake*, 29 Ohio

St. 457, 460, 461, 23 Am. Rep. 762 (citing *Obit. Cr. Law*, 757).

Under the power to pardon at common law, the power of the King to reprieve was included. Under the Constitution of 1844, giving the power to the Governor to grant a reprieve, and Act April 16, 1846, the term "reprieve" is merely used to signify the postponement of the sentence for a time. It does not and cannot defeat the ultimate execution of a judgment of the court. It merely delays it. *Clifford v. Heller*, 42 Atl. 155, 159, 63 N. J. Law, 105, 57 L. R. A. 312.

#### **Suspension distinguished.**

A reprieve is the withdrawing of a sentence for an interval of time, whereby the execution is suspended. It operates in capital cases only. *Chit. Cr. Law*, 757. The distinction between a reprieve and a suspension of sentence is that a reprieve postpones the execution of the sentence to a day certain, whereas a suspension is for an indefinite time. *Carnal v. People* (N. Y.) 1 Parker, Cr. R. 262. Therefore, where a reprieve is granted by a Governor, it is the duty of the sheriff, on the expiration of the time, to execute the sentence without further orders by the court. *In re Buchanan*, 40 N. E. 883, 886, 146 N. Y. 264.

The term "reprieve," as applied to convicts, has a definite meaning. It postpones the time of execution to a definite day, while a suspension is for an indefinite period. *Carnal v. People* (N. Y.) 1 Parker, Cr. R. 262, 266.

#### **Stay of execution.**

"Reprieve," as used in Const. art. 5, § 17, giving the Governor the power to grant a reprieve, cannot be considered to include the stay of execution of a death sentence, the power to grant which was conferred on the Supreme Court by Rev. St. 1881, § 1888. *Parker v. State*, 35 N. E. 179, 180, 135 Ind. 534, 23 L. R. A. 859.

### **REPRISAL.**

See "Letters of Marque and Reprisal."

### **REPRISES.**

"Reprises" is not a word in common use, even in the law. The dictionaries give it as a law term, with the following definition: "Deductions and duties paid yearly out of a manor and lands; as rent charge, rent seek, pensions, annuities, and the like." *Webst. Int. Dict.* "Yearly deductions, duties, or payments out of a manor and lands; as rent charge, rent seek, annuities, and the like." *Cent. Dict.* "Deductions and payments (as for annuities) out of lands; as a manor's yearly value over and above reprises." *Stand. Dict.* "Deductions or payments out of

the value of lands; as rent charges, annuities, etc." *Worcest. Dict.* "Deductions and duties which are yearly paid out of a manor and lands, as rent charge, rent seek, pensions, corodies, annuities, etc.; so that, when the clear yearly value of a manor is spoken of, it is said to be so much annum ultra reprises—besides all reprises." *Burrill, Law Dict.* (citing *Cowell*). "A resumption or taking back, used for such deductions as rent charges or annuities." *Jac. Law Dict.* "The deductions and payments out of lands, annuities, and the like, are called reprises, because they are taken back. When we speak of the clear yearly value of an estate, we say it is worth so much a year, ultra all reprises." *Bouv. Law Dict.* "Deductions on account of payments and expenses." *And. Law Dict.* Appellants rely strongly on the phrase "a yearly deduction," and argue that the term cannot include something that is sporadic and may never be chargeable against the land. But it does not appear that the yearly feature is of the essence of the definition. Only two of the four lexicographers quoted use the word "yearly" or "annual" in this connection, except in giving examples for illustration, and it is notably absent from three of the four law dictionaries. But, in addition to the general use of the word, we have a very important and persuasive legislative and judicial construction of it. As a legal, if not a popular, term it has survived longer in Pennsylvania than it appears to have done elsewhere. In the act of January 12, 1705-06, "for taking lands in execution for payment of debts" (2 Stat. [Ed. 1896] p. 244), it is provided that upon recovery of judgment and award of execution, to be levied upon lands, etc., it shall not be lawful for the sheriff to sell any such lands, etc., "which shall or may yield yearly rents or profits beyond all reprises sufficient within the space of seven years to pay or satisfy such debt or damages," but such lands shall be delivered to the execution creditor until the debt be levied by a reasonable extent, as upon writs of *elegit* in England, provided that, if the clear profits of such lands shall not be found by inquest of twelve men to be sufficient within seven years, etc., then the sheriff shall so certify, and a writ of *venditioni exponas* shall issue. The context of the word "reprises" here, and its use in connection with "clear profits," makes its meaning plain. It means such deductions as are required to be made from gross income in order to ascertain the clear or net profit; not deductions for bad management, or personal shortcomings of the holder of the land, or from fire or flood or similar casualty, but deductions for burdens incident to the land as such, certainly including taxes, charges, and impositions of all kinds which attach to the land itself. And such has been the judicial understanding of the word. Thus, in *Mellon v. Campbell*, 11 Pa. (1 Jones) 415, it is said by *Coulter, J.*:

"It is the duty of the jury to fix the annual clear value beyond all reprises, which include expenses of repairs, taxes, costs, trouble," etc. So in *Near v. Watts* (Pa.) 8 Watts, 319, Kennedy, J., says: "The inquest was to ascertain the clear yearly value of the estate, defraying all expenses and charges usually incident and necessary for the enjoyment thereof." And again, in the same case, drawing the distinction between an extent upon a life estate and upon a fee simple, he says, in regard to the latter, the inquest should "take into consideration all the liens existing against the estate that are or shall become payable within the seven years, as composing in this particular instance a portion of what has been considered reprises, because, unless the aggregate of the rents, issues, and profits beyond the amount of all such liens, including, also, what shall be deemed necessary to meet repairs and discharge all public assessments thereon, will pay," etc., the inquest return that it is insufficient. The act of 1705 remained on the statute books until it was substantially re-enacted by the existing act of June 16, 1836, and the legislative and judicial use of the word "reprises" has thus continued in the same sense for nearly 200 years. From these definitions and history of the word it is clear that in the essence of their meaning reprises are deductions necessary to be made from a gross fund in order to show a net result, or, in the language of the statutes, a "clear profit." *Delaware & H. Canal Co. v. Von Storch*, 46 Atl. 375, 376, 196 Pa. 102.

## REPROACH.

The word "reproach" is synonymous with the words "censure" and "obloquy." *Bettner v. Holt*, 11 Pac. 713, 716, 70 Cal. 270.

## REPRODUCTION.

Reproduction is the repetition or the act of reproducing, and it has such meaning in the rule that a purchaser may repair, but not reconstruct or reproduce, a patented device or machine. *Goodyear Shoe Machinery Co. v. Jackson* (U. S.) 112 Fed. 146, 150, 50 C. C. A. 159, 55 L. R. A. 692.

## REPUBLIC.

"A republic, acknowledged as such by our own government, is an independent sovereign power—in other words, a state—just as certainly and in the same sense as a monarchy, limited or absolute; and every state is a person, an artificial person, in a more extensive and far higher sense than an ordinary corporation." *Republic of Mexico v. De Arangoz*, 12 N. Y. Super. Ct. (5 Duer) 654, 638.

A republic is a government for the protection of the citizen against the exercise of all unjust power. It is a government administered by a few, as the representatives of the people and for their benefit. With this as the cardinal object of the state government, it has no privileges, except such as are conferred on it by the Constitution, by act of the Legislature, or such as are necessary for the due administration of the government. *State v. Harris* (S. C.) 2 Bailey, 598, 599.

## REPUBLICAN CANDIDATE.

The phrases "Republican candidate" and "candidate of the Republican party" are synonymous terms, and are so universally employed or understood, and designating one in a petition of nomination as the Republican candidate does not affect its sufficiency. *Wilkins v. Duffy* (Ky.) 70 S. W. 668, 671.

## REPUBLICAN GOVERNMENT.

A "republican government," within the meaning of the term as used in the federal Constitution, "is one constructed on the principle that the supreme power resides in the body of the people." Per Wilson, J., in *Chisholm v. Georgia*, 2 U. S. (2 Dall.) 419, 457, 1 L. Ed. 440.

## REPUBLISH.

To "republish" means to publish again that which has been before published, so that, as used in 2 Rev. St. c. 6, tit. 2, § 53, providing that, if a testator execute a second will, the revocation of that will shall not revive the first, unless he republish it, it means to publish it in the same manner as it was originally published.—In *re Stickney's Will*, 52 N. Y. Supp. 929, 931, 31 App. Div. 382.

## REPUDIATION.

The use of the term "repudiation," in an instruction on the question of the repudiation by a bank of the illegal act of its cashier, without expressly defining the term "repudiation," was not objectionable, since the word was not a word of rare use; nor was it a technical term applicable to any branch of learning or science, but it was a word in common use and commonly understood, and, as applicable to the case and used in the instruction, it was used, in its usual and ordinary acceptation, to mean a denial of any responsibility for the act of the cashier. *Iowa State Sav. Bank v. Black*, 59 N. W. 283, 284, 91 Iowa, 490.

A mere refusal to pay money when due, especially a refusal based upon the terms of the contract and in good faith, al-

though mistakenly believed to be justified by it, is not a repudiation of the contract, and does not warrant a rescission. *Daley v. People's Building, Loan & Saving Ass'n*, 59 N. E. 452, 453, 178 Mass. 13.

## REPUGNANCE.

One definition given of "repugnance" is "Inconsistency." These words, though not exactly synonymous, may be and often are used interchangeably. *Swan v. United States*, 9 Pac. 931, 933, 3 Wyo. 15L.

## REPUTE.

In prosecution for the seduction of a female of good repute, the meaning of "repute" is not to be limited to the female's reputation for chastity, and as signifying the "esteem" in which she is held for chastity in the neighborhood where she resided or among those with whom she associated, but defendant might give evidence of acts of lewdness or unchastity with others prior to the alleged seduction. *State v. Wheeler*, 7 S. W. 103, 104, 94 Mo. 252.

"Repute," as used in Rev. St. § 1259, making it an offense to seduce any female of good repute, means character reputed or attributed; established opinion. *State v. Patterson*, 88 Mo. 88, 104, 57 Am. Rep. 374.

### As to pedigree.

"Repute," in matters of pedigree, means such declarations and statements respecting the pedigree as have come down from generation to generation from deceased relatives, in such a way that even though it cannot be said or determined which of the deceased relatives originally made them or was personally cognizant of the facts therein stated, yet it appears that such declarations and statements were made as family history ante litem motam by a deceased person connected by blood or marriage with the person whose pedigree is to be established. In re *Hurlburt's Estate*, 35 Atl. 77, 81, 68 Vt. 306, 35 L. R. A. 794.

## REPUTABLE.

In its ordinary sense, "reputable" means worthy of repute or distinction; held in esteem; and what is reputable in a dental college, within the statute providing that a diploma, to entitle its holder to a license to practice dentistry without examination, must be issued by a "reputable" college, must be determined from the standpoint of men of scientific attainments in the line of work it represents. *State v. Chittenden*, 88 N. W. 587, 592, 112 Wis. 569 (citing Illinois State Board of Dental Examiners v. *People*, 123 Ill. 227, 245, 13 N. E. 201, 204).

A college requiring preliminary examination before admittance, and requiring students before graduation to attend two full and regular courses of lectures and practical instruction, might in other respects lack some of the elements making such an institution "reputable." *Illinois State Board of Dental Examiners v. People*, 13 N. E. 201, 204, 123 Ill. 227.

The term "reputable dental college or university" shall be defined as follows: A dental college or university requiring a preliminary examination for admission to its course of study, and which requires, as requisite for the granting of a dental degree, attendance on at least three courses of lectures of six months each, no two of which said courses to be held within one year, and having a full faculty of professors in all the different branches of dental education, to wit, anatomy and oral surgery, physiology, chemistry, materia medica, therapeutics, operative dentistry, and prosthetic dentistry, and clinical instructions in the last two named. *Cobbey's Ann. St. Neb.* 1903, § 9461.

## REPUTABLE FREEHOLDERS.

A deed for lands to many persons for a single consideration, and with the purpose of qualifying them to sign recommendations for inn and tavern licenses, is fraudulent, and will not constitute the grantees reputable freeholders, within the New Jersey statute requiring such petitions to be signed by "reputable" freeholders. *Austin v. Atlantic City*, 3 Atl. 65, 67, 48 N. J. Law (19 Vroom) 118.

## REPUTATION.

See "General Reputation"; "Notorious Reputation."

Reputation is the fruit of one's walk and conversation—the result of deportment. *Cauley v. State*, 9 South. 456, 92 Ala. 71.

Reputation is a sort of right to enjoy the good opinion of others, and is as capable of growth, and has as real an existence, as an arm or leg. It is a personal right, and an injury to reputation (as by a libel) is a personal injury within the meaning of statutes providing that injuries to a person shall not abate. *Jones v. Bradstreet Co.*, 13 S. E. 250, 251, 87 Ga. 79.

### As character.

See, also, "Character."

The "reputation" of a witness for truth is equivalent to his character for truth. General reputation is general character, common opinion, that in which there is general concurrence; or, in other words, general reputation or character is presumed to be indicative of actual character. *Knode v. Williamson*, 84 U. S. (17 Wall.) 586, 588, 21 L. Ed. 670.



"Reputation," as used in Act 1864, c. 38, providing that evidence of facts or reputation proving that a person is habitually and by practice a thief shall be sufficient for his conviction, is satisfactorily establishing the fact that he is a common thief, and is synonymous with "character." Evidence of the character of the person accused is evidence of his reputation. *World v. State*, 50 Md. 49, 54.

Doubtless there is a distinction observed by careful writers between "character" and "reputation"; "character," where the distinction is observed, signifying the reality, and "reputation" merely what is reported or understood from report to be the reality about a person or thing. The word "character," however, is often used as synonymous with and in the sense of "reputation." *State v. Wilson*, 1 Atl. 415, 416, 15 R. I. 180.

"Character consists of the qualities which constitute the individual; reputation, the sum of opinions entertained concerning him. The former is interior, the latter external; one is the substance, the other the shadow." In re *Spencer*, 7 Cent. Law J. 84-85.

"Reputation" and "character" "are not synonymous terms. Character is what a man or woman is morally, while reputation is what he or she is reputed to be. Yet reputation is the estimate which the community has of the person's character, and it is the belief that moral character is wanting in the individual that renders him unworthy of belief; that is to say, that reputation is evidence of character, and if the reputation is bad for truth, or reputation is bad in other respects affecting the moral character, then the jury may infer that the character is bad and the witness not reliable." *Leverich v. Frank*, 6 Or. 212, 213.

Webster defines "reputation" to be good name; the credit, honor, or character which is derived from a favorable public opinion or esteem, and character by report. "It is very true that the word 'character' is often used colloquially in the same sense as 'reputation,' but such is not its true signification. According to Webster, 'character' signifies the peculiar qualities impressed by nature or habit on a person, which distinguish him from others. These constitute real character, and the qualities which he is supposed to possess constitute his estimated character or reputation." *Andre v. State*, 5 Iowa (5 Clarke) 389, 394, 68 Am. Dec. 708.

"Character" and "reputation" are the same. The reputation which a man has in society is his character. Where, in judicial proceedings, character is made a part of the inquiry, it never can be proved by the proof of particular facts. General report is general reputation; general reputation is general character. A person may testify of his knowledge of the general character for truth

of a witness which he has derived from common report. *Kimmel v. Kimmel* (Pa.) 3 Serg. & R. 336, 338.

#### As general reputation.

"Reputation," as used in a question to a witness as to the reputation of a witness whom it was sought to impeach, meant "general reputation." *French v. Millard*, 2 Ohio St. 44, 50.

"Reputation" is said to be the common knowledge of a community. *Chellis v. Chapman*, 125 N. Y. 214, 26 N. E. 308, 11 L. R. A. 784 (cited in *Smith v. Compton*, 52 Atl. 386, 388, 67 N. J. Law, 548, 58 L. R. A. 480).

At common law, marriage may be established by cohabitation and "reputation." But there must be a general reputation of the parties that they are husband and wife, and a conflict in such reputation will not establish the marriage. And reputation in such a case consists of the belief and speech of the people who have an opportunity to know the parties, and have heard of and observed their manner of living. *Ashford v. Metropolitan Life Ins. Co.*, 80 Mo. App. 638, 644.

#### As popular estimation.

Reputation is the estimation in which a person is held by others, especially the popular opinion. A critic has said that "character lives in a man; reputation outside of him." *State v. Ussery*, 24 S. E. 414, 415, 118 N. C. 1177.

"Reputation," as used in the statement of the rule that cohabitation and reputation are necessary to ground a presumption of marriage, means the speech of the people who have an opportunity to know the parties. *Commonwealth v. Stump*, 53 Pa. (3 P. F. Smith) 132, 135, 91 Am. Dec. 198.

Reputation is no other than the hearsay of those who may be supposed to have been acquainted with the fact handed down from one to another. *Bliss v. Johnson*, 38 N. E. 446, 447, 162 Mass. 323 (citing *Higham v. Ridgway*, 10 East, 109, 120); *State v. Reed*, 7 South. 132, 133, 41 La. Ann. 581.

"Reputation" is defined to be the concurrence of many voices to the same fact. *Deputy v. Harris* (Del.) 40 Atl. 714, 715, 1 Marv. 100.

"Reputation is the estimation in which one is held, and this may be indicated by the way in which the person whose character is under consideration is received and regarded in society, and may be made manifest by acts and treatment as well as by words." *Peters v. Bourneau*, 22 Ill. App. 177, 179.

A person's "reputation for truth" is made by what his neighbors generally say of him in this regard. If they generally say he is untruthful, that makes his general reputation

for truth bad. Upon the other hand, if a man's neighbors say nothing whatever about him as to his truthfulness, that fact of itself is evidence that his general reputation for truth is good. *Treschman v. Treschman*, 61 N. E. 961, 966, 28 Ind. App. 206.

A woman's reputation for chastity is what the people of her acquaintance generally say of her in this regard; that is, the general credit for chastity which she bears among her neighbors and acquaintances. If a woman's neighbors and acquaintances say nothing of her, or do not question her character for chastity, then her reputation in this regard should be considered good. The best character is generally that which is the least talked about. Therefore the negative evidence of a witness that he never heard anything against the character of a woman for chastity on whose behalf he has been called—that is, that he never heard her conduct criticised, condemned, or even talked about—is admissible upon the trial where the reputation of the woman for chastity is in question, and is strong evidence of the woman's good repute. *State v. Bryan*, 8 Pac. 260, 266, 34 Kan. 63 (citing *Reg. v. Rowton*, 10 Cox, 34; *Gandolfo v. State*, 11 Ohio St. 114; 1 Whart. Ev. § 49).

#### As to pedigree.

"Reputation," in matters of pedigree, means such declarations and statements respecting the pedigree as have come down from generation to generation from deceased relatives in such a way that, even though it cannot be said or determined which of the deceased relatives originally made them or was personally cognizant of the facts therein stated, yet it appears that such declarations and statements were made as family history ante litem motam by a deceased person connected by blood or marriage with the person whose pedigree is to be established. In *re Hurlburt's Estate*, 35 Atl. 77, 81, 68 Vt. 366, 35 L. R. A. 794.

#### REPUTED CHARACTER.

The reputed character of a person is said to be the slow-spreading influence of opinion arising out of the deportment of an individual in the society in which he moves, as distinguished from his real character, which is that impressed by nature, traits, or habits upon a person. *Wright v. City of Crawfordsville*, 42 N. E. 227, 229, 142 Ind. 636.

#### REPUTED HOUSE OF PROSTITUTION.

The term "reputed house of prostitution or assignation," as used in the Penal Code, includes all premises which by common fame or report are used for the purpose of prostitution or assignation. *Pen. Code N. Y. 1903*, § 718.

#### REPUTED LIQUOR SHOP.

Act 1877, forbidding the keeping open of a "reputed liquor shop" on the day of any electors' meeting, means a shop with the reputation of selling liquors, gained by sales on other days than merely days on which electors' meetings are held. The reputation proved need not be that of selling liquors on the days of electors' meetings only. Reputation is necessarily of slow growth, and could not be well acquired within a few specified hours of a particular day occurring ordinarily but once a year. *State v. Cady*, 47 Conn. 44, 46.

#### REPUTED OWNER.

Evidence that a husband signed a contract for street work in front of a lot, the record title to which was in the wife, and stated to the contractors that the lot was community property, is sufficient to sustain a finding that the husband was the "reputed owner" within Code Civ. Proc. § 1191, as amended, providing that any person performing work on a street in front of a lot, at the request of the reputed owner, shall have a lien on the lot for work and materials, the words "reputed owner" importing merely a supposition or opinion derived or made up from outward appearances. *Santa Cruz Rock Pav. Co. v. Lyons* (Cal.) 43 Pac. 599, 601.

#### REPUTED THIEVES.

1 St. 3 Geo. IV, c. 55, § 21, relating to the apprehension of "reputed thieves" without warrant, only extends to persons generally reputed to be thieves, and not to one suspected of a particular theft. *Cowles v. Dunbar*, 2 Car. & P. 565, 567.

#### REQUEST.

See "Instance and Request."

Webster defines "request" to mean to ask; to solicit; to express desire for. *Johnson v. Clem*, 4 Ky. Law Rep. 860, 867 (quoting Webster, Dict.).

#### As at the instance of.

"Request," as contained in *Laws 1875*, c. 397, § 2, giving a lien on real estate to "any person who at the request of owner of any lot, etc., grades, fills in or improves the same," for his work done and materials furnished, is used in the same sense as the word "instance" in section 1 of the same act, providing that "every person performing labor upon or furnishing materials to be used in the construction, etc., of any building, etc., shall have a lien on the same for the work or labor done or materials furnished by each respectively, whether done or furnished at

the instance of the owner of the building or other improvement for his agent." *Cornell v. Barney*, 94 N. Y. 394, 399.

#### **As imposing a duty.**

In a will, "request" may impose a duty. In *re Byers' Estate*, 40 Atl. 524, 525, 186 Pa. 404 (citing *Hutton v. Hutton*, 41 N. J. Eq. [14 Stew.] 267, 3 Atl. 882; *Colton v. Colton*, 127 U. S. 300, 8 Sup. Ct. 1164, 32 L. Ed. 139).

#### **As allegation of employment.**

The statement in a lien notice given by a street contractor that assignor performed labor, etc., "at the request of defendant," is equivalent to the phrase that "the assignor was employed by the defendant," as required to be alleged in such notice by 2 *Ballinger's Ann. Codes & St. § 4835*. *Young v. Barzone*, 66 Pac. 135, 139, 26 Wash. 4.

#### **Implied request.**

The words "instance and request," in an allegation in a petition that the plaintiff performed services for the defendant at his instance and request, do not operate to limit the plaintiff to proof of an express contract, but he may support his petition by evidence of facts giving rise to an implied contract. *Columbus, H. V. & T. Ry. Co. v. Gaffney*, 61 N. E. 152, 154, 65 Ohio St. 104.

The word "request," as used in reference to the law that a testator must "request" the witnesses to his will to sign it, would ordinarily be understood as meaning "ask," but such is not its meaning in this connection, and a request may be shown by the testator's assent to the writing. *Gross v. Burneston*, 46 Atl. 993, 994, 91 Md. 383.

#### **Instigation distinguished.**

To say that one "requested" another to do an act does not imply that there was anything wrong in the act, but to say that one "instigated" another to do an act does imply that the act itself was wrongful. The word is never used lawfully with reference to a good, virtuous, lawful act. *Cone v. Iverson*, 35 Pac. 933, 938, 4 Wyo. 203.

#### **Option to refuse not imported.**

"Request," as used in a will in which the testator "requests" his wife to make provision for the testator's mother and sister, should not be construed as importing an option to refuse, and excluding the idea of obedience as corresponding duty, but to give a recoverable legacy. *Colton v. Colton*, 8 Sup. Ct. 1164, 1173, 127 U. S. 300, 32 L. Ed. 138.

#### **Preliminary act imported.**

A vote of the members of a religious society on approval of proposed amendments is

not a "request," within a provision of its constitution providing that a change therein cannot be granted unless two-thirds of its society request it, the word "request" being used in its ordinary import, and the provision meaning that such request must precede any action looking to a change in the constitution. *Philomath College v. Wyatt*, 31 Pac. 206, 216, 27 Or. 390, 26 L. R. A. 68.

#### **As procure.**

"Request," as defined by Webster, is "to ask for earnestly; to express desire for; to solicit; to entreat; to address with a request;" so that its use in an instruction that if defendant "requested, advised, and incited," etc., instead of "aided, abetted, and procured," is not erroneous. *Long v. State*, 86 N. W. 310, 315, 23 Neb. 33.

#### **Ratify distinguished.**

The constitution of a religious society provided that it should not be amended unless by request of two-thirds of the whole society. In determining the meaning of the word "request" as used in this provision, the court holds that it was undoubtedly the intention of the framers of the constitution that before any change could be made in the instrument it must be preceded by the expressed desire of two-thirds of the members, and consequently that the term "request" required action on the part of the membership prior to the amendment, and its requirements were not satisfied by a subsequent assent or a passive concurrence to or in the adoption of an amendment. *Philomath College v. Wyatt*, 37 Pac. 1022, 1028, 27 Or. 390, 26 L. R. A. 68.

#### **Require equivalent.**

The use of the word "requested," in a notice by executors to creditors in which the latter are requested to present their claims, instead of the word "required," which is the word used in the statute requiring executors to publish a notice in which the creditors are required to present their claims, does not invalidate the notice, but it is a sufficient compliance with the statute. *Prentice v. Whitney* (N. Y.) 8 Hun, 300, 301.

#### **Trust created.**

Where a donee of property is "requested" by his testator to dispose of that property in favor of others, the word is imperative, and its employment creates a trust. *Riker v. Leo*, 21 N. E. 719, 720, 115 N. Y. 93 (citing *Vandyck v. Van Beuren* [N. Y.] 1 Caines, 84); *Eddy's Ex'r v. Hartshorne*, 34 N. J. Eq. (7 Stew.) 419, 422.

"Request," as used in a will, wherein testator makes a devise and thereafter expresses a wish as to the disposition of the property or fund, is a precatory word, sufficient to create a trust in the property devised, *Curd v. Field*, 45 S. W. 92, 103 Ky.

293; where the subject and object of the trust are sufficiently certain, *Major v. Hern-don*, 78 Ky. 123, 129.

The word "request," as used in a will in a clause that the testator requests a legatee to make a certain disposition of the fund bequeathed, is a word of intention, which the court will carry into effect as if the testator had used an absolute word of devise in trust, and the court will direct the donee or first taker to hold as a trustee for those whom the donor intended to benefit. *Cockrill v. Armstrong*, 31 Ark. 580, 589.

The authorities are conclusive and harmonious that a trust will be created by such precatory words as "hope," "wish," "request," etc., if they be not so modified by the context as to amount to no more than mere suggestions. *Bohon v. Barrett's Ex'r*, 2 Ky. Law Rep. 371, 374, 79 Ky. 378.

The words "request" and "requesting" under many circumstances are precatory words sufficient to raise a trust, it depending not only upon the sense in which the words are used, whether intended as imperative or as merely the expression of a wish or preference, the observation of which is left to the discretion of the first taker; and hence, as used in a will giving the widow of the testator all his property for her use while living, and requesting her to have certain bequests paid to descendants of the testator named, at her death, will be construed as sufficiently definite to create a trust in favor of such beneficiary. *Coulson v. Alpaugh*, 45 N. E. 216, 217, 163 Ill. 298.

The word "request," in a will in which testator had given the whole of his estate to his wife, with an express wish that she divide the property at her death between certain designated beneficiaries, and which stated in a subsequent clause of the will that the testator requested her to make such distribution, is synonymous with "wish" in the former part of the will, and is to be considered as a precatory word, but not sufficient to create a trust after an unqualified devise. *Hopkins v. Glunt*, 2 Atl. 183, 185, 111 Pa. 287.

Where a will recites that the testator "hereby requests" that the life tenant cause the estate to be equally divided between certain persons, on her death, the phrase means that testator intends to create a trust in favor of such persons, and that it was his will that the persons named receive the estate as remaindermen. *Knox v. Knox*, 18 N. W. 155, 160, 59 Wis. 172, 48 Am. Rep. 487.

#### REQUEST BY MAIL.

An insured was "requested by mail" to pay his premium note as required by the policy, when a written request for payment

prepaid, duly directed and deposited by the company in the post office in due course of mail, would reach the place of his residence. A "request by mail" is a familiar phrase, and has a well-understood meaning. It does not import that the person to whom it is addressed shall receive it, but only that the person by whom it is made shall deposit in the post office a written request, duly directed, so that in the usual course of the mail it will reach its destination. *Lothrop v. Greenfield Stock & Mutual Fire Ins. Co.*, 84 Mass. 82, 84 (citing *Shed v. Brett*, 18 Mass. [1 Pick.] 401, 11 Am. Dec. 209).

#### REQUEST FOR DELIVERY OF GOODS.

A "request for the delivery of goods" is when the maker of it has no interest in the goods at all, as distinguished from a "warrant," which is when the person has a right, and warrants the person who has the goods to deliver them as far as he is concerned, or as distinguished from an "order," which is given when the party has a right to have the goods delivered. *Regina v. Ilidge*, 2 Car. & K. 871, 874.

#### REQUEST IN WRITING.

A "request in writing," as used in Act July 3, 1890, relating to the removal of a cause upon the simple "request in writing" of a party to the suit, and a petition, are one and the same thing. *Washington & I. R. Co. v. Cœur D'Alene R. & Nav. Co. (U. S.)* 60 Fed. 981, 984, 9 C. C. A. 303.

#### REQUIRE.

See "Legally Required."

"Require" means to make necessary; to demand; to ask as of right. *Mattingly's Heirs v. Read*, 60 Ky. (3 Metc.) 524, 526, 79 Am. Dec. 565.

Webster defines "require" to mean (1) to demand; to ask as of right, and by authority; (2) to claim; to render necessary as a duty; (3) to ask as a favor; to request; (4) to call to account for; (5) to make necessary; to demand; (6) to avenge. *Johnson v. Clem*, 4 Ky. Law Rep. 860, 867.

The words "prescribe," "direct," and "order" are all synonyms of the word "require." *United States v. Dimmick (U. S.)* 112 Fed. 350, 351.

#### As allow.

"Required," as used in Code 1871, § 760, providing that husband and wife may be witnesses for each other in all criminal cases, but they shall not be "required" to testify against each other as witnesses for the prosecution, should be construed as synonymous

with "allowed," so that a wife was not a competent witness against her husband, notwithstanding her testimony was voluntary. *Byrd v. State*, 57 Miss. 243, 246, 34 Am. Rep. 440.

**As authorize.**

"Require," as used in an instruction in a criminal prosecution to convict if the evidence require it, is synonymous with "authorize." *Turner v. State*, 70 Ga. 765, 777.

**As compel.**

"Require," as used in Comp. Laws, § 2742, declaring that the fees of witnesses "required" to attend in any court may be taxed as costs, is used as synonymous with "compel," and hence the fees of a witness who appears on a request without being subpoenaed are not taxable as costs. *Meagher v. Van Zandt*, 2 Pac. 57, 58, 18 Nev. 230.

"Required," as used in Laws 1871, p. 280, c. 118, § 1, providing that a husband or wife of the accused is not incompetent to testify in a criminal prosecution, and providing that no wife or husband of such accused shall be "required" to testify except as a witness on behalf of the accused, means "compelled," but does not mean that a husband or wife of the accused cannot testify against the accused voluntarily. *State v. McCord*, 8 Kan. 232, 239, 12 Am. Rep. 469.

Where Act Cong. March 3, 1887, § 3, provides that an application of removal must be made on or before the time defendant is "required" to answer or plead, and an order of publication required a certain defendant to plead on the first Monday in May, the word "required" should not be construed to mean "compelled," notwithstanding a rule of court provided that judgment pro confesso might be entered if defendant did not plead, etc., by the first Monday in June, since it is no less a requirement because no coercion or compulsion may follow. *Tennessee Coal, Lumber & Tan-Bark Co. v. Waller* (U. S.) 37 Fed. 545, 547.

**As demand or request.**

"To 'require' is to demand; to insist upon having; to claim as by right, on authority; to exact; to claim as indispensable." As used in Civ. Code, § 1681, providing that a surety may "require" his creditor to proceed against the principal, it is synonymous with "exact," "direct," "order." *Kennedy v. Falde*, 29 N. W. 667, 670, 4 Dak. 319.

The word "required," as used in an agreement whereby M. assigned to K. a fifth interest in a railroad contract, payable in stocks and bonds, K. to pay one-fifth of the cash capital as may be "required" by M., means "called for." *Appeal of McReynolds*, 66 Pa. (16 P. F. Smith) 102, 111.

Testator devised certain property in trust, to pay the interest to his daughter, and so much of the principal as she from time to time, by writing under her hand and attested to by two creditable witnesses, should "require" of the trustees. Held, that since the gift of the entire interest was to the daughter absolutely, and the gift of the principal conditioned only on her calling for or requiring it with certain formalities, the word "require" was used in the sense of "demand." *Lippincott v. Ridgway*, 11 N. J. Eq. (3 Stockt.) 526, 534.

In a policy of insurance providing that in cases of loss no suit or action for the recovery of any claim shall be sustainable in any court unless commenced within a certain time after appraisal has been required, "has been required" is equivalent to "has been requested," and, where no appraisal has been demanded, an appraisal will not be held to be a condition precedent to the right to sue. *National Home Building & Loan Ass'n v. Dwelling House Ins. Co.*, 64 N. W. 21, 22, 106 Mich. 236.

"Requiring," as used in Gen. Laws, c. 122, § 30, providing that inspectors of oil shall be paid by the persons requiring their services, should be construed in the sense of "requesting," "demanding." *Hanson v. Maverick Oil Co.*, 29 Atl. 459, 460, 67 N. H. 201.

There being no substantial difference between the words "request" and "require" as the latter word is used in the statute requiring executors to publish notice requiring creditors of the estate to present their claims, the use of the word "request" in a notice given in pursuance of the statute, which only states that the creditors are requested to present their claims, is sufficient. *Prentice v. Whitney* (N. Y.) 8 Hun, 300, 301.

The word "require" is not absolutely the synonym of the word "need," though it is of the word "demand." Though "require" may undoubtedly be properly used in the sense of "need," such is not its primary or usual signification. It comes from the Latin "requiro," and compounded of "re" and "quæro," to seek for, or to seek to get back. It means, according to all lexicographers, a demand, or, as Webster defines it, to ask as of right and by authority, as "King David 'required' Joab to number the children of Israel." So a bequest of money to a person to be paid when she may "require" it is not the equivalent of a direction that it be paid when she "needs" it, but rather that she be paid when she "demands" it. *Brewster v. Brewster*, 52 N. H. 52, 58.

"Required," as used in a statute providing that a railroad, "when required," shall transport certain persons and goods free of charge, means when requested or demanded,

and should not be construed to mean only when necessary, or when it is for the public interest or convenience. *People v. Central Pac. R. Co.*, 18 Pac. 90, 97, 76 Cal. 29.

A notification of a vote, at a legal town meeting, that the town of D. "require" a railroad to locate a depot in the town of D. on the line of said railroad west of Black Meadows, is equivalent to the "request" for the establishment of such depot, prescribed by Gen. St. c. 147, § 14, providing that, if the proprietors of any railroad shall not upon "request" establish proper stopping places and depots for the public accommodation, they may, upon such proceedings as are prescribed in the case of passes and bridges, be required to establish such depots. *Nashua & R. R. v. Town of Derry*, 58 N. H. 65, 66.

**As fairly or reasonably required.**

"Required," as used in a lease providing that the lessors would have the right to purchase whatever buildings the lessees erected on the premises, excepting such parts of the buildings and improvements as might be required by the lessee for the proper and convenient use of its railroad, etc., should be read "fairly required." *Coe v. Aiken* (U. S.) 61 Fed. 24, 35.

"Required," as contained in an agreement whereby the plaintiffs engaged during a period of three years to supply the defendants, a gas company incorporated by act of Parliament, with such quantities of pipes as should from time to time during the said period be "required" by the defendants, means that the plaintiff was bound to supply all such pipes as the company might reasonably require for such works as they were actually carrying on under the authority of their incorporation, and not such pipes as the company might think fit to order. *Whitehouse v. Liverpool New Gaslight & Coke Co.*, 5 Man., G. & S. 798, 806.

**Intention to be obeyed implied.**

To "require" is to order, direct, or command; and a charge in an information that the defendant "required" its laborers to work more than eight hours necessarily implies that in making such requirement there was an intention upon the part of the defendant that its order or direction should be obeyed. *United States v. San Francisco Bridge Co.* (U. S.) 88 Fed. 891, 893.

**As necessary.**

"Require," as used in an agreement to purchase all the necessary brick which the defendant would require for the construction of certain buildings, means all the brick necessary to complete the buildings, and not merely such as were asked for by the defendant, so that the defendant was bound to or-

der all these things from the plaintiff. *Miller v. Leo*, 55 N. Y. Supp. 165, 167, 35 App. Div. 589.

The word "required," as used in the Constitution providing that the General Assembly shall raise by taxation each year, in addition to the sum "required" to pay the public expenses and interest, the sum of \$100,000, etc., may be defined as "having imperative need." *Standard Dict.* The direction as to raising "the sum required to pay the public expenses and interest" must have meant to refer particularly to the condition of the treasury. If there were on hand funds available to pay any part of the public expenses or a part of the interest, there would be neither sense nor reason in directing that the full amount to pay each should be raised by taxation, and that there should be left for an indefinite time an available balance in the treasury unused. *Park v. Candler*, 40 S. E. 523, 529, 114 Ga. 466.

The word "required," as used in Rev. St. § 8822, providing that mine operators shall keep a sufficient supply of timber when required for use as props, was used as the equivalent or synonym of "needed," and should be so read and understood, and not as "requested." According to the lexicographers, the term "required" has several well-recognized meanings, and where the term is found in a statute, and the precise meaning which should be given it is involved in doubt or uncertainty, then, in interpreting the statute, we should, we think, select that shade of meaning which will serve what appears to have been the purpose of the Legislature in the enactment thereof. *Bowerman v. Lackawanna Min. Co.*, 71 S. W. 1062, 1064, 98 Mo. App. 308.

Where defendants agreed to purchase from plaintiffs as much coal as they should "require" for their mill, and by the contract plaintiffs were not to be liable for failure to furnish coal where they were prevented by unavoidable causes, and defendants were not to be compelled to accept the coal when their works should be out of operation, the word "require," as used in the contract, imports so much as is necessary for consumption in their business, and no more. *McKeever v. Canonsburg Iron Co.*, 16 Atl. 97, 98, 138 Pa. 184.

Where a mother devised her estate in trust during the lives of her husband and son, and during the minority of any of the son's children, and the trustee was to pay to the husband so much of the income and principal as he might "require" for his own personal use, to be paid on the husband's written request, the word "require" should be construed to mean "need" or "shall be requisite," and not to mean that the husband might demand or claim as of right and by

authority whatever he chose. *Hull v. Hollaway*, 20 Atl. 445, 447, 58 Conn. 210.

A testator devised the residue of his estate to his executors, in trust for the use and benefit of his daughter H. for life, the interest to be paid to her "as she may need or require." Held, that the word "require," as used by the testator, was substantially equivalent to the antecedent word "need," with which it was associated, and that the clause should be read as if testator had said "as she may need or her necessities require," and hence H. was entitled to only so much of the interest of the residuary fund as the executors should deem reasonably necessary for her support according to her station and situation in life, and not according to her desire or will. *Corlies v. Allen*, 36 N. J. Eq. (9 Stew.) 100, 101.

In a petition by a railway corporation to take land, setting up the rights which the petitioner seeks to acquire, and alleging that the property thus sought is "required" for the public, "required" is synonymous with the word "necessary," and conveys the same meaning. *Flint & P. M. R. Co. v. Detroit & B. C. R. Co.*, 31 N. W. 281, 285, 64 Mich. 350.

"Required," as used in a contract with the federal government to deliver stone at such times and in such quantities as may be required by the government, should be construed to refer to the wants of the service, and not to an unsettled purpose of the government; and hence, if the government caused delay by a change of plans, the contractor may recover damages. *Mueller v. United States (U. S.)* 19 Ct. Cl. 581, 591.

**As precatory word in wills.**

"Requires," as used in a will wherein testator makes a devise, and thereafter requires the disposition of the property or fund, is a precatory word, sufficient to create a trust in the property devised. *Curd v. Field*, 45 S. W. 92, 103 Ky. 293.

**In appeal pro forma pauperis.**

"Require," as used in Const. 1877 (Civ. Code, § 5881), providing that plaintiffs in error shall not be "required" to pay costs in the Supreme Court when the usual pauper oath is filed in the court below, does not relieve plaintiff in error, who filed a pauper affidavit, of all liability for costs in the Supreme Court, but entitled such plaintiff in error to be heard in the Supreme Court at the expense of the state, if at the time he desired to bring his case to the Supreme Court he was in a position where he was unable from poverty to pay the costs due and made an affidavit to that effect; and the state, having given him, on account of his poverty, the right to be heard in its highest

court, may enter a judgment on the records of the Supreme Court against him to be satisfied out of any property that he may thereafter acquire. *Sigman v. Austin*, 37 S. E. 894, 896, 112 Ga. 570.

**As required by law.**

"Required," as used in Pub. St. c. 39, § 52, providing that an administrator's sale shall not be audited if it appears, etc., that the administrator gave a bond in case the bond was required upon granting the license for the sale, is not used in the sense of "ordered" or "demanded," but, in speaking of the bond, has reference to a bond required by law. *Babcock v. Cobb*, 11 Minn. 347, 354 (Gil. 247, 253).

**As expressive of wish.**

In Act March 7, 1887 (St. 1887, p. 46, § 8), reciting that it is "desired and required" that all growers and manufacturers, traders, handlers, or bottlers of California wine, when selling or putting it up for sale, or when shipping it to parties sold, shall plainly stencil, brand, or have printed, where it may be easily seen, "Pure California Wine," and his name both on the label or bottle or package, "desired and required" should be construed as intended to express rather a legislative wish and permission than a mandate. As words of legislative command, they are singularly inappropriate and inconsistent. The word "desired" cannot be ignored in the construction of the act any more than the word "required," and the former is at least as forcible in its expression of a request as the latter is in its expression of a command. *Ex parte Kohler*, 15 P. 436, 437, 74 Cal. 38.

**REQUIREMENT.**

Where defendant agreed to buy its "requirements" of coal of plaintiff, the contract was mutual, and was one in which plaintiff could maintain an action for breach, as such provision required defendant to buy all its coal from plaintiff. *Minnesota Lumber Co. v. Whitebreast Coal Co.*, 160 Ill. 85, 43 N. E. 774, 31 L. R. A. 529 (cited in *McCaw Mfg. Co. v. Felder*, 41 S. E. 664, 667, 115 Ga. 408, holding a contract to furnish all the boxes necessary to be valid).

**REQUISITION.**

"Requisition of a physician," as used in Code 1876, § 4205, prohibiting the sale of liquors to minors except on the requisition of a physician for medicinal purposes, does not merely mean on the mere advice of the physician that liquor should be used, communicated to the vendor by the minor to whom it is given or sold, but an application or a request communicated by the

physician directly to the seller, either orally or in writing. *Bain v. State*, 61 Ala. 75, 79.

"Requisition," as the word is used in speaking of the requisition by the President of the United States upon the Governor of the state for troops, is a request by the chief executive magistrate to the executive officer representing state sovereignty, requesting that the state furnish a certain number of troops. *Mills v. Martin* (N. Y.) 19 Johns. 7, 26.

#### As requiring or demanding.

"Requisition," as used in Gen. Laws, c. 207, § 7, providing that a mortgagor entitled to redeem may require the mortgagee to assign the mortgage debt to such other person as the mortgagor directs, and providing that such right shall belong to each incumbrancer or to the mortgagor notwithstanding any intermediate incumbrance, but a requisition of an incumbrancer shall prevail over the requisition of the mortgagor, is not equivalent to a desire to retain, but should be considered in its literal sense of the act of requiring or demanding. *Atwood v. Charlton*, 45 Atl. 580, 581, 21 R. I. 568.

#### REQUISITION TO SUE.

A notice given by a security in a note to the payee that "you are hereby notified that I will not stand good as security any longer, on the note you hold against William Upton and myself as security," was held to be insufficient as a requisition to sue, within the meaning of the Missouri statute relating to securities. There ought to be an express direction to sue, that there may be no misapprehension of the meaning. It is as easy to speak out plainly as mysteriously, and there would be no certainty in the rule if it led the courts to grope for the meaning of the party among ambiguous words. Cases will arise in which it would be difficult to determine and in the end there would be no rule at all; nor would the creditor know how to keep himself safe unless he would fly at the principal on the first intimation of the surety's impatience. *Lockridge v. Upton*, 24 Mo. 184, 185.

#### REQUISITION FOR SURRENDER OF FUGITIVES.

"Requisitions for surrender of fugitives," as used in the Spanish treaty of January 5, 1877, art. 11, providing that requisitions for the surrender of fugitives from justices shall be made by the respective diplomatic agents of the contracting parties, or, in their absence, by superior consular officers, means the application for the final warrant for the surrender of the fugitives, which can only be executed by the executive authority after a judicial examination. *Castro v. De Uriarte* (U. S.) 16 Fed. 93, 96.

#### RES.

In the civil law the term "res" signifies a thing, an object. As a term of law, this word has a very wide and extended signification, including not only things which are objects of property, but also such as are not capable of individual ownership. And in old English law it is said to have a general import comprehending both corporeal and incorporeal things, of whatever nature or species. In modern usage the term is particularly applied to an object, subject-matter, or status considered as the defendant in an action, or as the object against which directly proceedings are taken. Thus in a prize case the captured vessel is the res. And proceedings of this character are said to be in rem. *Black, Law Dict.*

#### RES ADJUDICATA.

See, also, "Former Adjudication."

"Res judicata" means a thing definitely settled by a judicial decision. *State v. Wear*, 46 S. W. 1099, 1107, 145 Mo. 162.

Res adjudicata is a matter adjudged; a thing judicially acted on or decided. "The principle is that the decision of a court of competent jurisdiction upon a point which is or should have been construed as necessarily involved is final and conclusive." *Warren v. Raymond*, 17 S. C. 163, 164, 189.

"Res adjudicata" means that if an action be brought, and the merits of the question be discussed between the parties, and a final judgment be obtained by either party, the parties are concluded, and cannot canvass the same question in another action. It is founded upon two maxims of the law, one of which is that a man should not be twice vexed for the same cause, and the other that it is for the public good that there be an end of litigation. *Wisconsin v. Torinus*, 9 N. W. 725, 726, 28 Minn. 175.

In *Smith v. Auld*, 1 Pac. 626, 628, 31 Kan. 262, Mr. Justice Brewer, speaking for this court, said: "The whole philosophy of the doctrine of res adjudicata is summed up in the simple statement that a matter once decided is finally decided, and all the learning that has been bestowed and all the rules that have been laid down have been for the purpose of enforcing that one proposition. One rule fully established is that you may examine the entire record of the prior action in order to determine what was in fact adjudicated. The inquiry is not limited to the mere formal judgment. It extends to the pleadings, the verdict, or the findings; and the scope and meaning of the judgment is often interpreted by pleadings, verdict, or findings. Indeed, to determine the matters which are adjudicated, not only may you look to the entire record, but also, in many



instances, you may resort to parol testimony." *Hoisington v. Brakey*, 3 Pac. 353, 355, 31 Kan. 560.

Matters once determined by a court of competent jurisdiction can never be questioned. It matters not under what form the question be presented. Whenever the same question recurs between the same parties, the plea of *res adjudicata* estops. *McNeely v. Hyde*, 15 South. 167, 46 La. Ann. 1083.

The basic principle of *res judicata* is found in the necessity that a time should come when litigation shall cease, in order that the decree of the court may be carried out. *Res judicata* deals with the decree of the court, as contradistinguished from the judgment of the court, since it does not take place with respect to the reasons of the judgment, but only with respect to what was the object of the judgment. The office and function and utility of *res judicata* is not to settle law questions, but to lend stability to a decree, in order that such decree may be effective. *State v. American Sugar Refining Co.*, 32 South. 965, 966, 108 La. 603.

The term "*res judicata*" is used with different meanings in connection with different conditions, and not always with discrimination. Perhaps an exact discrimination is not always practicable, in the present state of the law on this subject. The two most important applications of the principle are when it is invoked in respect to a cause of action once finally determined by a judgment, and where it is invoked in respect to the conclusiveness of a fact contested between the parties to an action, and determined by the judgment in that action, upon the same parties, when agitating their controversies in another suit upon a different cause of action. There is an evident distinction in these cases not only as to the effect of a judgment, but as to the grounds on which the principle producing the effect is based. The distinction is drawn with great clearness in the opinion of Justice Field in *Cromwell v. Sac County*, 94 U. S. 351, 357, 24 L. Ed. 195. In the former case the judgment is produced as conclusive evidence that no cause of action exists. Either the cause of action has been satisfied and merged in the judgment, or its nonexistence has been judicially determined and forever settled by the judgment, and the controlling principle depends primarily on the legal effect of a judgment on the cause of action determined. The judgment is not treated merely as an estoppel to the proof of any fact involved in the trial of the cause of action alleged, but is rather held to be conclusive evidence that the cause of action alleged does not now exist, or never had any existence. In the latter case the judgment is produced as evidence of some material fact in the cause of action on trial, the truth of which fact both parties are es-

topped from denying. In such case the controlling principle depends upon the effect of a judgment in giving indefinite life and irrefutable probative force to any fact judicially found to be true. The considerations of public policy which support the rules of *res judicata* do not justify its extension to make a fact adjudicated in an action between two persons litigating a cause of action which has arisen between them in their individual capacity *res judicata* in subsequent actions brought by one, as assignee of a chose in action, against the other and a third person, which the plaintiff has purchased of such third person after his right therein has become fixed, and since the judgment in the first action was rendered. *Fuller v. Metropolitan Life Ins. Co.*, 35 Atl. 766, 767, 68 Conn. 55, 57 Am. St. Rep. 84.

An estoppel precludes parties and privies from contending to the contrary of that point on a matter of fact which, having been once distinctly put in issue by them, or by those with whom they are privy in estate or law, has been, on such issue joined, found against them. *Jones v. Muldrow* (S. C.) Cheves, 254, 255.

The essence of estoppel by judgment is that there has been a judicial determination of a fact. *Last Chance Min. Co. v. Tyler*, Min. Co., 15 Sup. Ct. 733, 736, 157 U. S. 683, 39 L. Ed. 859.

An estoppel is an omission or determination under circumstances of such solemnity that the law will not allow the fact so admitted or established to be afterwards drawn in question between the same parties or their privies. A judgment and verdict are conclusive by way of estoppel only as to those facts which are necessarily involved in them. *Orr v. Mercer County Mut. Fire Ins. Co.*, 6 Atl. 696, 699, 114 Pa. 387.

The doctrine of *res adjudicata* is plain and intelligible, and amounts simply to this: That a cause of action once finally determined, without appeal between the parties on the merits, by any competent tribunal, cannot afterwards be litigated by new proceedings either before the same or any other tribunal. *Weigley v. Coffman*, 28 Wkly. Notes Cas. 453, 455, 144 Pa. 489, 22 Atl. 919, 27 Am. St. Rep. 667 (citing *Foster v. The Richard Busted*, 100 Mass. 409, 1 Am. Rep. 125).

#### As requiring decision on merits.

An estoppel by a former judgment is based upon public policy. It demands that, when a fact has been judiciously and finally determined between the same parties, it should be at rest. It is, however, equally well settled that a former judgment, to be a bar, must have been a decision upon the merits. Thus a judgment for want of jurisdiction, or by reason of a technical de-

fect in the pleadings or as to the parties, or upon any ground not going to the merits, will not prevent a second action. Where a petition is dismissed without a reason being given, such dismissal will not work an estoppel. *Pepper v. Donnelly*, 8 S. W. 441, 442, 87 Ky. 259.

An estoppel must be certain to every intent, and if, upon the face of the record, anything is left to conjecture as to what was necessarily involved and determined, there is no estoppel. The entry of a default is therefore not an estoppel. *Board of Trustees of School Dist. No. 1 v. Whalen*, 41 Pac. 849, 851, 17 Mont. 1.

A decree dismissing a bill solely for want of jurisdiction is not a bar to another bill in the same court for the same cause of action after a decision of the Supreme Court on appeal, in an action brought in a different court, that the former court had jurisdiction. *Wegley v. Coffman*, 144 Pa. 489, 498, 22 Atl. 919, 27 Am. St. Rep. 667.

#### Necessary elements.

It is held that a matter is not regarded as res adjudicata unless there be a concurrence of four conditions: First, identity in the thing sued for; second, identity of the cause of action; third, identity of persons and of parties to the action; fourth, identity in the quality of the persons for or against whom the claim is made. *Jackson v. Cable* (Tex.) 27 S. W. 201, 203; *Mershon v. Williams*, 44 Atl. 211, 213, 63 N. J. Law, 398 (citing 2 Bouv. Law Dict. p. 467; *Davis v. Brown*, 94 U. S. 423, 24 L. Ed. 204); *Child v. McClosky*, 84 N. W. 769, 770, 14 S. D. 181; *Brady v. Pryor*, 69 Ga. 691, 696. The court will inquire whether the subject-matter of the controversy has been brought in question, and within the issue in the former proceeding, and has terminated in a regular judgment on the merits, and whether the former suit was between the same parties in the same right or capacity, or their privies claiming under them, and whether the former judgment was before a court of competent jurisdiction. *Stevens v. Stembridge*, 31 S. E. 413, 414, 104 Ga. 619.

"In order to make out a defense of res adjudicata, it must appear that the parties were the same, and that the matter involved was the same; and it must also appear that the matter was adjudicated in a suit and before a court having competent jurisdiction to adjudicate the matter." *Cherry v. York* (Tenn.) 47 S. W. 184, 188.

In order to establish a plea of res adjudicata, there must generally be an identity of parties, of subject-matter, and of cause of action. *Baldwin v. Hanecy*, 68 N. E. 560, 562, 204 Ill. 281.

Res adjudicata is determined as existing when it is ascertained that the matters

of the two suits are the same, and the issues in the former suit were broad enough to have comprehended all that is involved in the issues in the second suit. *Tankersly v. Pettis*, 71 Ala. 179. To support the plea of res adjudicata, the parties must be the same, the subject-matter the same, and the point must be directly in question, and the judgment must be rendered upon that point. *Wood v. Wood*, 33 South. 347, 349, 134 Ala. 557.

In order to make a plea of res adjudicata effective, there must be at least the concurrence of two things: First, identity of subject-matter; and, second, identity of persons and parties. *Lindauer Mercantile Co. v. Boyd* (N. M.) 70 Pac. 568, 570.

In order to make a matter res adjudicata, there must be a concurrence of the following conditions: First, identity in the thing sued for; second, identity of the cause of the action; third, identity of persons and parties to the action; fourth, identity of the quality in the persons for or against whom the claim is made. 2 Bouv. Law Dict. That there should be identity of persons and of parties to the action is a necessary consequence of the rule of natural justice. "Ne inauditus condemnatur." *Atchison, T. & S. F. R. Co. v. Jefferson County Com'rs*, 12 Kan. 127, 135.

A judgment cannot be res adjudicata as to any right or claim unless both claim and claimant have been before the court. *Gay v. Brierfield Coal & Iron Co.*, 11 South. 353, 364, 94 Ala. 303, 16 L. R. A. 564, 33 Am. St. Rep. 122.

Before plea of res adjudicata can be sustained, it must appear that there has been a trial, at which the party appeared or was bound to appear; that he was duly warned. had his day in court, and was defeated. *Mahon v. Luzerne County* (Pa.) 9 Kulp, 453, 461.

#### Matters included.

The rule of res adjudicata applies only in cases where the matter in issue is identical with that which was in issue at the former trial. *Keith v. City of Philadelphia*, 24 Wkly. Notes Cas. 115, 116, 125 Pa. 575, 17 Atl. 883.

A judgment makes only that which was in issue and decided res adjudicata. The reasons given by the judges, whether few or many, are not res adjudicata. Where the Supreme Court determines a demurrer to the complaint, any judgment based on facts assumed to exist by the opinion, but which are not alleged in the complaint, is not res adjudicata. The reasons of a judgment set forth in a Supreme Court opinion are not res adjudicata. *Case v. Hoffman*, 72 N. W. 390, 100 Wis. 314, 44 L. R. A. 728.

The judgment of a court rendered without opposition on a motion to annul a judgment for want of jurisdiction is *res judicata* on the question of jurisdiction. *Bartlett v. Wheeler*, 31 La. Ann. 540, 543.

Except in special cases, the plea of *res judicata* applies not only to points upon which the court was actually required to form an opinion and pronounce judgment, but to every point which properly belonged to the subject of the allegation, and which the parties exercising reasonable diligence, might have brought forward at the time. *Grant County Com'rs v. Cross* (N. M.) 73 Pac. 615, 616.

To work an estoppel by judgment, the former judgment must be directly in point, and involve the identical matter presented in the new action. *Water Com'rs of City of Brunswick v. Cramer*, 39 Atl. 671, 672, 61 N. J. Law, 270, 68 Am. St. Rep. 705 (citing *Chamberlain v. Hopper*, 34 N. J. Law [5 Vroom] 220; *Mutual Life Ins. Co. v. Newton*, 50 N. J. Law [21 Vroom] 571, 576, 14 Atl. 756).

All questions properly before the appellate court, and decided by them, are *res judicata*, regardless of whether the case is further proceeded with in the lower court, if remanded thereto. *Stewart v. Stebbins*, 30 Miss. 66, 81.

Although a court of law declines to determine a question of set-off, yet this is not *res judicata*, so as to preclude an inquiry in a court of equity. *Hackett v. Connett* (N. Y.) 2 Edw. Ch. 73, 75.

The principle of *res adjudicata* operates only as a bar to a second suit when the point in controversy is the same in both cases, and when the decision was upon the merits. The points actually decided will determine if the estoppel exists, and the identity of the cause of the demand must be the same in both instances. The judgment may be resorted to as showing what issues were determined, and for this purpose may *prima facie* establish the issue. But parol evidence is also competent to show what was the issue before the court, and the point actually adjudicated. *Freeman v. McAninch*, 24 S. W. 922, 925, 6 Tex. Civ. App. 644.

The doctrine of *res adjudicata* is founded on public policy, as conducive to peace, repose, and morality, and without working any injustice. The rule in regard to the conclusiveness of the verdict and judgment rendered in a former trial between the same parties, when invoked in a subsequent suit, requires that the controversy must be the same on both sides, and that the matter in issue must have been directly, and not collaterally or inferentially, decided. *Faires v. McLellan* (Tex.) 24 S. W. 365, 366.

### Parties.

A matter once adjudicated by a court of competent jurisdiction may be invoked as an estoppel in any collateral suit in any court of law or equity, or in admiralty, when the same parties or their personal representatives, or one of the parties and the privy and privies of the other, allege anything contradictory to it; and those who assume a right to control or actively participate in the trial or its management, though not formal parties, will be concluded. *State v. Johnson* (Mo.) 25 S. W. 855, 857.

One of the settled rules governing estoppels by judgment is that the estoppel cannot be successfully invoked, except against a party or privy. Another rule is that the estoppel must be mutual. *Lochridge v. Corbett*, 73 S. W. 96, 98, 31 Tex. Civ. App. 676.

Under a plea of *res judicata*, two elements are necessary, namely, identity of the thing demanded, and identity of the cause of demand or cause of suit. *Gallagher v. City of Moundsville*, 34 W. Va. 730, 12 S. E. 859, 26 Am. St. Rep. 942. But it is not necessary that precisely the same parties were plaintiffs and defendants in the two suits, provided the same subject in controversy between two or more of the plaintiffs and defendants to the suit, respectively, has been in the form of suit directly in issue and decided. *Brown v. Missouri Pac. Ry. Co.*, 70 S. W. 527, 96 Mo. App. 164 (citing *Western Min. & Mfg. Co. v. Virginia Cannel Coal Co.*, 10 W. Va. 250).

### As applying to points which might have been raised.

The rule of *res adjudicata* only extends to such questions as are actually litigated, and, under certain circumstances, to such as might be litigated. *Ward v. Joslin* (U. S.) 100 Fed. 676, 679.

All matters presentable to sustain the particular demand litigated in prior suit, and all matters presented or presentable under the issue to defeat such demand, are concluded by the judgment or decree in the former suit. *Withers' Adm'r v. Sims*, 80 Va. 651, 658.

In *Francis v. Wood*, 81 Ky. 16, 221, it was said: "Res judicata applies, except in special cases, not only to points on which the court was actually required by the parties to form an opinion and pronounce judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward. They cannot open the litigation in respect to matters which might have been brought forward only because by negligence or inadvertence they have been omitted from their case." And in *Davis v. McCorkle*, 77 Ky. (14 Bush)

746, it was said: "A party can no more split up differences than indivisible demands, and present them piecemeal in successive suits growing out of the same transaction." *Hardwicke v. Young*, 62 S. W. 10, 11, 110 Ky. 504.

Except in special cases, the plea of *res judicata* applies not only to points upon which the court was actually required to form an opinion and pronounce judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time. A recovery in one suit upon issue joined on matter of title is equally conclusive upon the subject-matter of such title, in any subsequent action, as an estoppel. The estoppel where the judgment was rendered upon the merits, whether on demurrer, agreed statements, or verdict, extends to every material allegation or statement which, having been made on one side and denied on the other, was at issue in the cause, and was determined in the course of the proceedings. *Aurora City v. West*, 74 U. S. (7 Wall.) 82, 102, 103, 19 L. Ed. 42.

A decision by a court of competent jurisdiction is binding on all other courts of concurrent jurisdiction. The defense of *res judicata* only extends to the matter necessarily determined before the judgment could have been given, and does not include every question which could have been raised, whether considered or not. A judgment, therefore, is not conclusive of a matter of fraud when the question of fraud was not raised, nor the facts constituting the fraud known to the party injuriously affected. *Hart v. Bates*, 17 S. C. 35, 42.

The general principle that the judgment or decree of a court possessing competent jurisdiction shall be final as to the subject-matter thereby determined can admit of no doubt. The principle, however, extends further. It is not only final as to the matter actually determined, but as to every other matter which the parties might litigate in the cause, and which they might have had decided. *Le Guen v. Gouverneur* (N. Y.) 1 Johns. Cas. 492, 502, 510, 1 Am. Dec. 121.

All matters presentable to sustain the particular demand litigated in the prior suit, and all matters presented or presentable under the issue to defeat such demand, are concluded by the judgment or decree in the former suit. *Withers' Adm'r v. Sims*, 80 Va. 651.

#### Effect in subsequent related suit.

The effect of an estoppel by judgment may present two aspects—one, where a second suit is brought between the same parties for the same cause of action; the sec-

ond, where a second suit between the same parties is brought, not for the same cause of action, but for a cause of action so related to the cause in the preceding suit that some matter, the establishment of which is essential to the recovery in the last suit, was determined in the preceding suit. It is settled as to the first class that, after one judicial determination by a court of competent jurisdiction, a second suit for the same matter between the same parties cannot be relitigated. Where a second suit, however, is brought, not for the same demand, but for a cause which was a part of the same matter, but was not included in the first action, the estoppel is not so sweeping. In such instance only those issues which are common to both suits, and which had to be or were actually decided in the first suit, are regarded as *res adjudicata* in the second suit. *Clark Thread Co. v. William Clark Co.*, 37 Atl. 599, 600, 55 N. J. Eq. 658.

#### Collateral attack distinguished.

See "Collateral Attack."

#### RES DERELICTA.

*Res derelicta* is that property from which the mind has withdrawn affection, and which has thus fallen back into the natural state of *res nullius*, and is again susceptible of becoming the property of the occupant. *Rhodes v. Whitehead*, 27 Tex. 304, 313, 84 Am. Dec. 631.

#### RES GESTÆ.

The *res gestæ* is defined by Wharton, in his work on Evidence, 258, 267, "as those circumstances which are the undesigned incidents of particular litigated acts, and are admissible where illustrative of such acts. These incidents may be separated from the act by lapse of time more or less appreciable. Their sole distinguishing feature is that they should be necessary incidents of the litigated act—necessary in this sense: that they are part of the immediate preparations for, or emanations from, such acts, and are not produced by the calculated policy of the actors. In other words, they must stand in immediate causal relation to the act—a relation not broken by individual wariness seeking to manufacture evidence for itself. Therefore declarations which are the immediate accompaniments of an act are admissible as part of the *res gestæ*; remembering that immediateness is tested by closeness, not of time but by causal relation, as just explained." This is an accurate statement of the rule. *Ft. Smith Oil Co. v. Slover*, 24 S. W. 106, 108, 58 Ark. 168; *Little Rock, M. R. & T. Ry. Co. v. Leverett* (Ark.) 3 S. W. 51; *Hunter v. State*, 40 N. J. Law (11 Vernon) 495; *Freeman v. State*, 51 S. W. 230, 40 Tex. Cr. R. 545; *Coll v. Easton Transit*

Co., 37 Atl. 89, 90, 180 Pa. 618; *People v. Wong* Ark, 30 Pac. 1115, 1117, 96 Cal. 125; *Denver & R. G. R. Co. v. Spencer*, 52 Pac. 211, 212, 25 Colo. 9; *Graves v. People*, 18 Colo. 170, 177, 32 Pac. 63, 65; *McLeod v. Johnson*, 52 Atl. 760, 761, 96 Me. 271; *State v. Thompson*, 34 S. W. 31, 37, 132 Mo. 301; *State v. Hudspeth*, 51 S. W. 481, 486, 150 Mo. 56; *State v. Walker*, 78 Mo. 380, 386; *State v. Tighe*, 71 Pac. 3, 7, 27 Mont. 327; *St. Clair v. United States*, 14 Sup. Ct. 1002, 1008, 154 U. S. 134, 38 L. Ed. 936.

Res gestæ are the circumstances, facts, and declarations which grow out of the main fact, or are contemporaneous with it, and serve to illustrate its character. *Stirling v. Buckingham*, 46 Conn. 461, 464.

The doctrine of res gestæ is based upon the presumption that declarations made at the same time with the principal act, evoked by it without premeditation, and giving it color and character as explanatory of the mind and purpose of the actor, are as reliable as the act itself, of which it is a part, and can be proved along with it, without the oath of the party. *Mitchum v. State*, 11 Ga. 615, 624. The res gestæ differ according to the circumstances of the particular case. It may be embraced within the brief compass of time which comprises the duration of the principal act or transaction itself, or it may extend over a much longer period of time, if the transaction be one of a continuing character. *McGowen v. McGowen*, 52 Tex. 657, 664.

Circumstances attending a particular transaction on investigation by the jury, if so interwoven with each other and with the principal fact that they cannot well be separated without depriving the jury of proof that is essential in order to reach a just conclusion, are admissible in evidence. These surrounding circumstances constituting part of the res gestæ, says Greenleaf, may always be shown to the jury. *State v. Prater*, 43 S. E. 230, 235, 52 W. Va. 132 (citing *St. Clair v. United States*, 154 U. S. 134, 14 Sup. Ct. 1002, 38 L. Ed. 936).

"Res gestæ," it has been said, "are events speaking for themselves through the instinctive words and acts of participants, not the words and acts of participants when narrating the events. \* \* \* And as long as the transaction continues, so long do acts and deeds emanate from it, become part of it, so that, in describing it in a court of justice, they can be detailed. The question is, is the evidence offered that of events speaking through participants, or that of observers speaking about the event? \* \* \* Nor are there any limits of time within which the res gestæ can be arbitrarily confined." *Territory v. Clayton*, 19 Pac. 293, 297, 8 Mont. 1 (citing *Whart. Cr. Ev.* § 262).

Two things must concur to render declarations admissible as part of the res gestæ. The facts themselves must be relevant and material, independently of what was said, and the declaration must relate to those facts, and must be explanatory of them. *Morrill v. Foster*, 32 N. H. 358, 360.

Whenever it becomes important to show upon the trial of any cause the occurrence of any fact or event, it is competent also to show any accompanying act, declaration, or exclamation which relates to, or is explanatory of, such fact or event. Such act, declaration, or exclamation is known to the law as res gestæ. *Dauids v. People*, 61 N. E. 537, 541, 192 Ill. 176.

The "res gestæ" may be defined as those circumstances which are the undesigned incidents of a particular litigated act, and which are admissible when illustrative of such act. These incidents may be separated from the act by a lapse of time more or less appreciable. They may consist of speeches of any one concerned, whether participant or bystander. They may comprise things left undone, as well as things done. *Little Rock & F. S. R. Co. v. Leverett*, 3 S. W. 50, 51, 48 Ark. 261.

Declarations, as a part of the res gestæ, are regarded as verbal facts indicating a present purpose and intention, and therefore are admitted in proof like any other material fact. *Carr v. State*, 43 Ark. 99, 100, 105.

No inflexible rule has ever been adopted as to what is part of the res gestæ. It must be determined largely in each case by the peculiar facts and circumstances incident thereto, but it may be stated as a fixed rule that included in the res gestæ are the facts which so illustrate and characterize the principal fact as to constitute the whole one transaction, and render the latter necessary to exhibit the former in its proper effect. *Chicago & E. Ry. Co. v. Cummings*, 53 N. E. 1026, 1031, 24 Ind. App. 192.

Hill's Ann. Code, § 680, provides that "where also a declaration, act or omission forms part of a transaction which is itself the fact in dispute, or evidence of the fact, such declaration, act or omission is evidence as a part of that transaction." This section is declaratory of the common law, and is a legislative definition of res gestæ. What is res gestæ, and what is not, is sometimes difficult to distinguish, but the difficulty in making the application does not in any manner impair the rule. *Humphrey v. Chilcat Canning Co.*, 25 Pac. 389, 390, 20 Or. 209.

Declarations made at the time of the commission of a criminal act, and expressive of its character, are admissible in evidence as part of the res gestæ; but, where the declaration and the act done are inconsistent, the presumption of intention is to be gather-

ed from the act. *State v. Shelledy*, 8 Iowa, (8 Clarke) 477, 489.

Utterances and exclamations of participants, or of persons acting in concert, made immediately before or after or in the execution of an act, which go to illustrate the character and quality of the act, are usually admissible on the ground that they are a part of the *res gestæ*. *Indianapolis St. R. Co. v. Whitaker*, 66 N. E. 433, 434, 160 Ind. 125.

#### Coincidence in time.

Declarations, in order to be parts of the *res gestæ*, need not be exactly coincident in point of time with the principal fact. *People v. Vernon*, 35 Cal. 49, 51, 95 Am. Dec. 49; *Dauids v. People*, 61 N. E. 537, 541, 192 Ill. 176. If they sprang out of the principal fact, tended to explain it, were voluntary and spontaneous, and made at a time so near it as to preclude the idea of deliberate design, they may be regarded as contemporaneous and admissible in evidence. Almost immediately after deceased was shot, he was carried into a house by defendant and others, and within an hour afterwards, on being asked how it occurred, he said that defendant shot him, but did not intend to. This declaration was admissible as a part of the *res gestæ*. *Johnson v. State*, 58 Pac. 761, 763, 8 Wyo. 494.

It is said that there are no limits of time in which the *res gestæ* can be arbitrarily confined. They vary, in fact, with each particular case. To make declarations a part of the *res gestæ*, they must be contemporaneous with the main fact, but, in order to be contemporaneous, they are not required to be precisely concurrent in time. If the declarations sprang out of a transaction, if they elucidate it, and if they were made at a time so near to it as to preclude the idea of deliberate design, they are then to be regarded as contemporaneous. If they amount to no more than a mere narrative of the past occurrence, or of an isolated conversation held or an isolated act done at a later period, they are inadmissible; but if declarations of a past occurrence are made under such circumstances as will raise a reasonable presumption that they are the spontaneous utterances of thoughts created by, or springing out of, the transaction itself, and so soon thereafter as to exclude the presumption that they are the result of premeditation and design, they will be admissible as a part of the *res gestæ*. *State v. Lockett*, 68 S. W. 563, 565, 168 Mo. 480; *Lambright v. State*, 16 South. 582, 587, 34 Fla. 564.

The statements of an accused in regard to the homicide, in order to be admissible as *res gestæ*, must appear to be closely connected with the homicide in point of time, though not necessarily exactly contemporaneous; but they should be so near as to suggest the ab-

sence of any fabrication, and it should appear to be spontaneous, and not the relation of a past transaction. *Ford's Case*, 50 S. W. 350, 351, 40 Tex. Cr. R. 290.

In order to constitute declarations a part of the *res gestæ*, it is not necessary that they were precisely incident in point of time with the principal fact. If they spring out of the principal fact, tend to explain it, were voluntary and spontaneous, and made at a time so near it as to preclude the idea of deliberate design, they may be regarded as contemporaneous, and are admissible in evidence. *Lewis v. State*, 15 S. W. 642, 643, 29 Tex. App. 201, 25 Am. St. Rep. 720; *State v. Hudspeth*, 60 S. W. 136, 143, 159 Mo. 178.

No inflexible rule can be adopted as to what lapse of time between the commission of an act and a declaration made should exclude the declaration, as not being a part of the *res gestæ*. Each case must depend on its own facts and circumstances. The act or declaration sought to be proven must, however, be so connected with the transaction as to be a part of it. In a trial for murder, where the witness testified that as soon after the murder as he could get over his scare or excitement, and thought it over, he went up to defendant and had a talk with him, the declarations then made by the latter are not admissible in his own behalf as part of the *res gestæ*. *Wright v. State*, 41 Atl. 1060, 1061, 88 Md. 705.

The *res gestæ* of a transaction is what is done during the progress of or so nearly upon the actual occurrence as fairly to be treated as contemporaneous with it. No precise point of time can be fixed a priori where the *res gestæ* ends. Each case turns on its own circumstances. Indeed, the inquiry is rather into events, than into the precise time which has elapsed. Is the proof offered of a matter fairly a part of the same transaction? Is it an event pending naturally and spontaneously as a part of the occurrence under investigation? If so, the law permits it to be proven as part of it, since the whole scene, as it had transpired, ought to appear to the tribunal called upon to determine its character. Matters occurring before or after—that is, before the transaction began, or after it ended—are not part of it. *Hall v. State*, 48 Ga. 607–608.

The declarations of a person, to be a part of the *res gestæ*, must have been made at the time of the act done, which they are supposed to characterize, and have been calculated to unfold the nature and quality of the facts they were intended to express, and so harmonize with them as obviously to constitute one transaction. *Enos v. Tuttle*, 3 Conn. 247, 250.

Declarations, as parts of the *res gestæ*, made at the time of a transaction, are re-

garded as verbal acts, and are hence admissible as any other material facts. An indispensable characteristic of these declarations is that they must be made at the time of the act, and calculated to unfold the nature and quality of the fact they are intended to explain. *Mitchum v. State*, 11 Ga. 615, 623.

At common law the *res gestæ* was strictly confined to the transaction itself, but the doctrine in some of the American states has been extended beyond the very time of the transaction. A test as to what constitutes *res gestæ* is that it is the event speaking for itself at the time. To illustrate, if, during the difficulty, one cry out, "Spare me!" or, "Don't stab me again!" But if it is the narration of a past transaction, it ought not to be admitted, as if, after a difficulty between A. and B., A. narrates to C. the circumstances of the difficulty in the past tense. So far as the Texas cases are concerned, they appear to have made a complete departure from this rule, for a large portion of the decided cases on this question are, in phraseology, narratives of a past transaction. In *Craig's Case*, 30 Tex. App. 619, 621, 18 S. W. 297, Judge Hurt said: "Just when the fact or statement is or is not a part of the *res gestæ* is one of the most difficult questions to solve known to the writer. The old rule was that, to be a part of the *res gestæ*, the fact of statement should be contemporaneous with the transaction, and this rule is approved by many courts of the first ability. On the other hand, the rule has been construed so as to admit acts and declarations occurring not contemporaneous with the transaction which preceded or followed it; and when they are to be admitted or rejected, if not coincident with the act or transaction in question, is a question of judicial discretion of embarrassing nicety." In *Freeman v. State*, 51 S. W. 230, 231, 40 Tex. Cr. R. 545, it was held that statements made by a wounded person from 30 to 60 minutes after the wounds were inflicted were admissible as part of the *res gestæ*, though the mind of the injured person had in the meantime been diverted by other affairs. The general rule is that what was said or done by the injured party at the time and place of the injury, as to its cause, is admissible as part of the *res gestæ*. 1 Greenl. Ev. § 108. While the above states the general rule, cases may be found where the courts of last resort of this state have upheld the admission of the declarations of the injured party as to the cause of the injury, made after the transaction, when the circumstances were sufficient to exclude the presumption that they were the result of premeditation or design. Declarations by one injured as to what caused the injury, though made several hours thereafter, are admissible as part of the *res gestæ*; the injury being such as to occasion immediate unconsciousness, he having been unconscious when found a few minutes after the

accident, and having of his own accord made the statement on regaining consciousness. *Missouri, K. & T. Ry. of Texas v. Moore*, 59 S. W. 282, 283, 24 Tex. Civ. App. 489.

The declarations of a party are competent as a part of the *res gestæ* when confined strictly to such complaints, expressions, and exclamations as furnish evidence of a present, existing pain or malady, to prove his condition, ills, pains, and symptoms, whether arising from sickness or from an injury by accident or violence. And a declaration made by a deceased person contemporaneously, or nearly so, with a main event, by whose consequence it is alleged that he died, is admissible. Generally the declarations must be contemporaneous with the event; yet, where there are connecting circumstances, they may, even when made some time afterwards, form a part of the whole *res gestæ*. Where the principal fact is the fact of bodily injury, the *res gestæ* are the statements of the cause, made by the injured party almost contemporaneously with the occurrence of the injury, and those relating to the consequences, made while the latter subsisted and were in progress. *Travelers' Ins. Co. of Chicago v. Mosley*, 75 U. S. (8 Wall.) 397, 407, 19 L. Ed. 437.

In a prosecution for murder, defendant testified in his own behalf that he remained at the place of the shooting for some time, and then rode to the home of deceased and notified the family, after which he started to deliver himself to the sheriff, and, meeting a person one mile and a half from the place of the shooting, delivered the gun to him. Held, that testimony of the defendant as to what he said when he delivered the gun was not competent as part of the *res gestæ*. It was not so closely connected with the act as to become an incident thereof, or to be the facts talking through the defendant. So much time had elapsed after the shooting took place that the defendant had ample opportunity to form his design and plan of defense; the shooting was complete; provision had been made for the comfort of the victim; the defendant had gone a mile and a half for the purpose of submitting to arrest; the event was past; the tragedy had been acted; and defendant's statement was but his history of a deed that was already done and complete in all its parts. *Territory v. Clayton*, 19 Pac. 293, 297, 8 Mont. 1.

Where accused procured a gun in a saloon, went back about 50 feet, killed a man with it, then returned to the saloon, and, throwing the gun on the floor, exclaimed: "My God! I have killed my best friend"—then hurried back to the dying man, raised his head, repeating that he had shot his best friend and would be hanged, such declarations constituted parts of the *res gestæ*, and were legitimate independent evidence of

the homicidal act. *Sullivan v. State*, 79 N. W. 721, 723, 58 Neb. 796.

Deceased was shot in the neck, and his articulation was affected by blood collecting in his throat. About 15 minutes after he was shot, brandy and camphor were administered; and about 15 minutes afterwards, when able to talk, he made certain statements as to the circumstances of the shooting and who shot him. Held, that the declarations were admissible as part of the *res gestæ*. *Fulcher's Case*, 13 S. W. 750, 751, 28 Tex. App. 465.

The declarations of a prisoner in his own behalf are not admissible for the defense unless they form part of the *res gestæ*. To be such, it is not necessary that they should be precisely concurrent with the act under trial. It is enough if they spring from it, and are made under circumstances which preclude the idea of design. It is only when the declarations are distinguishable in point of time, and are open to the suspicion of being a part of defendant's plan of defense, that they should be excluded. Thus, where one is charged with stealing a certain thing, his declarations that it was his property, made before the alleged stealing, were admissible in evidence. *State v. Thomas*, 30 La. Ann. 600, 602.

Declarations made about 20 minutes after the homicide, and so intimately connected with it as to negative the idea of manufacturing testimony, are a part of the *res gestæ*. *Stagner v. State*, 9 Tex. App. 440, 455.

The conversation of a party within two to five minutes of the transaction which resulted in the homicide, and before preparation for defense could probably have been in the mind of the party speaking, especially if the sayings are against his interest, is part of the *res gestæ*. *O'Shields v. State*, 55 Ga. 696, 701.

Declarations of a donor made on the evening of the same day on which an alleged gift was made, but after it was made, going to show that there was a gift, and the manner of it, are not admissible as part of the *res gestæ*. *Carter v. Buchannon*, 3 Ga. (3 Kelly) 513, 517.

A statement made by defendant 10 minutes after the homicide, and within 500 yards of where it occurred, to the effect that he went to deceased's house to get some clothes, and while there they quarreled, whereupon deceased cut defendant's coat, and that he shot her to prevent her from killing him, is inadmissible as part of the *res gestæ*; it not appearing what defendant was doing in the interval between the statement and homicide. *Ford's Case*, 50 S. W. 350, 351, 40 Tex. Cr. R. 280.

The statement of a person fatally injured in a railroad collision, made from 30 to

60 minutes after the accident, as to the manner in which it occurred, is simply the narrative of a past transaction, and is not admissible as part of the *res gestæ*. *Steinhofel v. Chicago, M. & St. P. Ry. Co.*, 65 N. W. 852, 853, 92 Wis. 123.

On a trial for murder, evidence that, a few minutes after the shooting, deceased said that defendant had shot her, is not admissible as part of the *res gestæ*. *People v. Wong Ark*, 30 Pac. 1115, 1117, 96 Cal. 125.

On the trial of an issue as to whether some of the heirs of a decedent had received property from him as an advancement, declarations of deceased, made years after the transaction took place, that the transfer was intended as a gift, were too remote to be admitted as a part of the *res gestæ*. *Thistlewaite v. Thistlewaite*, 31 N. E. 946, 132 Ind. 355.

#### Declaration of deceased person.

The term "*res gestæ*" means a thing or things done in and about as a part of the transaction out of which the litigation in hand grew, and on which transaction said litigation is based. The declaration of a person since deceased is competent evidence, as being part of the *res gestæ*, of some transaction occurring in the life of said deceased, provided the declaration so made was near the time of the transaction, and under such circumstances as to raise the presumption that it was an unpremeditated explanation thereof. *Collins v. State*, 64 N. W. 432, 434, 46 Neb. 37.

In case of homicide resulting from an operation performed by the accused upon the body of the deceased to bring about an abortion, the declaration of the deceased, made at the time she was introduced to the accused, to the effect that she was pregnant, and which had direct reference to the contemplated transaction between deceased and the accused, is admissible in evidence as a part of the *res gestæ*. *State v. Alcorn*, 64 Pac. 1014, 1018, 7 Idaho, 599, 97 Am. St. Rep. 252.

Deceased made statements to his son, and wrote a note to his wife, a few hours before leaving home on the night of the murder, to the effect that he was going to the city of C. on business, and that the prisoner was going with him. Held, that such statements, both oral and written, were admissible as part of the *res gestæ*; as explanations of the act of going from home. *Hunter v. State*, 40 N. J. Law (11 Vroom) 495, 538.

#### As illustrative of main transaction.

*Res gestæ* are the circumstances, facts, and declarations which grow out of the main fact, are contemporaneous with it, and serve to illustrate its character. *Carter v. Buchannon*, 3 Ga. (3 Kelly) 513, 517; *Chicago & E.*



*Ry. Co. v. Cummings*, 53 N. E. 1026, 1031, 24 Ind. App. 192. "When the act of a party may be given in evidence, his declarations made at the time, and calculated to elucidate and explain the character and quality of the act, and so connected with it as to constitute one transaction, and so as to derive credit from the act itself, are admissible in evidence. There must be a main or principal fact or transaction, and only such declarations are admissible as grow out of the principal transaction, illustrate its character, are contemporaneous with it, and derive some degree of credit from it." *Pinney v. Jones*, 30 Atl. 762, 763, 64 Conn. 545, 42 Am. St. Rep. 209.

*Res gestæ* is a matter incidental to a main fact and explanatory. It is made up of acts and words which are so closely connected with a main fact as to really constitute a part of it, and without a knowledge of which the main fact might not be properly understood. *Eagon v. Eagon*, 60 Kan. 697, 706, 57 Pac. 942, 943.

The idea of *res gestæ* presupposes a main fact or principal transaction, and the *res gestæ* mean the circumstances, facts, and declarations which grow out of the main fact, are contemporaneous with it, and serve to illustrate its character. In an action against a railroad company for the killing of a child, evidence as to what the engineer said about the accident within a few minutes after the child was killed is admissible as a part of the *res gestæ*. *Hermes v. Chicago, etc., Ry. Co.*, 50 N. W. 584, 585, 80 Wis. 590, 27 Am. St. Rep. 69.

#### As a part of principal act.

Declarations, in order to become a part of the *res gestæ*, must accompany the act which they are supposed to characterize, and must so harmonize as to be obviously one transaction. *Coffin v. Bradbury*, 35 Pac. 715, 720, 3 Idaho (Hasb.) 770, 95 Am. St. Rep. 37.

In order to make a declaration admissible as part of the *res gestæ*, it must accompany an act which directly or indirectly is relevant to the issue, and must in some way qualify, explain, or characterize that act, and be in legal sense a part of it. *Commonwealth v. Trefethen*, 31 N. E. 961, 963, 157 Mass. 180, 24 L. R. A. 235.

"Evidence, to constitute part of the *res gestæ*, must be connected with the subject-matter under investigation. Thus declarations and exclamations of persons not present at the place where an accident occurred which is the subject of the action, and who did no act which contributed to the accident, are no part of the *res gestæ*, as they are in no wise connected with the accident itself. It is stated in *Waldele v. New York Cent. & H. R. R. Co.*, 95 N. Y. 274, 47 Am. Rep. 41, that the rule is that, when the act of a party

may be given in evidence, his declarations made at the time, and calculated to elucidate and explain the character and quality of the act, and so constitute one transaction, and so as to derive credit from the act itself, are admissible in evidence. But declarations of a person, made while looking from a window of a house, having a tendency only to corroborate his testimony that he then saw a street railway accident, are not admissible as part of the *res gestæ* of the accident." *Ehrhard v. Metropolitan St. Ry. Co.*, 74 N. Y. Supp. 551, 552, 69 App. Div. 124.

Declarations accompanying and explaining the *res gestæ* may be proved, but such declarations are not admissible as part of the *res gestæ* unless they in some way elucidate or tend to characterize the act which they accompany, or may derive a degree of credit from the fact itself. If the declaration offered in evidence depends entirely for its effect on the credit of the person making it, it is inadmissible. *United States v. Angell* (U. S.) 11 Fed. 34, 39.

The declarations of a prisoner are not admissible as part of the *res gestæ* unless they are made at the time of the act which is being investigated, and which they are calculated to characterize. They must so harmonize and be connected with the act as to constitute a part of it. *Nelson v. State*, 32 Tenn. (2 Swan) 237.

#### Narratives.

The term "*res gestæ*" is defined as "the transaction, thing done, or subject-matter, as when it is necessary, in the course of a case, to inquire into the nature of a particular act, or the intention of the party who did the act." Proof of what the person said at the time of doing it is admissible in evidence as part of the *res gestæ*, for the purpose of showing its true character. The general rule is that declarations, to become part of the *res gestæ*, must accompany the act which they are supposed to characterize, and so harmonize with them as to constitute one transaction. If the declarations are mere narratives of a past event or occurrence, they are not *res gestæ*. *People v. Dewey*, 6 Pac. 103, 105, 2 Idaho (Hasb.) 83.

#### Statements of observers.

Statements of observers not participants in the act, the subject of investigation, are not admissible as *res gestæ*. On a trial for manslaughter, testimony that a witness for the state, present when the deceased received the shot, on passing from the room where the shot was delivered to the front room, stated to the persons who were there, in answer to the question, "What is the matter back there?" that accused had shot deceased, and shot him down for nothing, was inadmissible as part of the *res gestæ*. *State v.*

Ramsey, 20 South. 904, 905, 48 La. Ann. 1407.

The *res gestæ* in larceny is not restricted to the limited time when the fingers reach out and grasp the articles stolen. The *quo animo*, and all actions and words whereby that is demonstrated, form part of the *res gestæ*, and thus become admissible in evidence to prove the character of the act charged to be a crime. Declarations of a third person are not hearsay, and therefore are admissible in evidence where they are the natural concomitants of an act done by him, and are explanatory of such act, and such act is a part of the *res gestæ*. *State v. Gabriel*, 88 Mo. 631, 638.

#### As related to pertinent fact.

A declaration is not admissible as characterizing an act and constituting part of the *res gestæ* unless the act also is pertinent to the issue. Thus, on an indictment for poisoning, evidence that the deceased, on going out of her house just before she was poisoned, said she was going to meet the prisoner, is not admissible as tending to prove their meeting, even in connection with evidence of her illness on her return and her attributing it to what the prisoner had given her to drink. *People v. Williams* (N. Y.) 3 Abb. Dec. 596, 601.

#### Reply to question.

In an action against a railroad company for the negligent killing of a brakeman while in its employ, the declaration of the brakeman that "that handhold let me down," made to a witness who had seen the accident when a few yards away, and had run to help the brakeman in answer to his call after the exclamation by witness of "What in the world!" is not a part of the *res gestæ*, but is in the nature of a response to an inquiry. *Louisville & N. R. Co. v. Pearson*, 12 South. 176, 179, 97 Ala. 211 (following *Richmond & D. R. Co. v. Hammond*, 9 South. 577, 93 Ala. 181).

#### Spontaneity.

The test of whether or not declarations are *res gestæ* is, were they the facts talking through the party or the party's talk about the facts? Instinctiveness is the requisite, and when this exists the declarations are admissible. *State v. Lockett*, 68 S. W. 563, 565, 168 Mo. 480.

Declarations *res gestæ* are not merely declarations accompanying acts, but they are also declarations concomitant with present facts. The test of their admissibility is instinctiveness of utterance. If they appear to be the spontaneous and unpremeditated speech of the party in immediate causal relation to the thing in question, they are admissible, whether that thing be an act concurrently performed or a fact concurrent-

ly existing, or whether it be inculpatory or exculpatory in character or import. The declarations, therefore, of a person found in the possession of stolen goods as to how he came by them, made by him at once upon their being discovered in his keeping, are *res gestæ*. *State v. Gillespie*, 63 Pac. 742, 743, 62 Kan. 469, 84 Am. St. Rep. 411.

There are no limits of time within which the *res gestæ* can be arbitrarily confined. They vary, in fact, with each particular case. The distinguishing feature of declarations of this class is that they should be the necessary incidents of the litigated act—necessary in this sense: that they are part of the immediate concomitants or conditions of such act, and are not produced by the calculated policy of the actors. They need not be co-incident as to time if they are generated by an excited feeling which extends, without break or let, down from the moment of the event they illustrate. In other words, they must stand in immediate causal relation to the act, and become part either of the action immediately producing it, or of action which it immediately produces. *Whart. Cr. Ev.* (8th Ed.) §§ 262, 263. The test is, were the declarations the facts talking through the party, or the party's talk about the facts? Instinctiveness is the requisite, and, where this obtains, the declarations are admissible. *Bradberry v. State*, 22 Tex. App. 273, 2 S. W. 592, 593.

*Res gestæ* are events speaking for themselves through the instinctive and spontaneous words and acts of participants, and not the words of participants when narrating the events. The distinguishing characteristic of these declarations is that they must be necessary incidents of the criminal act, or immediate concomitants of it, and that they are not due to calculated policy. *State v. Molisse*, 38 La. Ann. 381, 382, 58 Am. Rep. 181.

#### Statements not made in defendant's presence.

Concomitant acts speaking through the principal actor, and events incident to the main transaction, are a part of the *res gestæ*. *Sullivan v. State*, 58 Neb. 796, 800, 79 N. W. 721. And statements made by deceased to a third person immediately preceding a homicide, and bearing a causal relation thereto, are admissible as a part of the *res gestæ*, though not made in the immediate presence of the defendant. *McCormick v. State* (Neb.) 92 N. W. 606, 607.

#### RES IPSA LOQUITUR.

"*Res ipsa loquitur*" imports that the plaintiff has made out a *prima facie* case without any direct proof of actionable negligence. *Bien v. Unger*, 46 Atl. 593, 595, 64 N. J. Law, 596.

The meaning of the phrase "res ipsa loquitur" is that the jury are warranted in finding from their knowledge as men of the world that such accidents usually do not happen except through the defendant's fault, and therefore in inferring that this one happened through the defendant's fault, unless otherwise explained. *Pinney v. Hall*, 156 Mass. 225, 30 N. E. 1016 (cited in *State v. Green*, 52 Atl. 673, 675, 95 Md. 217).

The phrase "res ipsa loquitur," which, literally translated, means that "the thing speaks for itself," is merely a short way of saying that the circumstances attendant upon an accident are, of themselves, of such a character as to justify a jury in inferring negligence as the cause of that accident, and the doctrine which it embodies, though correct in itself, may be said to be applicable to two classes of cases only, to wit: "First, when the relation of carrier and passenger exists, and the accident arises from some abnormal condition in the department of actual transportation; second, where the injury arises from some condition or event that is in its very nature so obviously destructive of person or property, and is so tortious in its quality, as in the first instance, at least, to permit no inference save that of negligence on the part of the person in the control of the injurious agency." *Benedick v. Potts*, 40 Atl. 1067, 1068, 88 Md. 52, 41 L. R. A. 478 (citing *Thomas*, Negl. 574); *Griffen v. Manice*, 59 N. E. 925, 926, 166 N. Y. 188, 52 L. R. A. 922, 82 Am. St. Rep. 630. There must be reasonable evidence of negligence, but when a thing is shown to be under the management of the defendant or its servants, and the accident is such as in the ordinary course of things, does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of an explanation by defendant, that the accident arose from want of care. For instance, where a piece of coal flew from the tender of a passing train and injured a section hand who was standing at a reasonable distance from the track, this, in the absence of explanation, and under the doctrine of res ipsa loquitur, constituted sufficient negligence on the part of the company to establish a prima facie case, notwithstanding that the coal was properly loaded on the tender. *Gulf, C. & S. F. R. Co. v. Wood* (Tex.) 63 S. W. 164, 165.

The doctrine of res ipsa loquitur, as expounded by the Court of Appeals in its latest utterance on the subject, in *Griffen v. Manice*, 59 N. E. 925, 166 N. Y. 188, 52 L. R. A. 922, 82 Am. St. Rep. 630, relates simply to the probative force of evidence. It does not dispense with the necessity of evidence of the defendant's negligence in any case, but, on the contrary, expressly requires it. In its application in those cases where the accident is such as in the ordinary course of

business does not happen if reasonable care is used, the effect of the rule is that evidence of the attendant circumstances is sufficient for an inference of negligence, without proof of any specific negligent act. But the attendant circumstances shown must be such as will warrant an inference not of negligence only, but of defendant's negligence—an inference that the injury is attributable to some violation of defendant's duty. The learned judge who wrote the opinion in *Griffen v. Manice*, supra, in explaining the meaning and application of "res ipsa loquitur," quotes approvingly section 59 of *Shearman & Redfield on Negligence*, as follows: "It is not that in any case negligence can be assumed from the mere fact of the accident and injury, but in these cases the surrounding circumstances which are necessarily brought into view by showing how the accident occurred contain, without further proof, sufficient evidence of defendant's duty, and his neglect to perform it. The fact of the casualty and the attendant circumstances may themselves furnish all the proof of negligence that the injured person is able to offer, or that it is necessary to offer." The judge, in his opinion, also quotes approvingly from *Benedick v. Potts*, 88 Md. 52, 40 Atl. 1067, 41 L. R. A. 478, and concludes: "The res includes the attending circumstances, and, so defined, the application of the rule presents principally the question of the sufficiency of circumstantial evidence to establish or to justify the jury in inferring the existence of the traversable or principal fact in issue—the defendant's negligence. The question in every case is the same—whether the circumstances surrounding the occurrence are such as to justify the jury in inferring the fact in issue." Thus it was held in an action for personal injuries that the doctrine did not apply, as, while the circumstances may have shown negligence, there was nothing to suggest that it was the negligence of the master, rather than that of fellow servants. *Fink v. Slade*, 72 N. Y. Supp. 821, 824, 66 App. Div. 105.

"Res ipsa loquitur" is a phrase which, as was said by Mr. Justice Garrison in *Bahr v. Lombard*, 21 Atl. 190, 23 Atl. 167, 53 N. J. Law (24 Vroom) 233, imports that in each case there must be something in the facts that speaks of the negligence of defendant; that is, that the thing which caused the injury was under the management of the defendant or his servants, and the accident was so unlikely to occur, if proper care had been exercised, as to justify an inference that it was due to some neglect of duty. The general rule is that the occurrence of an accident does not raise the presumption of negligence, but, where the testimony which proves the occurrence by which the plaintiff was injured discloses circumstances from which the defendant's negligence is a reasonable inference, a case is presented

which calls for a defense. *Excelsior Electric Co. v. Sweet*, 30 Atl. 553, 554, 57 N. J. Law (28 Vroom) 224.

The term "res ipsa loquitur" is used in the law of negligence with reference to cases where an accident has occurred, and the physical facts surrounding it are such as to create a reasonable probability that the accident was the result of negligence. In such cases the physical facts themselves are evidential, and furnish evidence of negligence. It is often difficult to determine when this maxim is to be applied, and its application must depend to a very great extent upon the circumstances of each case as it arises. The maxim is applicable where a servant is injured by the defective manner in which a wheel in the tackle block of a derrick is held in place, if it appears that the pin would not have worked out of place if it had been securely fastened in the block and had been kept in that condition, and therefore the mere fact that the pin worked out is presumptive evidence of the master's negligence. *Houston v. Brush*, 29 Atl. 380, 383, 66 Vt. 331.

What the court designates as a free paraphrase of the expression "res ipsa loquitur" is as follows: There are a class of cases in which there has been no direct evidence of any particular act of negligence, beyond the mere fact that something unusual has happened, which caused the injury. In such cases each will depend upon its own facts, with this understanding: that where a certain course of action has been pursued by any person without injury to others, and he, upon changing that course, injures another, the thing, unexplained, speaks for itself that such person has been negligent; or, if something unusual happens with respect to the defendant's property, or something over which he has control, which injures the plaintiff, and the natural inference on the evidence is that the unusual occurrence is owing to the defendant's act, the occurrence, being unusual, is said to speak for itself that such act was negligent. *Bahr v. Lombard*, 21 Atl. 190, 192, 53 N. J. Law (24 Vroom) 233.

The doctrine of res ipsa loquitur has received recent consideration from the courts, and the doctrine given a liberal construction. In *Breen v. New York Cent. & H. R. Co.*, 109 N. Y. 297, 16 N. E. 60, 4 Am. St. Rep. 450, the rule is thus stated: "There must be reasonable evidence of negligence, but when the thing causing the injury is shown to be under the control of a defendant, and the accident is such as, in the ordinary course of business, does not happen if reasonable care is used, it does, in the absence of explanation by the defendant, afford sufficient evidence that the accident arose from want of care on its part." In *Griffen v. Manice*, 166 N. Y. 188, 59 N. E. 925, 52 L. R. A. 922, 82 Am. St. Rep. 630, the cases are examined,

and the rule stated is approved. The opinion, in part, reads: "The maxim is also, in part, based on the consideration that, where the management and control of the thing which has produced the injury is exclusively vested in the defendant, it is within his power to produce evidence of the actual cause that produced the accident, which the plaintiff is unable to present." These views have been recently reiterated in this department in the case of *Pink v. Slade* (decided at the November term) 72 N. Y. Supp. 821, 96 App. Div. 105, and also find support in analogous cases in this and other states. In *White v. Boston & A. R. Co.*, 144 Mass. 404, 11 N. E. 552, it is held that there is a presumption of negligence where a passenger is injured by the falling of a lamp shade. In *Och v. Missouri, K. & T. Ry. Co.*, 130 Mo. 27, 31 S. W. 962, 36 L. R. A. 442, a presumption of negligence was held to arise where the injury was caused by the falling of a ventilator window. In *Horn v. New Jersey Steamboat Co.*, 23 App. Div. 302, 48 N. Y. Supp. 348, it was held that the falling of an upper berth from an unexplained cause was prima facie evidence of negligence on the part of the steamboat company. See, also, *Gerlach v. Edelmeyer*, 47 N. Y. Super. Ct. (15 Jones & S.) 292, affirmed 88 N. Y. 645; *Wolf v. American Tract Society*, 164 N. Y. 30, 58 N. E. 31, 51 L. R. A. 241; *Stewart v. Ferguson*, 52 App. Div. 317, 320, 65 N. Y. Supp. 149. The falling of a fire extinguisher fastened to the side of a car, resulting in the injury to plaintiff, was held to establish a prima facie case of negligence against defendant, in the absence of evidence explaining the occurrence. *Allen v. United Traction Co.*, 73 N. Y. Supp. 737, 67 App. Div. 363.

Where the physical facts of an accident themselves create a reasonable probability that it resulted from negligence, the physical facts themselves are evidential, and furnish what the law terms "evidence of negligence," in conformity with the maxim "res ipsa loquitur." *Seybolt v. New York, L. E. & W. R. Co.*, 95 N. Y. 562, 47 Am. Rep. 75. Thus, where a loud and unusual noise came from an electric car, and a volume of smoke issued therefrom, frightening plaintiff's horse, an instruction that such noise and smoke raised a presumption that it would not have been caused if defendant had used proper care in relation to the machinery of the car, and that the jury may infer that the defendant was guilty of negligence, was properly given. *Richmond Ry. & Electric Co. v. Hudgins*, 41 S. E. 736, 738, 100 Va. 409.

The theory of "res ipsa loquitur" may be illustrated by a statement from *Blanton v. Dold*, 18 S. W. 1140, 1149, 109 Mo. 64, where plaintiff was injured by the sudden starting of a machine contrary to its ordinary mode of operation. The court held that such action of the machinery tended of itself to

show want of care in its construction or condition, and, by way of argument, said: "Some catastrophes are of a nature such as to carry in a mere statement of their occurrence an implication of neglect. In such event the theory speaks for itself." *Cothron v. Cudahy Packing Co.*, 73 S. W. 279, 280, 98 Mo. App. 343.

The most apt and concise statement of the principle of *res ipsa loquitur* is found in the leading case of *Scott v. London & St. Katherine Docks Co.*, 3 Hurl. & C. 596, where the plaintiff sued for personal injuries, and the court held there must be reasonable evidence of negligence, but, where the thing is shown to be under the management of the defendant or his servants, and the accident is such as, in the ordinary course of things, does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by defendant, that the accident arose from want of care. *Chenall v. Palmer Brick Co.*, 43 S. E. 443, 445, 117 Ga. 106 (citing *Waterhouse v. Schlitz Brewing Co.*, 81 N. W. 725, 12 S. D. 397, 48 L. R. A. 157).

## RES JUDICATA.

See "*Res Adjudicata*."

## RESCIND.

To rescind is to abrogate, annul, avoid, or cancel a contract. *Powell v. F. C. Linde Co.*, 60 N. Y. Supp. 1044, 29 Misc. Rep. 419 (citing *Abb. Law Dict.*).

The word "rescind," as used in a statement by a party to a contract as follows, "I hereby terminate and rescind my said written contract," is synonymous with the word "terminate," and the rescission therefore relates only to the unfulfilled part, and not to the entire agreement, making the party rescinding liable on notes executed pursuant to the contract which matured before the rescission. *Hurst v. Trow Printing & Bookbinding Co.*, 22 N. Y. Supp. 371, 374, 375, 2 Misc. Rep. 361.

## RESCISSION.

Bishop defines a rescission of a contract as the avoidance of a voidable contract. *Bish. Cont.* § 679. But even where a contract is voidable, and is sought to be rescinded by one of the parties thereto, equity and good conscience require that he shall place the other in statu quo. He will not be permitted to repudiate a contract, and retain the benefits derived therefrom. *Tecumseh State Bank v. Maddox*, 46 Pac. 563, 568, 4 Okl. 583.

The rescission is the unmaking of a contract, requiring the same concurrence of

wills as that which made it, and nothing short of this will suffice. There is a wide difference between the rescission of a contract and its mere termination or cancellation. *Winton v. Spring*, 18 Cal. 451, 452. It is well settled that a technical rescission of a contract has the legal effect of entitling each of the parties to be restored to the condition in which he was before the contract was made, so far as that is possible, and that no rights accrue to either party by the force of the terms of the contract. *Clark v. American Developing & Mining Co.*, 72 Pac. 978, 980, 28 Mont. 468 (citing *Anvil Min. Co. v. Humble*, 153 U. S. 540, 14 Sup. Ct. 876, 38 L. Ed. 814).

After a contract has been broken, whether by an inability to perform it, or by a rescinding against right or otherwise, the party not in fault may sue the other for the damages suffered, or, if the parties can be placed in statu quo, he may, should he prefer, return what he has received, and recover in a suit the value of what he has paid or done. The latter remedy is termed "rescission." *Merrill v. Merrill*, 35 Pac. 768, 769, 103 Cal. 287.

Where the purchaser of goods fails to accept the same, and the seller refuses to take them back, and sues for the price, there is no rescission. The act of refusing to accept an article is not in accordance with the contract, but one of insistence on, and no rescission of, the contract. *Potsdamer v. Kruse*, 58 N. W. 983, 57 Minn. 193.

Rescission is a fact. The word itself may be used by contracting parties to indicate the right, but other words may be adopted to point out that course of conduct of the parties which shall constitute the fact of rescission. Hence omission of the term "rescind" in a contract does not indicate that other language was not intended to give a right to rescind. *Seanor v. McLaughlin*, 30 Atl. 717, 719, 165 Pa. 150, 32 L. R. A. 467.

## RESCUE.

Aiding prisoner to escape distinguished. see "*Aid*."

Rescue is forcibly and knowingly freeing another from arrest or imprisonment. *Code*, § 4478. A rescue takes place where there is no effort on the part of the prisoner to escape, but his delivery is effected by the interference of others without his co-operation, whereas the offense of aiding a prisoner to escape consists in inciting, supporting, and re-enforcing his exertions in his own behalf tending to the accomplishment of the object. *Robinson v. State*, 9 S. E. 528, 529, 82 Ga. 535.

A rescue is defined to be "when a man lawfully arrested and taken is set at large

wrongfully." An indictment for a rescue will not lie for a trespass on property. *State v. Mazyck* (S. C.) 3 Rich. Law, 291, 292.

The taking away and setting at liberty against the law a distrained animal constitutes a rescue, and it is not necessary that positive violence or menacing or threatening words should be employed to characterize the act as a rescue, and such a taking is esteemed in law a violent taking. *Hamlin v. Mack*, 33 Mich. 103, 108.

Taking cattle from the lawful custody of a field driver while driving the cattle to the pound is a rescue, though the cattle are never out of the sight of the field driver, and are finally yielded to him and impounded. *Vinton v. Vinton*, 17 Mass. 342, 344.

## RESENTMENT.

Anger distinguished, see "Anger."

## RESERVATION.

See "Military Reservation."

A reservation is a clause in a deed creating or reserving something out of the thing granted that was not in existence before. *Winston v. Johnson*, 45 N. W. 958, 959, 42 Minn. 398; *Fischer v. Laack*, 45 N. W. 104, 105, 76 Wis. 313; *Langdon v. City of New York* (N. Y.) 6 Abb. N. C. 314, 321; *Gould v. Glass* (N. Y.) 19 Barb. 179, 192; *Barnes v. Burt*, 38 Conn. 541, 542; *Gay v. Walker*, 36 Me. 54, 60, 58 Am. Dec. 734; *Morrison v. First Nat. Bank*, 33 Atl. 782, 88 Me. 155; *State v. Wilson*, 42 Me. 9, 21. A reservation is something taken back out of that which is granted, such as rent, or some right to be exercised, such as the cutting of timber. *Youngerman v. Polk County Sup'rs*, 81 N. W. 166, 167, 110 Iowa, 731; *Randall v. Randall*, 59 Me. 338, 340.

A reservation is defined to be a keeping aside or providing, as where a man lets or parts with his land, but reserves or provides himself a rent out of it. *Stephens v. Reynolds*, 6 N. Y. (2 Seld.) 454, 458 (citing *Jacob, Law Dict.*); *Parsell v. Stryker*, 41 N. Y. 480, 483; *Wegner v. Lubenow* (N. D.) 95 N. W. 442, 445.

A reservation in a deed is something created out of the granted premises by force and effect of the reservation itself, as an easement out of land granted, or rent out of premises devised. In re *Narragansett Indians*, 40 Atl. 347, 355, 20 R. I. 715; *Elliot v. Small*, 29 N. W. 158, 159, 35 Minn. 396, 59 Am. Rep. 329.

Reservation is something taken from the whole thing covered by the general terms making the grant, and cuts down and lessens

the grant from what it would be except for the reservation. *Miller v. Lapham*, 44 Vt. 416, 435.

A reservation is a proviso in a deed which reserves to the grantor some new right or interest in the thing granted, not before existing in him, operating by way of an implied grant. If it does not contain words of inheritance, it will only give an estate for the life of the grantor. *Engel v. Ayer*, 27 Atl. 352, 354, 85 Me. 448.

A reservation is a proviso in a deed creating some new right issuing out of the thing granted, which did not exist before as an independent right, in the behalf of the grantor, and not of a stranger. *Gould v. Howe*, 23 N. E. 602, 603, 131 Ill. 490 (citing 2 Washb. Real. Prop. [2d Ed.] pp. 646, 693, § 67).

A reservation is something in futuro in respect to the use of the land, as an easement or the like. *Green Bay & M. Canal Co. v. Hewitt*, 66 Wis. 461, 466, 29 N. W. 237.

A reservation in a grant must be of some new right not in esse before the grant, as of rent, etc., or perhaps of some pre-existing easement. *Cutler v. Tufts*, 20 Masa. (2 Pick.) 272, 278.

A reservation is a proviso in a deed creating some new right or interest in the thing granted, and reserving the same for the benefit of the grantor. *Inhabitants of Winthrop v. Fairbanks*, 41 Me. 307, 311.

A reservation is always something issuing or coming out of the thing or property granted, and not a part of the thing itself, and must be to the grantor or party executing it, and not to a stranger. *Karmuller v. Krotz*, 18 Iowa, 352, 358 (quoting *Borst v. Empie*, 5 N. Y. [1 Seld.] 33, 38).

### Exceptions distinguished.

Strictly speaking, a reservation in a deed "is something merely created or reserved out of the thing granted, that was not in existence before—to illustrate, an easement—while an exception is of a part of the thing granted, and of something in esse at the time." *Winston v. Johnson*, 45 N. W. 958, 959, 42 Minn. 398; *Moffitt v. Lytle*, 30 Atl. 922-923, 165 Pa. 173; *Cochecho Mfg. Co. v. Whittier*, 10 N. H. 305, 310.

The words "reserving and excepting," in a deed, are often used indiscriminately, and whether a particular provision is an exception or reservation does not depend on the use of either term, but on the nature and effect of the provision itself. *Martin v. Cook*, 60 N. W. 679, 680, 102 Mich. 267; *Stockbridge Iron Co. v. Hudson Iron Co.*, 107 Mass. 290, 298.

The terms "exception" and "reservation" are often used in deeds indiscriminately, and sometimes what purports to be a reservation

as to form is an exception. A reservation is a thing issuing out of the land granted. Thus a provision in a deed conveying certain premises, except the dower of 50 acres, etc., is an exception. *McAfee v. Arline*, 10 S. E. 441, 442, 83 Ga. 645.

A reservation differs from an exception in this: that the latter is a part of the thing granted—of the thing in esse at the time—but the former is of a thing newly created or reserved out of the thing demised, that was not in esse before. The two words are, however, often used indiscriminately. Whether a particular provision is an exception or a reservation does not depend on the use of the word "reservation" or "exception," but on the nature and effect of the provision itself. A reservation, in a conveyance, is the withholding by the grantor of some right or privilege for his own use out of, or in connection with, the estate conveyed, while an exception relates to a part of the thing granted. A reservation, and not an exception, is created by a deed conveying certain premises, but "excepting and reserving" \* \* \* the right and privilege of taking water from" a stream on the premises conveyed, and "also the right and privilege of three watering places for the convenience of" the grantor. *Smith v. Cornell University*, 45 N. Y. Supp. 640, 641, 21 Misc. Rep. 220.

The words "exception and reservation" are frequently used indiscriminately, and it not infrequently happens that a deed that purports to be a reservation has the force of an exception, or vice versa. A provision in a deed reserving to the grantor so much of the premises as may be needful for his enjoyment of the waters of a creek and all water rights for mining purposes is a reservation, pure and simple. *Wilson v. Higbee* (U. S.) 62 Fed. 723, 726.

A reservation in a deed has sometimes the force of a saving or exception. "Exception" is always a part of the thing granted, and a reservation is of a thing not in being, but is newly created out of the lands and tenements demised. Though "exception" and "reservation" have been used promiscuously, it is well settled that, in giving construction to instruments, the intention of the party is to be effectuated, and, if a deed cannot effect the design of them in one mode known to the law, their purpose may be accomplished in another, provided no rule of law is violated. Hence the distinction between an exception and reservation is so obscure in many cases that it has been observed that that which in terms is a reservation in a deed is often construed to be an exception, in order that the object designed to be secured may not be lost. A deed from a father to son of a tract of land lying between two other tracts owned by the father, and across which was a road connecting the two

tracts retained by the father, contained a clause, "reserving forever for myself the privilege of passing with teams and cattle across the same in suitable places to land I own south of the premises." This reservation was construed to be an exception. *Inhabitants of Winthrop v. Fairbanks*, 41 Me. 307, 311, 312; *Myers v. Bell Tel. Co.*, 82 N. Y. Supp. 83, 84, 83 App. Div. 623; *McClintock v. Loveless*, 5 Pa. Dist. R. 417, 418; *Sears v. Ackerman*, 72 Pac. 171, 172, 138 Cal. 583.

A deed contained a specific description of the land conveyed, and also this clause, "Said R. reserving lots sold, Nos. 1, 2, 3," etc.; designating by number 29 lots. The grantee claimed that the grantor excepted from his deed such lots only as he had in fact sold, and that such of the lots specified in the reservation as he had in fact not sold passed to the grantee in the deed. The word "reserving," used in this deed, in strict sense, means excepted. The office of an exception in a deed is to take something out of the thing granted that would otherwise pass, while a reservation creates in favor of the grantor some new right out of the thing granted which was not before in esse. The terms, however, as used in deeds, are often treated as synonymous; and words creating an exception are to have effect as such, although the word "reservation" is employed. In this case the grantor undertook to withdraw from his grant certain lots, and the language is to be construed as an exception. The same rules of construction apply to an exception in a deed as govern the grant itself. Indeed, all books treat of an exception upon the theory that it is a regrant by the grantee to the grantor of the estate described in the exception. *Roberts v. Robertson*, 53 Vt. 690, 692, 38 Am. Rep. 710.

By an exception some portion of the subject of the grant is excluded from the conveyance, and the title to the part excepted remains in the grantor by virtue of his original title. A reservation creates a new right out of the subject of the grant, and is originated by the conveyance. A deed conveying certain premises, excepting and reserving the right of interment on the land reserved for that purpose in the land conveyed, is an exception, and not a reservation. *Mitchell v. Thorne*, 32 N. E. 10, 12, 134 N. Y. 536, 30 Am. St. Rep. 699.

The words "exception" and "reservation" are often used indiscriminately, though there is a known difference between them. An exception is separating a part of that embraced in the description and already existing in specie, as excepting a particular parcel of land from a farm granted by general words. A reservation is something newly created out of the granted premises by force and effect of the reservation it-

self, as an easement out of lands granted, or rent out of lands demised. By a certain deed A. conveyed to C. a parcel of land, together with a certain water right for the running of a mill, "except the reserve of the right and privilege of conveying water through the premises hereby granted and conveyed, in the channel now open." A. controlled other water in the stream besides that conveyed to C. Held, that the phraseology was equivalent to "except and reserve," and that the grantor meant by such terms to secure himself the easement to convey water through the channel referred to; that it could not have been a reservation out of the water power, because the grant of water to C. was clear and distinct. And even had it been a reservation, in terms, as to water not granted to him, it would have been void as a reservation, because there was nothing for it to operate on. If the clause had been inserted, "except and reserve all the grantor's other water power," it would still be void; neither adding to nor diminishing the grantor's such other water power. *Hurd v. Curtis*, 48 Mass. (7 Metc.) 94, 110.

A reservation is always of something taken back out of that which is already granted, while an exception is of some part of the estate not granted at all. A reservation is never of any part of the estate itself, out of something issuing out of it, as, for instance, rent, or some right to be exercised in relation to the estate, as to cut timber. An exception, on the other hand, must be of a part of the thing granted or described, and can be of nothing else. *Blackman v. Striker*, 37 N. E. 484, 485, 142 N. Y. 555.

An exception in a grant is always a part of the thing granted and of a thing in being, while a reservation is of a thing not in being, but is merely created out of lands and tenements devised. It is said that, although these terms are frequently used as substantially synonymous, yet they are in reality different. A reservation is a clause in a deed whereby the grantor reserves something to himself out of that which he granted before. This differs from an exception, which is always a part of the thing granted and of a thing in existence at the time. A reservation is always something taken back out of that which is granted, while an exception is some part of the estate not granted at all. A reservation is never of any part of the estate itself, but of something issuing out of it, as, for instance, rent, or some right to be exercised in relation to the estate, as to cut timber upon it. An exception, on the other hand, must be a portion of the thing granted, or described as granted, and must also be of something which can be enjoyed separately from the thing granted. Where a deed of a certain piece of land reserved the right to cut and remove all the pine timber or trees upon said premises, and pro-

vided that the right "is hereby reserved by the grantor to enter upon said lands at any time within two years from the date of the deed, for the purpose of cutting or removing the trees or timber so reserved," it was held that there was a reservation, and not an exception, so that the absolute right of property in the trees was not excepted out of the estate granted, but there was only a right reserved to enter within two years and cut and remove the trees. *Rich v. Zeilsdorff*, 22 Wis. 544, 547, 99 Am. Dec. 81.

"A reservation is a clause of a deed whereby the feoffor, donor, lessor, grantor, etc., doth reserve some new thing to himself out of that which he granted before. This doth differ from an exception, which is ever of part of the thing granted, and of a thing in esse at the time; but this is of a thing newly created or reserved out of a thing demised that was not in esse before, so that this doth always reserve that which was not before, or abridge the tenor of that which was before. If one grant land yielding for rent money, corn, a horse, spurs, a rose, or any such thing, this is a good reservation; but if the reservation be of grass, or of the vesture of the land, or of a common or other profit to be taken out of the land, then these reservations are void." *Whitaker v. Brown*, 46 Pa. (10 Wright) 197, 198 (quoting *Shep. Touch.* p. 80); *Goodrich v. Eastern R. R.*, 37 N. H. 149, 164, 167; *Adams v. Morse*, 51 Me. 497, 498; *Inhabitants of Winthrop v. Fairbanks*, 41 Me. 307, 311.

An exception is something taken out of that which is before granted, by which means it does not pass by the grant, but is severed from the estate granted. A reservation is something issuing out of the thing granted, and not a part of the thing granted. *Cruise*, Dig. tit. 32, "Deed," c. 3; *Cunningham v. Knight* (N. Y.) 1 Barb. 399, 407; *Herbert v. Pue*, 20 Atl. 182, 183, 72 Md. 307.

A provision in a deed to a railroad company, "Said company to build a crossing over said railroad to pass to the back land with cart or otherwise," could not constitute an exception. The office of a provision of that description is to exclude from the grant, and retain to the grantor, some portion of his estate; whatever is thus excluded remaining in him as of his former right and title, because it is not granted. A reservation, on the other hand, is a new creation of something not previously existing. The grantee under the deed was subjected by its terms to the duty of building a crossing over the proposed railroad, to be used to pass to the back land with cart or otherwise. The railroad was yet to be constructed. Whatever was thus to be done was to be done as a new thing in the future, and the words in question therefore are to be construed as a reservation. *Knowlton v. New York, N. H. & H. R. Co.*, 44 Atl. 8, 9, 72 Conn. 188.



In construing a deed conveying in fee a tract of land, and stating that "the said grantor doth reserve a road ten feet wide" along a certain line, it being claimed that such reservation excepted the fee to such 10 feet, the court said: "A 'reservation' is the creation of a right or interest which had no prior existence as such in a thing or part of a thing granted. It is distinguished from exception, in that it is of a new right or interest. An exception is always of part of the thing granted. It is of the whole of the part excepted. A reservation may be of a right or interest in the particular part which it affects. These terms are often used in the same sense, the technical distinction being disregarded. Though apt words of reservation be used, they will be construed as an exception if such was the design of the parties." *Kister v. Reeser*, 98 Pa. 1, 5, 42 Am. Rep. 608.

"A reservation is the creation in behalf of the grantor of a new right issuing out of the thing granted—something which did not exist as an independent right before the grant. An exception is a clause in a deed which withdraws from its operation some part of the thing granted, which would otherwise have passed to the grantee under the general description. The part excepted is in existence at the time of the grant, and remains in the grantor, unaffected by the conveyance. Frequently the words 'exception' and 'reservation' are used as synonymous, and the term 'exception' will be held to mean reservation whenever it may be necessary to effectuate the intention of the parties to the instrument." Thus, in a deed of railroad land, expressly reserving and excepting a strip of land for a right of way, the words must be construed to mean either a reservation or an exception, for, strictly speaking, a thing cannot be both reserved and excepted at the same time. The clause was held to create a reservation, and not an exception. *Biles v. Tacoma, O. & G. H. R. Co.*, 32 Pac. 211, 212, 5 Wash. 509.

Both a reservation and an exception must be a part or arise out of that which is granted in a deed. The difference is that an exception is something taken back out of the estate then existing and clearly granted, while a reservation is something issuing out of what is granted. So, where a man grants a tract of land described by metes and bounds, except one acre, which is also particularly described, there is an exception, and the acre never passes; but, on the other hand, if one grants a tract of land without any exception of a part, but reserves rent or some right which he may exercise in relation to the estate, as to cutting timber or to have an easement of some kind therein, this is a reservation; and so, where a conveyance of a sawmill provided that the grantor reserved all slabs made at the mill,

there was a reservation. *Adams v. Morse*, 51 Me. 497, 498; *Inhabitants of Winthrop v. Fairbanks*, 41 Me. 307, 311.

A part of two lots was conveyed by a deed under which plaintiff deraigned title, "saving and excepting therefrom" 15 feet square "as a way to" the grantor's cellar. The adjoining property, including the store to which the cellar pertained, was conveyed by the same grantor to a remote grantor of defendants by a deed including the right of way as mentioned in the first deed, and the plot was used by defendant and his predecessors as a way to the cellar, and who later erected thereon a two-story structure. Plaintiff and his grantors did not use or attempt to use the plot in any way. Held, that the clause in the deed should be considered as an exception, by which no right in the plot was granted to plaintiff, and not as a reservation by the grantor simply of a right of way. *Mount v. Hambley*, 50 N. Y. Supp. 813, 815, 22 Misc. Rep. 454.

An exception is said to be a withdrawal from the operation of a grant of some part of the thing granted, while a reservation is of some new thing issuing out of what is granted. Thus, where real estate is granted, a portion thereof may be excepted from the terms of the conveyance, or the trees or woods grown thereon. If the exception be valid, the title to the thing excepted remains in the grantor, the same as if no grant had been made. A reservation, while not affecting the title to the thing granted, may reserve to the grantor the right to the use or enjoyment of a portion thereof, as an easement, the right to pass over, or the like. Thus a conveyance of land subject to a lease which expires on a specified day—the 6th—subject to the lease, does not create an exception or reservation. *Eiseley v. Spooner*, 36 N. W. 659, 660, 23 Neb. 470, 8 Am. St. Rep. 128.

Every reservation in a deed is the act of the grantor, and should be construed most strongly against him, and most beneficially for the grantee. A reservation has sometimes the force of a saving or exception. A reservation is of a thing not in being, but newly created out of the land and tenements devised, though "exception" and "reservation" have often been used promiscuously. The construction given to a clause called a reservation is that it is an exception if it falls within that definition, and if such was the design of the parties. *Wellman v. Churchill*, 42 Atl. 352, 353, 92 Me. 193 (citing *State v. Wilson*, 42 Me. 9; *Inhabitants of Winthrop v. Fairbanks*, 41 Me. 307).

#### Exemption from taxation.

Act Tenn. March 20, 1858, authorizing the Home Insurance & Trust Company to organize "with all the forms, officers, terms,

powers, rights, reservations, restrictions, and liabilities given to" the M. Company, did not pass to the Home Company an exemption from taxation granted to the M. Company by its charter. *Home Ins. & Trust Co. v. State of Tennessee* (U. S.) 161 U. S. 198, 200, 16 Sup. Ct. 476, 40 L. Ed. 670.

#### **As disposition of public land.**

"Reservation," as used in speaking of the reservation of public lands, does not imply an absolute disposition of the lands in all cases, but the withholding of them from some other disposition, such as sale, or for the use of schools and other objects. It differs in meaning from the word "appropriation," which implies a setting apart or application to some particular use. *Jackson v. Wilcox*, 2 Ill. (1 Scam.) 344, 359.

The word "reservation," as used in the treaty of October 2, 1863, between the United States and the Chippewa Indians, which provided that there should be set apart from the tract thereby ceded a reservation of 640 acres near the T. river for Chief Moose Dung, had the effect of vesting in the chief a title or interest in the 640 acres upon selection made, so that he could execute a valid lease thereof without the approval of the Secretary of the Interior. *Meehan v. Jones* (U. S.) 70 Fed. 453, 455.

The term "reservation," in the sixth article of the Chickasaw Treaty of May 24, 1834, reading, "also reservations of a section shall be granted to persons, male and female," etc., was equivalent to an absolute grant. *Anderson & Orne v. Lewis & Niles* (Miss.) Freem. Ch. 178, 203; *Wray v. Ho-yap-nubby* (Miss.) 10 Smedes & M. 452, 461.

#### **Right of way.**

A right of way to land conveyed is not an exception, but a reservation, which may be inferred from any wording indicating an intention to create an easement. *Calhoun Gold Min. Co. v. Ajax Gold Min. Co.*, 59 Pac. 607, 615, 27 Colo. 1, 50 L. R. A. 209, 83 Am. St. Rep. 17.

### **RESERVE—RESERVED.**

See "Premium Reserve"; "Reinsurance Reserve"; "Way Reserved."  
Keep in reserve, see "Keep."

"Reserve" means to keep, to hold, to retain. *Myers v. Conway*, 7 South. 639, 640, 90 Ala. 109.

The word "reserve" means to appropriate; to set aside. *Meigs v. McClung*, 13 U. S. (9 Cranch) 11, 15, 16, 17, 3 L. Ed. 639, 641.

"Reserve," as used in a contract to render services as a baseball player for a cer-

tain season, and providing that the player might be reserved by the other party to the contract for the succeeding season, is used in its ordinary sense of to hold; to keep for future use. *Metropolitan Exhibition Co. v. Ward*, 9 N. Y. Supp. 779, 780, 24 Abb. N. C. 393.

In a conveyance of house lots upon a street not yet made or accepted, but existing only upon a plan, the words "with a reserve of the street" may be construed as words of grant, when such was the obvious meaning of the parties. *Palmer v. Dougherty*, 33 Me. 502, 54 Am. Dec. 636.

#### **As creating estate.**

An exception in a deed in fee that the grantor "reserves the use of certain tracts of land and farm thereon, or the rents and profits arising from it, during his life and the life of his wife," is insufficient to create any estate in the wife; and therefore the money becoming due after the death of the grantor, for the use and occupation of the premises, goes to the grantor's personal representatives, and not to his wife. *Logan's Adm'r, v. Caldwell*, 23 Mo. 372, 373.

#### **As except.**

"Reserve" and "except" are often used indiscriminately, and whether a particular provision is an exception or a reservation does not depend upon the use of either term, but upon the nature and effect of the provision itself. Therefore, while a reservation in favor of a stranger to the instrument is invalid, yet, in order to effectuate the intention of the grantor, such a reservation has been treated as excepting from the grant the thing reserved. Under these principles, where the grantor reserved to himself and to his daughter, who was a stranger to the deed, an estate for the lives of both in the property conveyed, the life estate, in accordance with the intention of the parties, was valid as an exception to the grant in the deed. *Martin v. Cook*, 60 N. W. 679, 680, 102 Mich. 267.

It is held that to "reserve" means an exception, and to "except" means a reservation, when these words are used in a deed. *Negaunee Iron Co. v. Iron Cliffs Co.* (Mich.) 96 N. W. 468, 474.

A deed contained a specific description of the land conveyed, and also a clause reserving certain lots. Held, that the two lots did not pass to the grantee, but the clause should be construed as an exception. *Roberts v. Robertson*, 53 Vt. 690, 692, 38 Am. Rep. 710.

"Saving and reserving" are apt words to use in a deed that constitute a reservation, but, when used in a deed reserving and saving coal in the lands to the grantor, they must operate as an exception, because the

coal is a corporeal hereditament in esse at the date of the deed, part of the land itself, and therefore not the subject of a reservation. Says Lord Coke: "Note a diversity between an exception, which is ever of part of the thing granted and of a thing in esse, but newly created or reserved out of the land or tenement demised." And his criticism upon the word "reserved" is as follows: "Reserve" cometh of the Latin word 'reservo'; that is, to provide for store, as, when a man departeth with his land, he reserveth or provideth for himself a rent for his own livelihood. And sometimes it hath the force of saving or excepting." *Whitaker v. Brown*, 46 Pa. (10 Wright) 197, 198 (quoting 2 Co. Litt. [Thomas' Ed.] \*412).

"Reserving," in a deed, technically saves only a right to some use or benefit in the thing granted, instead of excluding or excepting from the operation of the deed a part of the thing embraced in the general description. But it may be used in the sense of excepting, the words "reserving all the minerals underlying the soil," in the granting clause of a deed, constituted *prima facie* an exception of the minerals from the operation of the grant. *Sloan v. Lawrence Furnace Co.*, 29 Ohio St. 568, 569.

Where A., owner in fee of a parcel of land on which were two dwelling houses, one of which had been assigned to his father's widow as dower, conveyed an undivided one-half of the dower estate to B., and afterwards the probate guardian of A. conveyed the land with one dwelling house thereon, reserving the house occupied by the widow, the word "reserving" must be construed as "excepting," because the widow had a life estate in the house, which could not be reserved by the grantor, but only excepted out of the grant. *Kimball v. Withington*, 6 N. E. 759, 760, 141 Mass. 376.

The word "reserved," as used in a deed conveying certain lots, "said described pieces and parcels of land all fronting on M. street, and running back from said street 100 feet to an alley reserved by the grantor," was not used in the sense of "excepting from." The grantor was the absolute owner of the entire premises, and, had it been his intention to grant only the specific number of feet, without the alley, the most natural thing would have been to have said just that; but what was added was evidently intended as descriptive of the alley, and as an insurance to the grantee that the strip described had been set apart by the grantor for alley purposes, and appurtenant to and for the benefit of the abutting sublots into which he was dividing the land. *Long v. Fewer*, 53 Minn. 156, 159, 54 N. W. 1071.

#### As applicable to inception of contract.

"Reserved or taken," as used in statutes providing that all notes, bills, bonds, etc.,

on which a higher rate of interest than there-in specified is reserved or taken shall be utterly void, do not invalidate a security originally free from corruption, but under which there has been a subsequent taking or agreement to take illegal interest. *Sloan v. Sommers*, 14 N. J. Law (2 J. S. Green) 509, 515.

"Reserved," as used in Rev. St. c. 35, § 4, providing that, when it shall appear that "unlawful interest has been taken or reserved," it shall be lawful for the debtor to become a witness, etc., refers to a usurious contract for the loan of money, whereby there has been reserved or taken a greater rate of interest than is allowed by law at the inception of the contract, and not to the payment of unlawful and usurious interest on a lawful contract. *Brickett v. Minot*, 48 Mass. (7 Metc.) 291, 294.

#### As creating mere license.

Where, in a deed of land containing a bed of ore, there was a clause "reserving to the grantor the right to mine on the granted premises" a certain quantity of ore annually at a certain duty per ton, the grantor was licensed to enter the mine; but it saved him no title in the land or in the ore before mined, and it did not restrict the grantee from mining at the same time, even to the exhaustion of the ore. *Stockbridge Iron Co. v. Hudson Iron Co.*, 107 Mass. 290, 321.

#### As giving option.

A written contract for the regulation and grading of real property, which contains a provision that the owner "reserves the right to decide" after the rock has been uncovered whether he will have the same removed or not, entitles him to decide that the same shall not be removed, and gives him the right to thereafter remove it himself. *Riley v. Black*, 16 N. Y. Supp. 206.

#### As pledged.

In relation to school lands, "reserved" is synonymous with "pledged." *Ferry v. Street*, 11 Pac. 571, 573, 4 Utah, 521.

#### As creating reservation.

The word "reserving," in its strict and technical sense, when used in a deed granting real estate, but reserving something therein, implies a reservation of some use or lesser estate out of the estate granted. *Keeler v. Wood*, 30 Vt. 242, 245.

"Reserving," as used in a deed containing a clause "reserving to myself the use of the well in the highway in front of said land," created a reservation in favor of the grantor, and not an exception, though the word "reserving" is often construed to create an exception, and the word "excepting" to create a reservation, it appearing that the

water in the well was ample for the use of both parties; and therefore the grantor was not entitled to change the manner of obtaining water from the well so as to exclude the grantee from its use. *Barnes v. Burt*, 38 Conn. 541.

"Reserving," as used in a warranty deed of certain land, reserving therefrom a strip for a public street, cannot be construed as an exception of anything, for an exception is a part of the thing granted, and of something in esse at the time of the grant, while a reservation is defined to be something newly created or reserved out of the thing granted that was not in esse before, so that although the terms "exception" and "reservation" are often used indiscriminately, and the difference between them is in particular cases sometimes obscure and uncertain, the so-called reserving for a public street would be a reservation proper, as distinguished from an exception, properly so called. *Elliot v. Small*, 29 N. W. 158, 159, 35 Minn. 396, 59 Am. Rep. 329.

"Reserving the highway," as used in a conveyance of land containing the usual covenants of warranty, but reserving the highway for its use and purpose as a highway, and does not prevent the fee of the lands included in the highway from passing to the purchaser, subject only to the easement of the public. *Peck v. Smith*, 1 Conn. 103, 134, 6 Am. Dec. 216.

"Reserving three rows of apple trees for the use of our mother," as used in a conveyance granting certain real estate, but reserving "three rows of apple trees for the use of our mother," will be construed to only indicate a reservation for the life of the mother. *Keeler v. Wood*, 30 Vt. 242, 246.

In construing a deed of a tract of land, "reserving always a right of way as now used, on the west side of the above-described premises, for cattle and carriages from the public highways to a piece of land now owned by R., lying north of and adjoining the premises hereby conveyed," the court said: "A right of way cannot be created by an exception in a deed. It may be created by a reservation. If the word 'excepting,' or an equivalent word, is used in the deed for the purpose of creating the right, the courts have considered it as meaning reserving, in order to give effect to the intention of the parties." *Bridge v. Pierson* (N. Y.) 66 Barb. 514, 518.

The word "reserving," in a deed of a railroad right of way, releasing all claims for damages, but "reserving" to the grantor a private crossing over the walk along the course of a previously existing cartway, has the effect of excepting the cartway from the grant, and does not create a new right in the grantor by way of reservation, and there-

fore the word "heirs" is not necessary to make the easement of crossing perpetual. *Hamlin v. New York & N. E. R. Co.*, 36 N. E. 200, 201, 160 Mass. 459.

"Reserve," in a conveyance of land, with covenant for quiet enjoyment, "reserving" the right to enter on a certain part thereof and dig and take sand and clay fit for brick-making, did not make a technical reservation. Lord Coke says: "The word 'reserve' sometimes hath the force of saving and excepting. Sometimes it serveth to reserve a new thing, namely, a rent, and sometimes to except a part of the thing in use that is granted." *Ryckman v. Gillis* (N. Y.) 6 Lans. 79, 81.

"Reserving" is often considered as creating an exception, and the word "excepting" as creating a reservation. The clause in a deed of land, "reserving to myself the use of the well in the highway in front of said land," created a reservation, and not an exception, where it appeared that the water was employed for the use of both parties, so that the grantor had no right to exclude the grantee. *Barnes v. Burt*, 38 Conn. 541.

#### As withdrawn.

"Reserved to the United States," as used in Act Cong. July 5, 1866, § 1, providing for the construction of a military wagon road, does not describe or include lands "sold or otherwise disposed of," but only Indian and military reservations, and the like—lands withdrawn from the public domain for some special use of the United States, and not lands already disposed of to states or others. *Cahn v. Barnes* (U. S.) 5 Fed. 326, 331.

The word "reserved," in a land grant made by Congress, may not always be held to include lands withdrawn for the purpose of supplying possible deficiencies in some prior land grant. Yet, as that is the ordinary scope of the word, if any narrower or different meaning is to be attributed to it in such grant the reasons therefor must be clear. *Northern Pac. R. Co. v. Musser-Sauntry Land, Log & Mfg. Co.*, 18 Sup. Ct. 205, 206, 168 U. S. 604, 42 L. Ed. 596.

#### RESERVE LANDING.

The words "reserve landing" on a certain tract of land, fronting on a river, and included in a plat of land dedicated as part of a city which covered other lands fronting on the river, were construed to show a reservation to the use of the owner of the particular tract, and not a dedication thereof to the public. *Grant v. City of Davenport*, 18 Iowa, 179, 186.

#### RESERVE FUND.

Expert evidence has been held admissible that the term "reserve," among insurance

people, where the word or term is applied to a level rate policy, means a sufficient percentage of the annual premiums to meet, when invested at the given rate of interest, all present and prospective liability on account of the particular policy. When applied to term insurance, it means the entire mortuary premiums collected for the particular term. It has no application to assessment insurance. *Fry v. Provident Sav. Life Assur. Soc. of New York* (Tenn.) 38 S. W. 116, 126.

A statute of New York provides that, whenever any policy of life insurance issued by a domestic company shall lapse for the nonpayment of any premium, the "reserve on such policy" shall, on demand made, with surrender of the policy, within six months after the lapse, be applied, as shall have been agreed, to continue the policy in force at its full amount so long as such amount will purchase temporary insurance. The policy of a New York company stipulated to insure the assured for one year, accompanied by an agreement to renew the insurance from year to year, without examination, on the payment of a fixed annual premium, and provided that the excess of such premiums over operating expenses and the assured's share of death losses should constitute a "guaranty fund" to apply in reduction of later premiums, and after five years to extend the insurance in case of lapse. Held, that the fund classed in the policy as a "guaranty fund" was embraced within the meaning of the words "reserve on such policy," as used in the statute. *Nielsen v. Provident Sav. Life Assur. Soc.*, 73 Pac. 168, 169, 139 Cal. 332, 96 Am. St. Rep. 146.

A reserved fund, under Comp. Laws, § 5169, is a fund kept for the protection of the patrons of an insurance company, so that the company may have the means to reinsure its risks if necessary. *Detroit Fire & Marine Ins. Co. v. Hartz* (Mich.) 94 N. W. 78.

#### RESERVED PUBLIC SQUARE.

The words "Reserved public square," written upon a block in the recorded plat of a village, which village was the county seat, do not indicate whether the ground is to be appropriated to the use of the county for the erection of buildings thereon, or whether it is to be used solely for pleasure grounds, and as a public square, with ornamental trees, walks, etc. *Daniels v. Wilson*, 27 Wis. 492, 497.

#### RESERVOIR.

In common speech, a "reservoir" often signifies the water kept, not the structure in which it is kept. *Hutchinson v. Chicago & N. W. Ry. Co.*, 37 Wis. 582, 603.

#### RESETTLE.

The word "resettle," as used in a contract in which a party agrees to give another full possession of his medical practice, and promises not to resettle in the town so long as the other party is located there, means that he will not resettle in said town to engage in the practice of medicine. *Haldeman v. Simonton*, 7 N. W. 493, 494, 55 Iowa, 144.

#### RESHIPING.

See "Privilege of Reshipping."

#### RESIDE.

See "Cease to Reside."

Come to reside, see "Come."

The word "reside" is used in two senses—the one, constructive, technical, legal; the other, denoting the personal, actual habitation of individuals. When a person has a fixed abode, where he dwells with his family, there can be no doubt as to the place where he resides. The place of his personal and legal residence is the same, so that when a person has no permanent habitation or family, but dwells in different places, as he happens to find employment, there can be no doubt as to the place where he resides. He must be considered as residing where he actually or personally resides. But some individuals have permanent habitations where their families constantly dwell, yet pass a great portion of their time in other places. Such persons have a legal residence with their families, and a personal residence in other places; and the word "reside" may, with respect to them, be used to denote either their personal or their legal residence. *Shattuck v. Maynard*, 3 N. H. 123, 124.

The word "reside" may, and sometimes does, have different meanings in the same or different articles or sections of a Constitution or statute. The constitutional direction that a district judge shall reside within his district was not intended for his convenience, but for the benefit of the people, whose servant he is. In this case, "reside" will be held to mean an actual, as distinguished from a legal or constructive, residence or domicile. But this section will be given a reasonable, and not a purely technical, interpretation. So, where a judge retained his actual residence in a district, though his health was such that it became necessary for him to be at a lower elevation for as much of the time as his actual presence was not needed in his judicial district for the discharge of his official duties, it is only a fair and reasonable construction to say that it is his bona fide intention to return to his district as soon as his health permits, for the purpose of maintaining there

his actual residence. *People v. Owers*, 69 Pac. 515, 518, 29 Colo. 535.

**In reference to corporations.**

"Probably the only sense in which a corporation may be said to reside anywhere is with reference to its legal or statutory habitat, which is the jurisdiction of its incorporation. In this sense, to say that a corporation is a nonresident is to say that it is a nondomestic corporation, and all corporations which are not domestic are foreign." Thus an affidavit by an attorney for a corporation that the reason why the complaint was not verified by the plaintiff was because it did not reside in the county was to be construed to mean the corporation was a foreign corporation. *Clark's Cove Fertilizer Co. v. Stever*, 62 N. Y. Supp. 249, 251, 29 Misc. Rep. 571.

The word "residing," as used in the statute providing that every overseer of highways shall give at least three days' notice to those residing in his district against whom a land, railroad, property, or personal property road tax is assessed, either in person or in writing left at his usual place of abode, of the time of and the place where he may appear and pay his road tax in labor, includes railroad corporations having a line of road in the district and an agent or representative residing in the district on whom the overseer may serve the notice the company is entitled to receive. It is not the duty of the overseer, in order to perform the official act of serving the notice, to seek beyond the limitations of his district for the taxpayer. *Chicago & N. W. Ry. Co. v. People*, 55 N. E. 643, 645, 183 Ill. 196.

The word "reside," as used in Civ. Code Prac. § 73, providing that an action against a common carrier for personal injury must be brought in the county in which the defendant resides, or in which plaintiff is injured or in which he resides, if he resides in the county through which the carrier passes, means, with reference to a corporation, its chief office or place of business. *Eichhorn v. Louisville & N. R. Co.*, 65 S. W. 797, 112 Ky. 338.

**As domicile.**

See "Domicile."

**As dwell.**

"Reside" means to live in a place. *Middlebury v. Waltham*, 6 Vt. 200, 202.

According to Walker's Dictionary "reside" means "to live; to dwell; to be present." *Lask v. United States (Wis.)* 1 Pin. 77, 79.

To "reside" means to dwell permanently for any length of time; a settled abode. *Graham v. Commonwealth*, 51 Pa. 255, 258, 88 Am. Dec. 581.

In the statutes generally the word "reside" is used in a sense which includes all who are the actual stated dwellers in any stated place, though they may have a technical domicile elsewhere; and the word "resides," as applied to a minor, refers to his actual stated residence. *Kelsey v. Green*, 37 Atl. 679, 682, 69 Conn. 291, 38 L. R. A. 471.

"Resides," as used in Code, § 2370, declaring that guardians of minors must be appointed by the court of probate of the county in which such minor resides, means to live; to dwell; to have one's home or domicile. *Allgood v. Williams*, 8 South. 722, 723, 92 Ala. 551.

"Reside," as used in Poor Act, § 3, providing that any stranger who shall come to reside in a town, etc., means to live in a place as one's abode; and where one came into a town as a servant in a family, and was hired for no definite time, such person had come to reside, within the meaning of the statute. *Middlebury v. Waltham*, 6 Vt. 200, 202.

"Residing out of the state," as used in an attachment statute, means having no abode within the state. *Stout v. Leonard*, 37 N. J. Law (8 Vroom) 492, 495.

"Residing therein," as used in Rev. Laws, § 2818, requiring every town to relieve and support the poor and indigent persons residing therein, is to be construed as referring to persons having an actual residence, as contradistinguished from transients, and does not require a residence of three years, though Acts 1886, No. 42, § 13, declares, for the purpose of the act, that the residence of a person shall be in the town in which he last resided for three years. *Town of New Haven v. Town of Middlebury*, 21 Atl. 608, 610, 63 Vt. 399.

The word "resides," in R. L. § 2817, as amended by section 4, St. 1886, making it the duty of plaintiff's overseer to provide for the relief of a pauper found in the town and in need of immediate assistance, means an actual residing, and not a legal three years' residence. *Leicester v. Brandon*, 27 Atl. 318, 319, 65 Vt. 544, 545.

**In reference to municipal corporations.**

"Resides," as used in Code Civ. Proc. § 395, providing that certain actions shall be brought in the "county in which defendant resides," applies to towns, as well as to private persons, and the county in which they are situated will be construed to be the county of their residence. *Buck v. City of Eureka*, 31 Pac. 845, 846, 97 Cal. 135.

**As have permanent abode.**

"Reside," as used in Const. art. 2, § 27, declaring that every white male inhabitant

who has resided in the state six months preceding any election may vote, means to take up a permanent abode in the state. *Spragins v. Houghton*, 3 Ill. (2 Scam.) 377, 383.

"Reside" is to dwell permanently or for a length of time; to have a settled abode for a time. *Webst. Dict.* As used in *Rev. St. c. 146, § 28*, relating to causes of action which shall have accrued against one who shall be absent from and reside without the state, the word is synonymous with "dwelling place" or "home." "Inhabitaney" and "residence" do not mean precisely the same thing as "domicile," when the latter term is applied to the succession of personal estate; but they mean a fixed and permanent abode, a dwelling place for the time being, as contradistinguished from a mere temporary locality of existence. *Drew v. Drew*, 37 Me. 389, 391 (citing *In re Wrigley* [N. Y.] 8 Wend. 134).

"Reside," as used in an act relating to the support of paupers and the recovery by one town for supplies furnished from the town wherein the pauper resided or had a legal residence, means to live in a place and have a place of permanent abode; and hence a person coming from another town and engaging in a family as a hired girl, nurse, etc., came there to reside, within the statute, and could not be considered merely as a transient person. *Middlebury v. Waltham*, 6 Vt. 200, 202.

"Reside," as used in *Rev. St. c. 32, § 1*, providing that any person 21 years of age who shall reside in any town within the state for the term of five years together, and shall not during that term receive directly or indirectly any supplies or support as a pauper from any town, shall thereby gain a settlement in such town, means to dwell permanently for a length of time, or to have a settled abode for a time. *Inhabitants of Warren v. Inhabitants of Thomaston*, 43 Me. 406, 417, 69 Am. Dec. 69.

"Reside," as used in *Acts 2d Cong. 1st Sess. c. 33*, for establishing a uniform militia throughout the United States, making it the duty of the commissioning officer of the company to enroll every citizen who shall come to reside within his bounds, was not meant to include a mere temporary residence. It is true in a strict sense that a man may be said to come to reside at a place where he comes intending to stay for a short time, although he has no intention thereby to change his domicile. But the act should have a reasonable construction, and nothing can be more unreasonable than such a strict interpretation of the law. It cannot be easily believed that it was the intention of Congress that a traveler or person absent from home on a visit to a friend or on special business should be held liable to do militia

duty wherever he may be found. *Commonwealth v. Swan*, 18 Mass. (1 Pick.) 194, 195.

The word "resides," as used in *Code, §§ 1480, 1488*, providing that the district court in the county where plaintiff resides has jurisdiction of all cases of divorce, and further providing that the petition for divorce, in addition to the facts on account of which the plaintiff claims the relief sought, must state that he or she has for the last six months been a resident of the state, means a legal residence, not an actual residing alone, but such a residence as that, when a man leaves it temporarily or on business, he has an intention of returning to, and which, when he has returned to, becomes and is de facto and de jure his domicile. So, before the applicant for a divorce can claim to be within the jurisdiction of the court, he must have a fixed habitation with no present intention of removing therefrom. *Hinds v. Hinds*, 1 Iowa (1 Clarke) 36, 41.

"Resides," as used in *Rev. St. 1845, p. 197, § 2*, providing that divorce proceedings shall be had in the county where the complainant resides, means something more than merely an existence in the county where the suit is commenced. It means residence, and not a domicile. While a man can have but one domicile he may have several residences; and, though the residence is more transient in its nature, there must be some intent of permanent business. It cannot be acquired by going to a place with the purpose of retiring immediately. When the domicile and entire business are within another jurisdiction, residence cannot be obtained by a visit to this state merely for the institution of the suit, without any other intention. *May v. May*, 64 Ill. 406, 409.

"Residing therein," as used in *Rev. St. tit. 42, § 16*, providing that it shall be the duty of the selectmen of a town to furnish necessary support to any person, not an inhabitant of the town "residing therein," who shall become unable to support himself, applies to a pauper who is temporarily within a town at the time when he needs relief. The object of the statute is to afford immediate relief, without waiting to settle the point of final responsibility. The common understanding of the expression is not a mere stopping and being in a place, but abiding in it for some continuance of time. *Trumbull v. Moss*, 28 Conn. 253, 256.

*Gen. St. 1878, c. 80, § 23*, prescribes that the application for a writ of habeas corpus under certain conditions shall be made to an officer having proper authority "residing in any adjoining county." Held, that the term "residing in" is not to be restricted to an actual permanent residence in the county, but includes the case of presence in the county of the proper officers for the purpose of

transacting judicial business therein. In re Doll, 50 N. W. 607, 608, 47 Minn. 518.

## RESIDE OUT OF.

Absence synonymous, see "Absence."

## RESIDE OUT OF THE STATE.

"Reside out of the state," in a statute relating to limitation of actions, has the same meaning as the expression "the time of his absence," so that, while the debtor resided out of, he was absent from, the state. "To depart from and reside out of the state," and "to be absent from and reside out of the state," are equivalent expressions. *Venable v. Paulding*, 19 Minn. 488, 492 (Gil. 422, 424); *Pentfield v. Chesapeake, O. & S. W. Ry. Co.*, 10 Sup. Ct. 566, 569, 134 U. S. 351, 33 L. Ed. 940; *Burroughs v. Bloomer* (N. Y.) 5 Denio, 532, 535.

The words "depart from and reside out of the state," as employed in Gen. St. 1865, p. 747, providing that, if the debtor departs from and has his residence out of this state after the cause of action accrues, the time of his absence shall not be deemed or taken as any part of the time limited, did not necessarily mean a departure with the intent to change permanently the residence of the party. The intent at the time of removal does not necessarily decide anything, since the party's intentions may change at a subsequent period. He may come to a different mind, and fix his dwelling in another locality, with no present purpose of leaving it, and thus become domiciliated there, notwithstanding his original purpose. It is the fact of absence beyond the reach of process, for a substantial period of time and for a purpose not transient in its character, that is important. *Johnson v. Smith*, 43 Mo. 499, 501.

One's residence out of the commonwealth might have been but temporary, yet, if the time of his proposed return was indefinite, he retained no domicile in the commonwealth, and was "absent from and resided out of the state," within the meaning of Rev. St. c. 120, § 9, relating to the limitation of actions. *Sleeper v. Paige*, 81 Mass. (15 Gray) 349, 350.

"Reside out of the state," as used in a statute of limitations, prescribing the time of commencing actions, and providing that if, after such cause of action shall have accrued, such person depart from and reside out of the state," the time of his absence should not be deemed or taken as any part of the time limited for the commencement of such action, cannot be construed to include a going out of the state with the intention of returning by a person leaving his family and property in the state, though he may remain

in the state to which he went, engaged in business, for several months. *Garth v. Roberts*, 20 Mo. 523, 525, 64 Am. Dec. 203.

Under Code Civ. Proc. § 401, declaring that if, after a cause of action has accrued against a person, he departs from and resides without the state, and remains continuously absent therefrom for a year or more, the time of his absence is not a part of the time limited for commencement of the action, evidence merely that a person having a domicile and residence in the state of New York went to Europe and was absent 2½ years does not show that he resided without the state; it being necessary, for this, that he should at least take up his temporary abode at some particular place with the intention of making it his home while so absent, and actually reside there. *Hart v. Kip*, 42 N. E. 712, 713, 148 N. Y. 306.

"Reside out of the state," as used in Wag. St. p. 1919, art. 2, § 16, providing that if, after a cause of action accrues against any person, the person shall "depart from and reside out of the state," the time of his absence shall not be deemed or taken as any part of the time limited for the commencement of the action, means a change of his residence, so that the process of the law cannot be served on him. If the residence is not changed, and under the provisions of the law service can be had which will authorize a personal or general judgment, the statute continues to run. Hence, where defendant's family had a permanent residence in the state, and he left them at such residence, supporting them all the time, where they continued all the time that he was gone, and until his return, and his property was left there, the statute of limitations did run; for his place of abode was at the residence of his family, the service of summons there being entirely good at any time, and there being nothing to prevent the plaintiff from bringing an action, and obtaining a personal judgment, and prosecuting it to satisfaction. *Venucl v. Cademartori*, 59 Mo. 352, 353.

"Residence out of the state," as used in Shannon's Code, § 4455, providing that, if a person against whom an action accrues resides out of the state, the time of such absence shall not be taken as part of the time limited for the commencement of the action, means such nonresidence as renders it impracticable at all times to obtain service of process, so that, while a corporation's technical legal residence may be where it was created, its residence and status for the purposes of suit may be where it can, through its agents and officers, be reached with process. While a corporation may reside beyond the state and be out of the state, still it may, through its officers and agents, sub-



ject itself to the jurisdiction of the courts of the state, and hence is not residing outside of the state, within the meaning of this section of the statute. *Turcott v. Yazoo & M. V. R. Co.*, 45 S. W. 1067, 1069, 101 Tenn. 102, 40 L. R. A. 768, 70 Am. St. Rep. 661.

A person who has a domicile and actual residence in another state, and only comes into this state occasionally, or even for a few hours daily, is "absent from and resides out of the state," within the meaning of Gen. St. c. 155, § 9, relating to limitation of actions. *Rockwood v. Whiting*, 118 Mass. 337, 340.

## RESIDENCE.

See "Actual Residence"; "Family Residence"; "Legal Residence"; "Place of Residence"; "Occupied as a Residence"; "Private Residence"; "Usual Place of Residence"; "Usual Residence."

Residence in the city, see "In the City."

In Rap. & L. Dict. p. 1113, it is said: "Residence is used in law to denote the fact that a person dwells in a given place, or, in the case of a corporation, that its management is carried on there." *Pittsburg, C., C. & St. L. R. Co. v. City of Indianapolis*, 46 N. E. 641, 642, 147 Ind. 292, 296.

An actual residence is a predicament contemplated by the New Jersey statutes relating to attachment, and there is no distinction between a temporary and a permanent residence, between residence for a summer or for life. *New York City Bank v. Merrit*, 13 N. J. Law (1 J. S. Green) 131, 134.

Residence is defined by Webster to be a dwelling in a place for some continuance of time. "There must be a settled, fixed abode, and an intention to remain permanently at least for a time, for business or other purposes, to constitute a residence within the legal meaning of the term." *Bartlett v. City of New York*, 7 N. Y. Super. Ct. (5 Sandf.) 44, 47 (citing *Frost v. Brishin* [N. Y.] 19 Wend. 11, 32 Am. Dec. 423); *Quinn v. State*, 35 Ind. 485, 490, 9 Am. Rep. 754; *Lask v. United States* (Wis.) 1 Pin. 77, 79.

The term "residence" simply means a settled or fixed abode of a character indicating permanency, at least for an indefinite time. It signifies a party's permanent home and principal establishment, to which, whenever he is absent, he has the intention of returning. In *re Clarke*, 15 N. Y. Supp. 370, 371.

Every person has in law a residence. In determining the place of residence the following rules should be observed: (1) It is the place where one remains when not called elsewhere for labor or other special

or temporary purpose, and to which he returns in seasons of repose. (2) There can only be one residence. (3) A residence cannot be lost until another is gained. (4) The residence of the father during his life, and after his death the residence of the mother while she remains unmarried, is the residence of an unmarried minor child. (5) The residence of the husband is the residence of the wife. (6) The residence of an unmarried minor, who has a parent living, cannot be changed by either his own act or that of his guardian. (7) The residence can be changed only by the union of act and intent. Pol. Code 1903, Cal. § 52.

"Residence," as used in the Constitution, requiring a voter to have a residence in a district 10 days next preceding the election, did not restrict the term to its ordinary meaning, which is the place where man establishes his abode, makes the seat of his property, and exercises his civil and political rights; but the Constitution used the word in an indefinite sense, leaving the subject of residence in an election district to legislative discretion. *Chase v. Miller*, 41 Pa. (5 Wright) 403, 420.

Residence means the act or state of being seated or settled in a place. It imports not only personal presence in a place, but an attachment to it by those acts or habits which express the closest connection between a person and a place, as by usually sitting or lying there. In *re Collins* (N. Y.) 64 How. Prac. 63, 65.

To constitute a "residence" there must be an actual home, in the sense of having no other home, whether he intends to reside there permanently, or for a definite or indefinite length of time. Residence, therefore, is a question depending upon fact and intention, and, if so, it may be applicable to a particular spot or to a whole country. A person who wanders from country to country, with no intention of remaining fixedly anywhere, acquires no new residence. On the other hand, one who confines his wanderings to a particular country or locality, but declines to fix himself upon some particular spot, can very properly be said to be a resident of that country or locality. Home, domicile, or residence may therefore include a spot or a wide area. Each of these words may be applied either to a house, a precinct, a ward, a county, or a state. *Langhammer v. Munter*, 31 Atl. 300, 301, 80 Md. 518, 27 L. R. A. 330.

The test of residence, under the attachment act, is whether a person has such residence in the state that a summons can be served. If he has not, his creditors are entitled to some remedy against his estate within the state. *Weber v. Weitling*, 18 N. J. Eq. (3 C. E. Green) 441, 443.

The term "residence," mentioned in the chapter relating to paupers, shall be taken

and considered to mean the actual residence of the party, or the place where he or she was employed, or, in case he or she was in no employment, then it shall be considered and held the place where he or she made it his or her home. *Cobbeys' Ann. St. Neb.* 1903, § 9364; *Mills' Ann. St. Colo.* 1891, § 3395.

The legal residence of a person, with reference to his right of suffrage and eligibility to office, is that place where his habitation is fixed and permanent, and to which, whenever he is absent, he has the intention of returning. *Comp. Laws Nev.* 1900, § 1723.

The term "residence," when in statutes, shall be construed to mean the place adopted by a person as his place of habitation, and to which, whenever he is absent, he has the intention of returning. When a person eats at one place and sleeps at another, the place where such person sleeps shall be deemed his residence. *Gen. St. Kan.* 1901, § 7342, subd. 23.

The residence of a married man, if not separated from his wife, shall be where his wife resides. If a married man be separated from his wife, he shall be considered, as to residence, a single man. The residence of a single man shall be where he usually sleeps. *Rev. St. Tex.* 1895, art. 1733.

A person's residence is not broken by his going into another state or foreign country to seek a new abode, but continues until the fact and intention unite in another abode elsewhere. *Labe v. Brauss*, 12 Pa. Co. Ct. R. 255, 256.

Under St. 1801, by which a settlement was acquired by a year's residence in any town without being warned to depart, the residence of a man could not be continued by his wife and family, in his absence from the state, so as to confer upon him a legal settlement, unless they continued together, keeping house as a family. *Town of Middleton v. Town of Poultney*, 2 Vt. 437, 438.

A railroad contractor, who has left the state and gone to a foreign country to prosecute his business there, and who, if successful, will remain as long as necessary for the completion of the work, and who has actually been gone four months, is not a resident of the state, within the meaning of Code Civ. Proc. § 537, providing that a writ of attachment may issue where the defendant is not a resident of the state. *Hanson v. Graham*, 23 Pac. 56, 57, 82 Cal. 631, 7 L. R. A. 127.

#### **Abode synonymous.**

Residence means a place of abode. *Midlebury v. Waltham*, 6 Vt. 200, 202.

In holding that a return of service of a declaration, showing that it had been served by leaving a copy at the most notorious place of abode of the president of the defendant corporation, was sufficient, under the statute

requiring such a service to be made by leaving the notice at his most notorious place of residence, it was said that by the Georgia statutes "notorious place of residence" and "notorious place of abode" are legal synonyms. *Water Lot Co. v. Bank of Brunswick*, 30 Ga. 685, 686.

In an action of ejectment, the officer returned on the rule to plead: "S. not being found at his place of abode, a true copy was left with his daughter at his residence." Held, that it would be presumed that the word "residence" was used as synonymous with "his usual place of abode," and that the daughter was a member of defendant's family. *Smithson v. Briggs* (Va.) 33 Grat. 180, 184.

#### **Citizenship equivalent.**

The term "residence" is not synonymous with "citizenship," and an averment of residence is not an equivalent of an averment of citizenship for purposes of jurisdiction of the United States courts. *Tug River Coal & Salt Co. v. Brigel*, 67 Fed. 625, 628, 14 C. C. A. 577; *Wolf v. Hartford Life & Annuity Ins. Co.*, 13 Sup. Ct. 602, 603, 148 U. S. 389, 37 L. Ed. 493; *Pennsylvania Co. v. Bender*, 13 Sup. Ct. 591, 148 U. S. 255, 37 L. Ed. 441; *Zambrino v. Galveston, H. & S. A. R. Co.* (U. S.) 38 Fed. 449, 453.

Citizenship and residence are not convertible terms. Citizenship is a status or condition, and is the result of both act and intent. An adult person cannot become a citizen of a state by simply intending to, nor does any one become a citizen by mere residence. Residence and intent must coexist and correspond. *Sharon v. Hill* (U. S.) 26 Fed. 337, 342. Thus, where a person resided in Illinois, and went to Wisconsin because of litigation, and her stay was prolonged by delay of the hearing, and though she engaged temporary room only, and had neither made nor negotiated permanent arrangements, and her household goods were left in store in Chicago, she was not a resident of Wisconsin. *Illinois Life Ins. Co. v. Shenehon* (U. S.) 109 Fed. 674, 675.

"Citizenship" and "residence" are not synonymous terms, so that testimony of plaintiff that he lives in a certain state does not show his citizenship. *Danahy v. National Bank of Denison* (U. S.) 64 Fed. 148, 149, 12 C. C. A. 75.

The terms "citizenship" and "residence," in respect to corporations, within the meaning of the removal acts, are synonymous and are fixed in the state granting the charter, although it may be recognized generally for the purpose of doing business in other states. *Baughman v. National Waterworks Co.* (U. S.) 46 Fed. 4, 5, 7.

#### **Domicile distinguished.**

See "Domicile."

**As domicile required for citizenship.**

To constitute residence, under Judiciary Act March 3, 1887, c. 373, 24 Stat. 552, § 1, as corrected by Act Aug. 13, 1888, c. 866, 25 Stat. 433, § 1 [U. S. Comp. Stat. 1901, p. 508], providing that "no civil suit shall be brought," etc., "against any person by any original process or proceeding in any other district than that whereof he is an inhabitant; but, where the jurisdiction is founded only on the fact that the action is between citizens of different states, suit shall be brought only in the district of the residence of either the plaintiff or the defendant." No more is required than is required in the residence element of citizenship, and where it is shown that a local domicile is not necessary to establish residence in the acquisition of citizenship, it is not necessary to constitute residence within a district. *Marks v. Marks* (U. S.) 75 Fed. 321, 331.

**As dwelling.**

Residence is defined to be "place of abode; dwelling." *Reg. v. Hammond*, 17 Q. B. 772, 781 (citing Johns. Dict.).

The term "residence," as used in the pauper law, is synonymous with home or dwelling place. *Town of North Yarmouth v. Town of West Gardiner*, 58 Me. 207, 210, 4 Am. Rep. 279.

"There must be a settled, fixed abode, and intention to remain permanently, at least for a time, for business or other purposes, to constitute a 'residence,' within the meaning of that term." *Frost v. Brisbin* (N. Y.) 19 Wend. 11, 14, 32 Am. Dec. 423.

By the express provisions of Gen. St. 1889, the term "residence" means the place adopted by a person as his place of habitation, and to which, whenever he is absent, he intends to return. *Hatch v. Smith*, 49 Pac. 698, 699, 6 Kan. App. 645.

The term "residence," as used in Pauper Act (Rev. St. 1845, c. 80) § 15, by the express provisions of such statute, means the actual residence of the party, or the place where he was employed, or, in case he was in no employment, then the place where he made his home. *Town of Dorr v. Town of Seneca*, 74 Ill. 101, 103.

The term "residence," as used in the homestead exemption laws, has "invariably been construed as meaning an actual residence thereon as a home or dwelling place." *Quehl v. Peterson*, 49 N. W. 390, 391, 47 Minn. 13.

"Residence," as used in Gen. St. 1878, c. 68, § 8, providing that the claimant of a homestead must be in actual "residence and occupancy" of the premises, means an actual occupancy of the premises and an actual residence thereon as a home or dwelling

place. *Quehl v. Peterson*, 49 N. W. 390, 391, 47 Minn. 13.

"Residence" is defined to be the place of abode, dwelling, or habitation for some continuance of time. To reside in a place is to abide or dwell there permanently for a length of time, as contradistinguished from a mere temporary locality of existence. *Jones v. Commonwealth*, 41 S. E. 949, 951, 100 Va. 842.

"Residence" has been defined to be the place where a person's habitation is fixed without any present intention of removing therefrom. The place where a person lives is *prima facie* taken to be his residence, unless facts be established to the contrary. *Tracy v. Tracy*, 48 Atl. 533, 534, 62 N. J. Eq. 807.

Within the meaning of Const. art. 3, § 1, requiring an elector to reside a certain time in the election district before he is qualified to vote, the elector's residence is the place where he makes his permanent or true home, his principal "place of business, and his family residence; where he intends to remain indefinitely, without present intention to depart." *Fry's Election Case*, 71 Pa. (21 P. F. Smith) 302, 306, 10 Am. Rep. 698.

"Residence," in attachment laws, "generally implies an established abode, fixed permanently for a time for business or other purposes, although there may be an intent existing all the while to return to the true domicile." *Weitkamp v. Loehr* (N. Y.) 11 Civ. Proc. R. 36, 40 (citing *Krone v. Cooper*, 43 Ark. 547).

To constitute a "residence," within the legal meaning of the term, there must be a settled, fixed abode and intention to remain permanently, at least for a time, for business or other purposes. Whether a person has established himself in a certain place, so as to work a change in his domicile, or not, is immaterial; for he may have changed his domicile, but still be a resident there. The domicile of a citizen may be in one state or territory, and his actual residence in another. *Tazewell County Sup'rs v. Davenport*, 40 Ill. 197, 204.

"Residence" implies an established abode, fixed permanently for a time, for business or other purposes, though there may be an intent in the future at some time or other to return to the original domicile. In the contemplation of the attachment law, there is or may be a marked distinction between "domicile" and "residence." The "domicile" of a citizen may be in one place and his residence in another. They generally, however, are at the same place. *Morgan v. Nunes*, 54 Miss. 308, 310.

"Residence," as that word is used in Gen. St. 1878, c. 66, § 147, authorizing attachment on the ground of nonresidence, is not to be

construed as synonymous with the word "domicile," since a person may have a political domicile in a state, and yet actually reside outside of the state for a large portion of the time. The word is therefore to be construed in its popular sense to mean the place where a person actually is for a sufficient length of time to enable it to be said that he has taken up his residence or actually resides in a particular place, and therefore the fact that a debtor moving from Minnesota to South Dakota did not abandon the home which he had previously occupied in Minnesota did not the less render him a nonresident; he having gone to South Dakota for the purpose of labor and filling a government position for a time. *Lawson v. Adlard*, 48 N. W. 1019, 1021, 46 Minn. 243.

"Numerous definitions of 'residence' are to be found in the books, but what the word means in any particular statute depends upon its purpose and the phraseology of the context. Every case must be decided upon the particular language of the statute and the circumstances giving rise to the question. To meet the intention and requirements of some statutes a commercial or business residence might be all the law required, while to gratify the intention of another statute it may be necessary to hold residence to be more than a business residence, and to mean all that the word 'domicile' means in its strictest and most technical application. The term 'residence,' in Code, art. 75, § 87, providing that no person shall be sued out of the county in which he resides, until the sheriff or coroner of the county in which he resides shall have returned 'non est' a summons issued in such county, means the county or city where he has his permanent, fixed home, whether he has the intention of returning and remaining there after a temporary absence on account of business, or otherwise. In *State v. Gittings*, 35 Md. 169, this court uses the word 'home' as synonymous with the word 'residence,' as used in this statute, thereby indicating that such was the real meaning of the statute's language." *Tyler v. Murray*, 57 Md. 418, 441.

The word "residence" is used to indicate the place of abode, whether permanent or temporary. A man may have a residence in one place and a domicile in another. Residence in a place, without the requisite intention of remaining, will not suffice to give one a domicile; nor will an intention to change one's domicile, unaccompanied by actual removal, result in a change of domicile. *State v. Allen*, 35 S. E. 990, 992, 48 W. Va. 154, 50 L. R. A. 284, 86 Am. St. Rep. 29.

Within the meaning of Comp. St. c. 37, authorizing an action in bastardy by any woman a resident of the state, the word "residence" is not used in the sense in which it is employed in the Civil Code, but applies as well to the county in which the mother of the

child may actually reside, and which is liable to be charged with its support, although she may in fact have a home in another county or state. *Clarke v. Carey*, 60 N. W. 78, 41 Neb. 780.

By the sixth mode of gaining a settlement, as provided by statute, a residence of 5 years together of a person 21 years of age is required. Such residence means the same thing as "having his home" there, and when the home is once fixed it continues until actually changed. Absences of longer or shorter duration often occur, and the domicile remains unchanged. *Inhabitants of Brewer v. Inhabitants of Linnaeus*, 36 Me. 428, 429.

In construing statutes relating to attachment of the property of nonresidents, the distinction has been recognized between an actual residence and a legal residence; the latter being generally deemed a domicile, and not the residence contemplated, and the word "residence" being construed in its popular sense, as the act of abiding in a place for some continuance of time. In *Morgan v. Nunes*, 54 Miss. 308, it is said that residence implies an established abode, fixed permanently for a time for business or other purposes, although there may be an intent in the future at some time or other to return to the original domicile. In *Frost v. Brisbin* (N. Y.) 19 Wend. 11, 32 Am. Dec. 423, it is said that a transient visit of a person for a time at a place does not make him a resident while there, but that something more is necessary. To entitle him to that character, there must be a settled, fixed abode. An intention to remain permanently, at least for a time, for business or other purposes, is necessary to constitute residence within the legal meaning of the term. *Lawson v. Adlard*, 48 N. W. 1019, 1020, 46 Minn. 243.

"Residence" means the abode or place where one actually lives, and not where he is legally domiciled. A person may temporarily reside out of the state while domiciled within the state, under Code Civ. Proc. § 401, which provides that if, after a cause of action has accrued against a person, he departs from and resides out of the state, and remains continuously absent therefrom for one year or more, the time of his absence is not the time limited to the commencement of the action. Therefore the absence from the state for such time will stop the running of a statute against the defendant, though his domicile is still within the state. *Hart v. Kip*, 26 N. Y. Supp. 522, 524, 74 Hun. 412.

The term "residence," as used in Rev. St. c. 60, § 4, declaring that in divorce proceedings, if the residence of the libelee is known, it shall be named in the libel and actual notice shall be obtained, cannot be construed to mean whereabouts or commorancy, but means actual residence in its usual sense; and therefore, where a libelee has a

known residence in the state and is only temporarily absent from it, actual personal service of the libel must be obtained. *Spinney v. Spinney*, 32 Atl. 1019, 1021, 87 Me. 484.

In *Shaeffer v. Gilbert*, 73 Md. 66, 20 Atl. 434, in defining the meaning of "residence" and what is necessary to constitute it, as used in our Constitution, the court said: "It does not mean one's permanent place of abode, where he intends to live all his days or for an indefinite or limited time, nor does it mean one's residence for a temporary purpose, with the intention of returning to his former residence when that purpose shall have been accomplished, but means, as we understand it, one's actual home, in the sense of having no other home, whether he intends to reside there permanently or for a definite or indefinite length of time." Thus where a person moves his family and builds a house in a state, intending to make it his actual home, and his family reside there, but he comes into another state during the week to labor, he is a resident of the state where his family resides. *McLane v. Hobbs*, 21 Atl. 708, 709, 74 Md. 166.

"Residence" expresses the idea of an abode which may be temporary, but is not transient; that is, an abode where one sits down with some business or other object which requires it, and with the intention of remaining steadily in the place until such object is accomplished. In December, 1889, a New York dealer gave up his house, stored his furniture, and went to Florida for the recovery of his son's health. He returned in April, 1890, remained a little over a month at a hotel, and then went to Europe for the same purpose, finally returning to New York in June, 1893. Though the debtor may have been continuously domiciled in New York, he resided without the state during such absences, within Code Civ. Proc. § 401, and hence they were not a part of the time limit for suing on the debt. *Bennett v. Watson*, 47 N. Y. Supp. 569, 570, 21 App. Div. 409.

One who is dwelling in the state, with no intention of leaving, being engaged in constructing public work under a contract that will occupy him for an indefinite period, is not a nonresident within the attachment law, providing for attachment of goods of nonresidents. *Didler v. Patterson*, 25 S. E. 661, 663, 93 Va. 534.

The word "residence," in Laws 1853, p. 974, requiring substituted service to be made at the residence of the person to be served, with some person of proper age, if admittance can be obtained, and if not obtained by affixing the same to the outer or other door of said residence, is clearly synonymous with "dwelling house." Webster defines "residence" to be a "dwelling house; habitation." *Foot v. Harris* (N. Y.) 2 Abb. Prac. 454, 457.

The term "residence" has been judicially defined as the abode or dwelling place, as distinguished from a mere temporary locality of existence. Residence, and even domicile, is a quality which endures, when once acquired, until changed animo et facto. In *re Hughes* (N. Y.) 1 Tuck. 38.

The words "resident" and "residence" import more than a temporary stay in a place for the performance of a single piece or job of work, especially where the workman at the same time has a home and permanent place of abode in another place. It is difficult to define in precise language what constitutes a residence, or makes one a resident of a place. It depends upon the circumstances then surrounding the person, upon the character of the work to be performed, upon whether he has a family or a home in another place, and largely upon his present intention. In the language of the law, residence has come to have a well-defined meaning of home or place of abode of the individual. A logging camp has few characteristics and qualities of a residence, especially as applicable to a person who is found to have a home or abode in another place. *Rindge v. Green*, 52 Vt. 204, 208.

"Residence" means place of abode. *Middlebury v. Waltham*, 6 Vt. 200, 202.

The word "residence," as used in Code Civ. Proc. § 636, providing that a plaintiff shall be entitled to an attachment on showing by affidavit to the satisfaction of the judge, among other things, that the defendant is a nonresident, means the abode or place where one actually lives, and not a legal domicile. In other words, a reading of the section will show that it was intended to give a method for the collection of debts by appropriating the property of the debtor to be found within the state, when proceedings against the debtor personally are impossible, or liable to be made ineffectual, and thus it allows the use of process in rem when process in personam could not be served. So a person is a nonresident of the state when he is actually living out of the state, though his legal domicile may be within the state. *Hanover Nat. Bank v. Stebbins*, 69 Hun. 308, 309, 23 N. Y. Supp. 529.

A showing that a licensee in a settler's license from the Commissioner of the State Land Office for a tract of swamp lands lived with his father on an adjoining parcel, which was used and partially inclosed with the tract covered by the license, does not establish the nonresidence contemplated by Comp. Laws 1871, § 3990, providing for forfeiture of the license by any person who shall abandon and not reside on the lands described in his license; for an unmarried man, who lives with his father in such close proximity to his own farm, may be fairly said to reside on

his own farm, if such occupation is honestly designed as home occupation. *Hedley v. Leonard*, 35 Mich. 71, 76.

The word "residence," as used in Act April 2, 1822, prohibiting civil process from issuing against a returning soldier until the expiration of a certain period after his return to his usual place of residence, means the residence he had before he entered the service; for a soldier in the field has no residence there, as the word "residence" means a dwelling. *Graham v. Commonwealth*, 51 Pa. 255, 258, 88 Am. Dec. 581.

#### **As including more than dwelling house.**

The word "residence," in Rev. St. 1895, art. 3251, giving a landlord a preferred lien for rent on all property of the tenant situated in the residence, cannot be construed to limit the lien solely to property that may be contained within the dwelling house, but he has a lien on all property on the leased premises. *York v. Carlisle*, 46 S. W. 257, 258, 19 Tex. Civ. App. 269.

#### **Home synonymous.**

See "Home."

#### **As residence of individual.**

The term "residence," within the meaning of a statute authorizing service on a husband by leaving the notice at his usual place of residence, means the place where the husband himself resides, which is not necessarily where his wife resides, and therefore, in a case where the husband has left the state with an intention never to return, the fact that his wife still resides at the place where she and her husband formerly resided does not make him a resident at such a place, and therefore substituted service cannot be obtained on him by leaving a copy of the summons at such place. *Amsbaugh v. Exchange Bank*, 5 Pac. 384, 387, 33 Kan. 100.

A party may have a residence in one state, while his family may reside in another. *Exchange Bank of St. Louis v. Cooper*, 40 Mo. 169, 171.

In a foreclosure suit the subpoena was returned with the usual affidavit of nonresidence of defendant. It appeared that defendant had separated from his wife, who had gone with her child to her father, the complainant. The defendant, after boarding in the county of Hunterdon for a short time, left the state, and was confined for crime in the penitentiary of Pennsylvania. It was held that the actual domicile of the wife was not the legal domicile of the husband, nor could it be regarded, contrary to the fact, as his actual residence within the meaning of the statute regulating the service of process. *McPherson v. Howsel*, 13 N. J. Eq. (2 Beas.) 35, 36.

#### **Inhabitaney distinguished.**

Fixity and permanence are said to be more strongly imported by the term "inhabitaney" than by "residence." *In re Hughes' Infants* (N. Y.) 1 Tuck. 38.

#### **As affected by intention.**

Residence is a question of intention. The inquiry in determining it is *quo animo* the party either moved to or from the state. *In re Casey* (Pa.) 1 Ashm. 126.

Residence is a matter of intention. A minor cannot form such intention for himself. *In re Cannon's Estate*, 15 Pa. Co. Ct. R. 312, 314.

The question of residence, within the meaning of the law regulating attachments, is generally one of intention, to be determined from the facts and circumstances of each particular case. *Johnson v. May*, 68 N. W. 1032, 1033, 49 Neb. 601.

One of the marked evidences of residence is that the person claiming it identifies himself and all his interests with his new place of abode, and exercises the right and performs the duty of a citizen. *Thomas v. Warner*, 34 Atl. 830, 831, 83 Md. 14.

It is true that usually intention is an important element in determining the question of residence, yet where a pauper's home was always with his father, and he never had any other place which he could call his own, and moved with his father from the town where he and the father had resided to another town, he left there no place nor home to which he had a right to return, and the question of his intent in making such change was immaterial in determining his residence. *Town of South Burlington v. Town of South Worcester*, 31 Atl. 891, 893, 67 Vt. 411.

A person's residence is the place of his domicile, or the place where his residence is fixed without any present intention of removing therefrom. *Cooley, Const. Law* (5th Ed.) p. 754. A man may acquire a domicile if he be personally present in a place and elect that as his home, even if he never design to remain there always, but design at the end of some short time to remove and acquire another. *McCrary, Elect.* p. 496, § 38. In the case of *Sanders v. Getchell*, 76 Me. 158, 49 Am. Rep. 606, it was held that bodily residence in a place, coupled with an intention to make such a place a home, would establish a domicile or residence. It is not necessary that there should be an intention to remain permanently at the chosen domicile. It is enough if it is for a time the home, to the exclusion of other places. It follows that the residence of a person depends on his acts and intentions. His intention may be made to appear from his acts

and statements. *Brittenham v. Robinson*, 48 N. E. 616, 617, 18 Ind. App. 502.

Where a party left the state of Tennessee and went to Texas, with the intention of making that his place of residence, or if, after he got there, he determined to make that his residence, and was residing there, though without his family, he will be considered a nonresident of Tennessee, within the meaning of the attachment laws of Tennessee. *Whitly v. Steakly*, 62 Tenn. (3 Baxt.) 393.

The words "domicile" and "residence" are often used indifferently. Generally speaking they mean the same thing, but have, however, different meanings. Residence, combined with an intention to remain, constitutes domicile. Residence means a fixed and permanent abode, a dwelling house for the time being, as contradistinguished from a mere temporary locality of existence. *Weitkamp v. Loehr*, 53 N. Y. Super. Ct. (21 Jones & S.) 79, 82.

Act 1831 abolished imprisonment for debt, providing that no person should be arrested on civil process, save in cases where defendant should not have been a resident of the state for at least one month prior to the commencement of suit against him. Held, that there must be a settled, fixed abode, and an intention to remain permanently, at least for a time, in order to constitute a residence, and that a person having his domicile in the state, but carrying on business out of the state and personally superintending such business, was not a resident within the statute. *Frost v. Brislin* (N. Y.) 19 Wend. 11, 14, 32 Am. Dec. 423.

A party who formerly resided in another state, having abandoned that and come to this state, cannot be said to have a residence anywhere until his mind shall have been settled as to whether he will take up his residence here or elsewhere; and until he shall come to the determination, and have a fixed place of habitation, with an intention of staying there, he cannot be said to have a residence anywhere. *Miller v. Burrows* (N. Y.) 2 Edm. Sel. Cas. 157, 158.

"Residence" has much the same signification as "domicile," and means the place where a person lives and has his fixed, permanent home; and where a person has two residences at different seasons of the year, that will be deemed his domicile or home which he himself selects or describes as his home, or where he votes or exercises the rights and duties of a citizen. *People v. Surrogate's Court of Putnam County* (N. Y.) 38 Hun, 218, 220.

One who, though domiciled in the state of New York, is living in another state and has no place of abode in New York, nor any place which he could call his home, or to which he could return on coming into the

state, is a nonresident within the meaning of the Code, permitting an attachment. The intentions of such a person as to the future cannot affect the question of his residence. *Wood v. Hamilton* (N. Y.) 14 Daly, 41, 42.

G., from 1860 to April, 1885, had a place of business in New York City, and only resided in Paris during a portion of that time for the purpose of purchasing goods for his New York house. In the fall of 1884 he announced his intention to his friends of removing to New York, shipped a large part of his furniture from Paris to New York, and notified his landlord in Paris that he would not need his apartments there after the spring of 1885. On March 17, 1885, he arrived with his family and occupied rooms at a hotel in New York until May 25, 1885, from which date he lived in New York City, declaring his intention to make New York his permanent residence. Held, that G. was not a nonresident, and that an attachment issued on that ground should be vacated. *Knapp v. Gerson* (U. S.) 25 Fed. 197.

The test of residence, when a party removes from one state to another, seems to be, did he remove from his former residence with the intention of abandoning the same? If he did so leave, and in pursuance of that intention actually went beyond the borders of the state, he will become a nonresident of that state, and upon going into another state with the intention of residing there he will become a resident thereof. *Swaney v. Hutchins*, 13 N. W. 282, 283, 13 Neb. 266.

Residence is indeed made up of fact and intention; that is, of abode with intention of remaining. But it is not broken by going to seek another abode, but continues until the fact and intention unite in another abode elsewhere. *Pfautz v. Comford*, 36 Pa. (12 Casey) 420, 422.

Under the statute requiring that "the plaintiff shall have resided in this state one year immediately preceding the time of" applying for a divorce, the plaintiff must have, in fact and intent, an established home in the state for the preceding year, a place where he lives and has an abode, where he would be liable to taxation, where service of process of court could be had upon him by copy, and where he has an actual habitation and residence. *Hall v. Hall*, 25 Wis. 600, 607, 608.

In order to constitute a residence within the meaning of Rev. St. c. 40, § 2, providing that no person shall be entitled to a divorce who has not resided in the state one year, unless the offense complained of was committed within the state, or while one or both of the parties resided in the state, there must be a fixed abode and an intention to remain, at least for a time, for business or other reasons not solely connected with the bringing of the suit for divorce. A wife, liv-

ing separate and apart from her husband, might establish an independent residence in a state other than that in which the husband resided, within the meaning of the divorce statute, providing the change was made in good faith and not merely for the purpose of instituting a divorce suit. *Chapman v. Chapman*, 129 Ill. 386, 21 N. E. 806.

#### **Occupancy distinguished.**

Under a statute requiring seven years' residence by adverse possession to give title, seven years' occupancy was not a bar. An occupancy may exist without a residence. *Chiles v. Jones*, 34 Ky. (4 Dana) 479, 484.

#### **As having place of business.**

A defendant, whose domicile is in New Jersey, where he spends his time, except during business hours of the day, is not a resident of New York, though his business is in New York, and he is daily and habitually there from 7 o'clock in the morning to 7 o'clock in the evening, and though he keeps his bank account in New York, and therefore his property may be attached under the New York attachment laws. *Bache v. Lawrence* (N. Y.) 17 How. Prac. 554, 555.

One had a place of business in New York City, but boarded in Newark, N. J., where he carried on business. He repeatedly stated the latter to be his residence, and was seldom, if ever, at his ostensible place of business in New York City. Held, that he was a nonresident of the state of New York, within the meaning of the attachment law of the state. *Greaton v. Morgan* (N. Y.) 8 Abb. Prac. 64, 65.

Whether a man's absence from his family be for so many hours in each day or so many days in each week, if his family live in a neighboring state, and he provides for them, resorts to them on the Sabbath and other days of cessation from business, and abides with them whenever the immediate demands of his business will admit, and whenever sickness disables him from business, he is to be deemed a resident of that state, and not a resident of the state of New York, within the provision of the attachment laws. *Chaine v. Wilson* (N. Y.) 8 Abb. Prac. 78.

A person carrying on within the city of New York a regular business, and in the course of his occupation spending his time during the regular business hours of the business days of the week in the city, keeping his bank account there, and there in good faith transacting all his business, is a "resident," within the meaning of the attachment laws, though his family reside in another state, and he himself spends his Sundays, or even all his nights, with them. *Towner v. Church* (N. Y.) 2 Abb. Prac. 299, 300.

Where it appeared that defendant, at the time of issuing an attachment against him,

kept a house in New Hampshire, in which his wife and children lived, and in which he entertained his friends, and which was frequently called by him his home, such place was the legal "residence" and domicile of defendant, notwithstanding his positive statement that he had since the spring of 1852, and then had, a store of goods, and was doing business as a merchant, and had actually resided, in New York, with the honest intention of making the latter place his permanent residence. *Lee v. Stanley* (N. Y.) 9 How. Prac. 272, 277.

One had his business and property in the state of New York, and his business capital and his bank account there, where he was engaged in business, and where he spent on an average of eight hours of every business day, but for reasons of convenience and economy maintained his family in the state of New Jersey, and spent with them there his nights and Sundays. Held, that he was not a resident of the state of New York, within the meaning of the attachment laws. *Barry v. Bockover* (N. Y.) 6 Abb. Prac. 374.

An attachment was issued in New York against a firm doing business in Chicago. One of the partners had his domicile in New York, but a part of each year he resided in Chicago. Held, that the attachment was proper; the partners being nonresidents of the state of New York, as the place of business of a firm, at which its operations are carried on and where the partners are, either continually or at times, to manage the business, can properly be called the "residence" of each of the partners, within the meaning of the attachment laws. *McKinlay v. Fowler* (N. Y.) 67 How. Prac. 388, 389.

A man's residence is where he actually dwells at the time, not merely where he may carry on business regularly. A man's home, the place where his wife and children actually reside, is ordinarily his place of residence. He may for purposes of business establish himself in another state, away from his family, and remain there so continuously as to make himself a resident thereof for all the purposes of attachment generally; but he cannot be a resident of two distinct places at the same time. *Robinson v. Morrison* (D. C.) 2 App. Cas. 105, 124.

#### **As having permanent abode.**

"Residence" is defined as "the act of residing, abiding, or dwelling in a place for some time," and also as "the place where one rests." *Webst. Dict.* In *Reeder v. Holcomb*, 105 Mass. 93, it is said that residence usually imports the place of one's permanent domicile, rather than a temporary abode. *Zebert v. Hunt* (U. S.) 108 Fed. 449, 451.

The term "residence," in an application for a life policy, was construed to signify place of permanent, rather than mere temporary, abode, in the sense of "domicile," rather



er than of mere inhabitancy. *Mobile Life Ins. Co. v. Walker*, 58 Ala. 290, 295.

"Residence," as used in attachment laws, means an established, fixed, and permanent abode for a time, for business or other purposes, though there may be an intent existing all the while to return to the true domicile. *Penfield v. Chesapeake, O. & S. W. R. Co.*, 10 Sup. Ct. 566, 569, 134 U. S. 351, 33 L. Ed. 940.

"Residence," within the meaning of the attachment act, is where a man has a settled, fixed abode, with the intention of remaining there permanently for a time, for business and other purposes. *Barroa v. Burke*, 82 Ill. App. 116, 121.

"Residence," within the meaning of Const. art. 2, § 1, which provides that "every male citizen of the United States of the age of 21 years, who shall have been a resident of this state 6 months next preceding the election day, and of the county in which he claims his vote 60 days, shall be entitled to vote," means the place of a person's permanent abode, and it will not be changed by the person residing in another county for temporary purposes, as for education, unless the person resides there with the intention of remaining permanently. *Vanderpoel v. O'Hanlon*, 5 N. W. 119, 120, 53 Iowa, 246, 36 Am. Rep. 216.

"Residence" is defined to be a place of abode; a dwelling; a habitation; the act of abiding or dwelling in a place for some continuance of time. To reside in a place is to abide; to sojourn; to dwell there permanently or for a length of time. It is to have a permanent abode for the time being, as contradistinguished from a mere temporary locality of existence. The word "residence," like "domicile," is often used to express different meanings, according to the subject-matter. *Long v. Ryan* (Va.) 30 Grat. 718, 719.

"Residence" indicates permanency of occupation, as distinct from lodging or boarding or temporary occupation. Residence indicates the place where a man has his fixed and permanent abode, and to which, whenever he is absent, he has the intention of returning. It is in this sense that the word "residence" is used in St. Okl. § 4953, declaring that the time fixed in the statutes for the prosecution of offenses does not include the time during which the accused is not a resident of the territory. *Coleman v. Territory*, 47 Pac. 1079, 1081, 5 Okl. 201.

"Residence" means the place where one resides; an abode; a dwelling or habitation. Residence is made up of fact and intention. There must be the fact of abode and the intention of remaining. *Wright v. Genesee Circuit Judge*, 117 Mich. 244, 245, 75 N. W. 405.

A "place of residence," in the common-law acceptance of the term, means a fixed

and permanent abode, a dwelling place for the time being, as contradistinguished from a mere temporary local residence. *Silvey v. Lindsay* (N. Y.) 42 Hun, 116, 120.

"Residence" is dwelling in a place for some continuance of time, and is not synonymous with domicile, but means a fixed and permanent abode or dwelling, as distinguished from a mere temporary locality of existence; and to entitle one to the character of a "resident" there must be a settled, fixed abode, and an intention to remain permanently, or at least for some time, for business or other purposes. *Barney v. Oelrichs*, 11 Sup. Ct. 414, 416, 138 U. S. 529, 34 L. Ed. 1037.

Residence is a place of abode. It never denotes the place where a man is, or happens to be. The term "nonresident," in the attachment act, means a person in the state who is not resident in the state. *Evans v. Perrine*, 35 N. J. Law (6 Vroom) 221, 223.

A man's residence, like his domicile or usual place of abode, means his home, to and from which he goes and returns daily, weekly, or habitually from his avocation and business, wherever carried on. The indefinite abode of a person in Missouri, doing business therein, but without the intention of remaining there permanently, does not make him a resident of the state, and under the provisions of the attachment act he is a nonresident. *Greene v. Beckwith*, 38 Mo. 384, 389.

#### Prison.

Whether the term "residence" be taken in the sense of domicile, or of abode, it implies a place where a party is situated through choice, and where in some conceivable manner his personal belongings would be the more readily found; and neither in its legal nor in its popular meaning is the word "residence" satisfied by an incarceration in any particular place. It is impossible to hold, for purposes of execution against a person, that he resided where he was imprisoned. *American Surety Co. of New York v. Cosgrove*, 81 N. Y. Supp. 945, 946, 40 Misc. Rep. 262.

#### Rented house included.

"Residence," as used in Kansas exemption laws, which exempt from sale on execution a homestead occupied as a residence by the family of the owner, together with all the improvements on the same, does not merely mean "dwelling house"; but it may also include everything connected therewith used to make the same more comfortable and enjoyable, but does not include a rented house on the same lot. *Ashton v. Ingle*, 20 Kan. 670, 671, 27 Am. Rep. 197.

#### As any place rightfully occupied.

Residence may import temporary sojourn or permanent domicile. The precise meaning depends upon the purpose and phrase-

ology of the particular statute. *And. Law Dict.* Under Rev. St. 1894, § 1988 (Rev. St. 1881, § 1915), declaring guilty of kidnapping "whoever \* \* \* forcibly or fraudulently carries off or decoys from his place of residence, or arrests, \* \* \* any person, with intention of having such person carried away from his place of residence, unless it be in pursuance of the laws," the term "residence" means, as applied to a child, any place where the child has a right to be. *Wallace v. State*, 47 N. E. 13, 14, 147 Ind. 621.

#### **Temporary absence.**

A man's legal residence is not changed when he leaves it for temporary purposes and transient objects, meaning to return when those purposes are answered and objects attained. *Daubmann v. City Council of City of Camden*, 39 N. J. Law (10 Vroom) 57, 59.

Residence is the home or habitation fixed in any place, without a present intention of removing therefrom. A change of place for a temporary purpose, with an intention to return, is not change of residence. *Stratton v. Brigham*, 34 Tenn. (2 Sneed) 420, 422.

The word "residence" is synonymous with the words "dwelling place" or "home," and means some permanent abode with intention to remain. "Residence" in a given place does not necessarily involve continued personal presence in that place. A person may be temporarily absent and remain from home without a change of residence. When a person voluntarily takes up his abode in a given place, with intention to remain permanently or for an indefinite period of time, or, to speak more accurately, when a person takes up his abode in a given place without any present intention to remove therefrom, such place of abode becomes his residence or home, and will continue to be his residence or home, notwithstanding temporary personal absence, until he shall depart with the intention to abandon such home. To establish a residence, there must be personal presence without any present intention to depart, and to break up such residence, when once established, there must be departure with intention to abandon. *Inhabitants of Warren v. Inhabitants of Thomaston*, 43 Me. 406, 418, 69 Am. Dec. 69.

#### **Temporary presence.**

A person's place of residence is where he has his fixed and permanent abode, so that under an act limiting the jurisdiction of justices of the peace to their respective counties, and leaving them without authority to entertain suits for the recovery of money against actual residents in any other county, a person who is temporarily in such county, with the intention to return to the other county as his residence and home, is a resident of the other county. *Bradley v. Fraser*, 6 N. W. 293, 294, 54 Iowa, 289.

The word "residence," as used in Pub. St. c. 77, § 16, requiring notice of dishonor of a bill of exchange to be directed to the indorser's residence, is not used in a strict sense, as necessarily implying a permanent, exclusive, or actual abode in such place, but may be satisfied by a temporary, partial, or even constructive residence. *Wachusett Nat. Bank v. Fairbrother*, 148 Mass. 181, 185, 19 N. E. 345, 347, 12 Am. St. Rep. 530.

#### **Settlement distinguished.**

See "Settlement (In Poor Laws)."

#### **Suburban distinguished.**

The words "residence" and "suburban," as used in the statute authorizing the common council of a city to prohibit sales of intoxicating liquors in the suburban or residence portion of the city, do not mean the same thing. The suburban portion of the city is the outlying part; that portion which is remote from the center of trade and population, where the houses are generally more or less scattered, and where many of the improvements and advantages enjoyed by the central and more densely populated parts of the city are wanting. The suburban part of the city may be occupied for business, or it may be occupied by residences, or it may be used both for residence and business purposes. *Rowland v. City of Greencastle*, 62 N. E. 474, 476, 157 Ind. 591.

#### **Residence of corporation.**

The "residence of a corporation" is for most legal purposes where its chief office or place of business is; and, except where it is by law otherwise provided, its franchise tax should be paid in that jurisdiction. *Board of Councilmen of City of Frankfort v. Stone (Ky.)* 58 S. W. 373, 374.

The residence of a corporation, if it can be said to have a residence, is necessarily where it exercises corporate functions. It dwells in the place where its business is done. It is located where its franchises are exercised. It is present where it is engaged in the prosecution of the corporate enterprise. *Bristol v. Chicago & A. R. Co.*, 15 Ill. (5 Peck) 436, 438.

The term "residence," or "home," when used with reference to a corporation, means the place where it is located by or under the authority of its charter. It has no power to change its home or residence, or its citizenship. *Ex parte Schollenberger*, 96 U. S. 369, 376, 24 L. Ed. 853.

The term "residence of a corporation" is usually used to designate the place where the principal office of the corporation is located, or where its principal operations are carried on; but in contemplation of law the residence of a railroad or turnpike corporation is in every county through which its line passes.

**Baltimore & Y. Turnpike Road v. Crowther,** 1 Atl. 279, 285, 63 Md. 558.

For the purpose of laying the venue, the principal office or place of business of a corporation is technically the place of "residence" of the corporation. Ordinarily its books are there, and its directors and executive officers meet and transact its business there. Its residence may certainly be with more propriety said to be there than at any other place. **Thorn v. Central R. Co.,** 26 N. J. Law (2 Dutch.) 121, 124.

The "residence of a corporation" is the place where the governing power of the corporation is exercised, where those meet in council who have a right to control its affairs and prescribe what policy of the corporation shall be pursued, and not where the labor is performed in executing the requirements of the corporation in transacting its business. In order to determine the legal residence of a corporation, reference must be had to the place where its will is declared and made known, and not to the place where its mandates are obeyed or the business or labor transacted or performed which it authorizes or requires. Where a corporation's charter requires the biennial meetings of its stockholders to be held at a certain city, and its by-laws provide that its offices shall be there and at such other towns as its directors may establish them, that city, being the place where the governing power of the corporation is exercised, is the corporation's residence. **State v. Tennessee Coal, Iron & R. Co.,** 29 S. W. 116, 119, 94 Tenn. 295.

The "residence" contemplated by Gen. St. 1901, § 5228, providing that, in any county in which a city court shall have been created, justices outside of the city wherein such court is located shall not have jurisdiction of cases in which any defendant resides in such city, is synonymous with "domicile," and means that place where the habitation is fixed and permanent, and, if applicable to railroad companies at all, it could only apply to the home office, where its general corporate business is conducted, not to its several stations maintained for the transaction of local business. **Jossey v. Georgia & A. Ry. Co.,** 102 Ga. 706, 28 S. E. 273; **Galveston, H. & S. A. R. Co. v. Gonzales,** 151 U. S. 496, 14 Sup. Ct. 401, 38 L. Ed. 248. The court in the latter case, in discussing the question of residence of a corporation, said: "These cases must be regarded as establishing the doctrine that a domestic corporation is both a citizen and an inhabitant of the state in which it is incorporated; but in none of them is there any intimation that, where a state is divided into districts, a corporation shall be treated as an inhabitant of every district of such state, or in every district in which it does business, or, indeed, any district other than that in which it has its headquarters, or such offices as answer in the case of

a corporation to the dwelling of an individual." **Robinson v. Missouri Pac. Ry. Co. (Kan.)** 72 Pac. 854, 855.

The word "residence," as used in Gen. St. tit. 19, c. 2, § 12, providing that, when any corporation is engaged in transacting business in any other town than that in which its secretary resides, process of foreign attachment may be served on it by leaving a copy with any agent or clerk employed by the corporation to keep its accounts or pay its employes in the town where it transacts its business, refers to the official residence of the secretary; that is, the town where he performs his duties as secretary. A corporation whose principal office was in H. carried on manufacturing in W., where its accounts were kept and its employes paid. The secretary of the corporation resided in W., but went early every day to H., and spent the entire day in the office of the corporation there, and all his duties were performed there. The secretary must not be regarded as residing in W., within the meaning of the statute, and hence service made upon the clerk who kept the accounts and paid the employes there was good. **Adams v. Willimantic Linen Co.,** 46 Conn. 320, 322.

#### RESIDENCE PORTION.

"Residence," as used in a statute authorizing the common council of a city to define places for the sale of intoxicating liquors to be used upon the premises in the business portion of the city, and to exclude them from the residence and suburban portions, does not mean the same thing as "suburban." The suburban portion of the city is the outlying part; that portion which is remote from the center of trade and population, where the houses are generally more or less scattered, and where many of the improvements and advantages enjoyed by the central and more densely populated parts of the city are wanting. The suburban part of the city may be used for business, or may be occupied by residences, or it may be used both for residence and business purposes. **Rowland v. City of Greencastle,** 62 N. E. 474, 476, 157 Ind. 591.

An ordinance prohibiting sales of liquor in the "residence portion" of a city does not mean that such portion should be given up exclusively to family residences to come within the prohibition; and hence, where a part of the city is partly used for residence purposes, it will not become a business portion of the city because a grocery or other business was here and there carried on therein. **Shea v. City of Muncie,** 46 N. E. 138, 144, 148 Ind. 14.

#### RESIDENT.

See "Nonresident"; "Not a Resident."

"Resident" is defined in Burrill's Law Dictionary to be "one who has a seat or set-

tlement in a place; one who dwells, abides, or lives in a place; an inhabitant; one who resides or dwells in a place for some time," etc. *Brown v. Ashbough* (N. Y.) 40 How. Prac. 260, 263.

Worcester defines "resident" thus: "Dwelling; having abode in any place; living; inhabiting; abiding; residing." The *Century Dictionary* defines "resident" thus: "One who has a residence." In a legal sense a residence in law is defined as "the place where a man's habitation is fixed, without a present purpose of removing therefrom." *Brisenden v. Chamberlain* (U. S.) 53 Fed. 307, 311.

"Resident" is defined as "dwelling or having an abode in any place." *United States v. Penelope* (U. S.) 27 Fed. Cas. 486, 487.

"The word 'resident' is the opposite of the word 'transient.' The former describes a person at rest in a town, while the latter describes him in his passage through or across it." *Town of New Haven v. Town of Middlebury*, 21 Atl. 603, 610, 63 Vt. 399.

The term "resident" has not a technical meaning. In some statutes and for some purposes it means one thing, and in other statutes and for other purposes it means another thing. *United States v. Nardello* (D. C.) 4 Mackey, 503, 512.

The term "resident," as used in the attachment laws, has a peculiar meaning. The writ of attachment is an extraordinary mode of procuring the appearance of defendant, and is not to be resorted to when the ordinary process of the law can be used, though the legal domicile of defendant may be out of the state. *Hackettstown Bank v. Mitchell*, 28 N. J. Law (4 Dutch.) 516, 518.

The term "resident of the state," in the homestead law, means an actual and not a constructive presence. *Rix v. McHenry*, 7 Cal. 89, 91.

"Resident" is "a word with a great variety of meanings. The necessary element in its signification is locality of existence. The permanency of a residence indicated, however, depends in a great degree upon the context. The word has been variously construed to mean an occupier of lands, a resident, a permanent resident, one having a domicile, a citizen, or a qualified voter. The construction is generally governed by the connection in which the word is used." In re *Town of Hector*, 24 N. Y. Supp. 475, 479.

"Resident," within the meaning of the court rule requiring all notices of motion to be served on persons not "resident in the state" by setting up the same in the office of the clerk of the court, means having a dwelling house or usual place of abode at

which, under the chancery act, process for appearance is to be served. *Hervey v. Hervey*, 38 Atl. 767, 769, 56 N. J. Eq. 166.

Under the insolvent act, requiring that an insolvent applying for a discharge thereunder be an inhabitant, a plea that the defendant was a resident was sufficient, as the words signify the same thing. A person resident is defined to be one dwelling or having his abode in any place; an inhabitant; one that resides in a place. *Roosevelt v. Kellogg* (N. Y.) 20 Johns. 208, 211.

A person having left forever his native land, and living in the state of New York, without any determination to reside anywhere else, is a resident of the state of New York. *Heidenbach v. Schlapd* (N. Y.) 10 How. Prac. 477, 478.

Code 1873, § 3076, relating to exemptions, provides that any person coming into the state with the intention of remaining shall be considered a resident within the meaning of the chapter. Held, that the term "resident," as so defined, was not to be construed to include merely a person who had come into the state with an intention of remaining, and had actually obtained a place of residence, but that the actual presence of the person in the state with an intention of remaining, though he had not obtained a house to live in, was sufficient to constitute him a resident within such definition. *Cox v. Allen*, 59 N. W. 335, 338, 91 Iowa, 462.

The word "resident," as used in the attachment laws, requiring an oath or affirmation to the effect that defendant is not a resident at the time in the state, applies to such persons only as are beyond the reach of ordinary process. If a summons or a *capias* can be served, an attachment does not lie. *Kugler v. Shreve*, 28 N. J. Law (4 Dutch.) 129, 130.

A "resident," within the meaning of the title on "Elections," must be construed to mean a person who has resided or will have resided continuously within this state for one year, and in the county four months, and in the precinct sixty days, next preceding the day of the next ensuing election. *Rev. St. Utah* 1898, § 805.

Under the provisions of the by-laws of a beneficial society that no sick benefits shall be granted to resident brothers for more than a week prior to application therefor, and an absent brother claiming benefits must send a statement of the case, attested by the sachem of a tribe near the place where he may be, one out of the jurisdiction of the tribe or lodge to which he belongs is an absent brother, without regard to the place of his residence, since the term "resident" does not have reference to the legal residence of a party, but designates one who at the

time of claiming benefits is within the jurisdiction of the tribe, while an absent brother is one who happens at the time to be permanently or temporarily without the jurisdiction. *Walsh v. Cosumnes Tribe*, No. 14, L. O. R. M., 41 Pac. 418, 108 Cal. 496.

#### Absence or removal as affecting.

The word "resident," in Const. art. 10, § 2, exempting the homestead of a resident, has a more restricted meaning than "domicile," and to entitle a person to a constitutional exemption he must be an actual, not a constructive, resident. Where the facts show an actual removal from the state, even for a definite period, the person so removing ceases while absent to be a resident, though he intend to return and resume his residence. *Fulton v. Roberts*, 113 N. C. 421, 18 S. E. 510, 512.

"Resident," as used in Code, art. 10, §§ 1, 2, securing certain exemptions to residents of a state, means actual, and not constructive, residents; and hence one who has been absent from the state for seven or eight years, working in another state, but expecting to return, is not entitled to the exemption. *Munds v. Cassidey*, 98 N. C. 558, 4 S. E. 355, 356.

Divorce Act, § 7, provides that no person shall be entitled to a divorce who has not resided in the state one year previous to the filing of the petition. Held that, where there is citizenship once established, the wording of the statute does not require that the residence should have been for one whole year; necessary absence with an intention of returning being sufficient. *Fickle v. Fickle*, 13 Tenn. (5 Yerg.) 203, 204.

A resident who has left the state to escape a prosecution, with an intention of returning as soon as he can succeed in having the prosecution dismissed, his wife and children remaining in the state upon his home place, is a resident of the state, within a homestead statute. *Chitty v. Chitty*, 24 S. E. 517, 518, 118 N. C. 647, 32 L. R. A. 394.

#### Aliens.

The term "residents," as used in the conscript laws, includes not only citizens, native and naturalized, but also foreigners, whose residence in this country has been such as to attach to them a national character as members of society. "The word 'residents' is ordinarily used to designate persons in a particular locality, as of a city, town, or county, and not, as in this instance, to designate a class within the whole limits of the government. Congress designed that this term should include more than citizens, native and naturalized; otherwise, the word 'citizen' would have been used. It includes also foreigners, not naturalized, whose residence here has been such as to attach to

them a national character as members of society, and who are thereby under obligations to defend the country." *Ex parte Blumer*, 27 Tex. 734, 736.

#### As citizen.

The provision of Act Tenn. March 19, 1877 (Laws 1877, c. 31, § 5), that, on the insolvency of a foreign corporation carrying on business in the state, "creditors who may be residents of this state shall have a priority in the distribution of assets over all simple contract creditors, being residents of any other country or countries," must be construed as using the word "residents" as meaning the same as "citizens"; and, as applied to creditors who are residents and citizens of other states, the provision is in contravention of section 2, art. 4, of the Constitution of the United States, declaring that the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states. A corporation of another state, however, is not a "citizen," within the meaning of such constitutional provision, and cannot invoke its protection. *Blake v. McClung*, 19 Sup. Ct. 165, 172 U. S. 239, 43 L. Ed. 432.

To confer jurisdiction on the courts of the United States of a suit for the infringement of a trade-mark at common law, or for unfair trade, there must exist diverse citizenship between the parties, which must appear on the record. An allegation in such a suit that defendants are residents of a state is not a sufficient allegation of their citizenship; for the term "resident" does not necessarily imply citizenship, and cannot be substituted for it. *Allen B. Wrisley Co. v. George E. Rouse Soap Co.* (U. S.) 90 Fed. 5, 6, 32 C. C. A. 496.

#### In reference to corporation.

The word "resident," occurring in the Constitution or in a statute, ordinarily means an individual or citizen, and does not mean a corporation. *People v. Schoonmaker* (N. Y.) 63 Barb. 44, 51.

"The fourth section of the supplement of March 25, 1863, exempting from taxation property out of the state of residents in the state, does not apply to corporations. A corporation may be considered as a resident, inhabitant, or citizen for some purposes, such as jurisdiction or venue, but in this supplement, taking it in connection with the whole tax law, it is evident that the word 'resident' was not intended to include a corporation." *Easton Delaware Bridge Co. v. Metz*, 32 N. J. Law (3 Vroom) 199, 203.

"A corporation is a mere creation of local law, having no legal existence beyond the sovereignty where created. It dwells in the place of its creation, and cannot migrate. *Paul v. Virginia*, 75 U. S. (8 Wall.) 168, 19

**L. Ed. 357.** How, then, can a corporation of another state become a bona fide resident of Indiana? It is true that the existence of a corporation may be, and frequently is, recognized abroad by the enforcement of its contracts made abroad, as well as at the place of its domicile, and in other ways; but that is done purely upon considerations of comity. A state statute, declaring a conveyance in trust of real or personal property to other than 'a bona fide resident' of the state invalid, does not govern a conveyance in trust to a foreign corporation of property within the state." *Farmers' Loan & Trust Co. v. Chicago & A. Ry. Co.* (U. S.) 27 Fed. 146, 150.

Inasmuch as a corporation is a mere creation of local law, having no legal existence beyond the sovereignty where it is created, dwelling in that place, and being incapable of migration, a corporation is not a "resident," within a state statute making a conveyance in trust to other than a bona fide resident invalid. *Farmers' Loan & Trust Co. v. Chicago & A. Ry. Co.* (U. S.) 27 Fed. 146, 150.

#### **Domicile distinguished.**

See "Domicile."

#### **Females.**

Acts 1875, p. 206, authorizing the county court to make an order on the petition of a majority of the adult residents of the township prohibiting the sale of intoxicating liquors within three miles of any academy situated therein, construed to permit the signing of such petitions by women and girls who are adult residents of the township. *Blackwell v. State*, 36 Ark. 178, 181.

#### **As inhabitant.**

The word "resident" has the same meaning as "inhabitant," and means one who dwells or resides permanently in a place. *Ullman v. State*, 1 Tex. App. 220, 222, 28 Am. Rep. 405; *In re Wrigley* (N. Y.) 4 Wend. 602, 604; *Roosevelt v. Kellogg* (N. Y.) 20 Johns. 208, 210, 211; *Bell v. Pierce* (N. Y.) 48 Barb. 51, 53; *United States v. Penelope* (U. S.) 27 Fed. Cas. 486, 487, 489.

The words "resident" and "inhabitant" are not synonymous; the latter implying a more fixed and permanent abode than the former. *Succession of Glvanovich*, 24 South. 679, 680, 50 La. Ann. 625 (citing Abb. Law Dict.). It frequently imports many privileges and duties a resident could not claim or be subject to. *Frost v. Brisbin* (N. Y.) 19 Wend. 11, 12, 32 Am. Dec. 423.

The words "resident" and "inhabitant" are not synonymous; the latter implying a more fixed and permanent abode than the former. *McFarlane v. Cornelius*, 73 Pac. 325, 329, 43 Or. 513.

The term "inhabitant" is defined in law to mean one who has a legal settlement in the town, city, or parish, and is synonymous with the word "resident," which is more generally used in this country, and probably better understood. *Helle v. Deerfield Tp.*, 96 Ill. App. 642, 643.

"Resident," as used in a statute requiring the appointment of three persons, citizens of the state, who should be "residents" of the metropolitan police district, and, as often as vacancies should occur by reason of removal from the district, the appointment of others to fill their places, is synonymous with the word "inhabitant," as used in Rev. St. p. 122, § 34, providing that every office becomes vacant on the incumbent ceasing to be an "inhabitant" of the state. An "inhabitant" means one domiciled in a place. *People v. Platt*, 3 N. Y. Supp. 367, 369, 50 Hun. 454.

Code, § 250, provides that a warrant of attachment may issue whenever it appears by affidavit that a cause of action exists against the defendant, and that the defendant is a foreign corporation or not a resident of the state. Held, that the word "resident" was used as synonymous with "inhabitant," and means a person dwelling or having his place of abode in any place. *Munroe v. Williams*, 16 S. E. 533, 535, 37 S. C. 81, 19 L. R. A. 665.

The words "inhabitant" and "resident," as used in Gen. St. 1901, § 2806, providing that upon the decease of any inhabitant of the state letters testamentary or letters of administration upon his estate shall be granted by the probate court of the county in which the deceased was an inhabitant or resident at the time of his death, are synonymous, and therefore but one court is possessed of jurisdiction to administer the estate of a deceased—the probate court of the county of his residence at the time of his death. *Ewing v. Mallison*, 70 Pac. 369, 371, 65 Kan. 484, 93 Am. St. Rep. 299.

"Resident" is not synonymous with "inhabitant," as the term "inhabitant" implies a fixed and more permanent abode than the term "resident," and frequently imports many privileges and duties which a mere resident could not claim to be subject to. There is a marked difference in the meaning of the terms "resident" and "inhabitant," growing out of their respective rights and duties. *Tazewell County Sup'rs v. Davenport*, 40 Ill. 197, 204.

"Resident," as used in St. 1817, c. 190, providing that a probate court shall be held within the several counties of the commonwealth for taking the probate of wills and granting administration on the estates of persons deceased, being inhabitants or residents in the same county at the time of their decease, is not synonymous with the term

"inhabitant," but is a word of different capacity and meaning; for habitation means something different from mere residence. *Harvard College v. Gore*, 22 Mass. (5 Pick.) 370, 372.

"Resident," as used in Act March 1, 1819, requiring an elector whose vote is challenged to swear that he is a resident of a particular township and has resided in the state six months immediately preceding the election, "may be considered less restricted in its sense and meaning than 'inhabitant,' for which it seems to have been used as equivalent. It is certainly not to be considered more comprehensive and implying other qualifications than those enumerated. If the term 'inhabitant' had been used, instead of 'resident,' it would not have implied any more than is implied by the term 'resident,' though the literal language of the Constitution. If any inference is to be drawn from the use of the term 'resident,' it is certainly fair to presume that by its use the members of the Legislature intended to declare that the term 'inhabitant' did not imply citizen, but one who was a resident of the state, and is an explicit interpretation that the term 'inhabitant' meant absolutely one who dwells in the country." *Spragins v. Houghton*, 3 Ill. (2 Scam.) 377, 405.

#### As having place of business.

"Resident," as used in Sess. Acts 1871, c. 193, § 110, prohibiting the sale of goods by sample, etc., by any person not a resident merchant or mechanic, does not import a personal residence, but refers to the place of business. *Speer v. Commonwealth (Va.)* 23 Grat. 935, 14 Am. Rep. 164.

Within the meaning of Const. art. 6, § 18, prohibiting the Legislature from extending the jurisdiction of the county court to persons not "residents of the county," the word "resident" involves the idea both of a dweller and of permanency, "and does not include a nonresident having a business office in the county." If we were to give effect to the word according to its primary and etymological meaning, it of course refers to one having a dwelling or an abode in a particular place for a continued length of time, as its root implies. But we take it that it is to be applied with the meaning and in the general sense in which the word is used in law, except when a special signification is attached to it by some statute, as in those cases relating to taxation, the settlement of paupers, and other enactments in which a particular or special, as distinguished from the primary and general, meaning is given it. As affecting jurisdiction, the word involves the idea both of a dweller and of permanency. In *Isham v. Gibbons* (N. Y.) 1 Bradf. Sur. 69, 82, it is said: "So far as our own Constitution and laws speak of residents, the idea of a fixed and permanent

dwelling seems to be involved." *Routenberg v. Schweitzer*, 63 N. Y. Supp. 746, 747, 50 App. Div. 218.

"Resident merchant, mechanic, or manufacturer," as used in Sess. Acts 1870-71, c. 193, § 101, fixing a license tax on every person who sells by sample card, etc., who is not a resident merchant, mechanic, or manufacturer, was not intended to import "a personal residence, but only the place of business"; and, as any person, though not a resident of the state, may take out a license as a merchant, the statute is not in conflict with Const. U. S. art. 4, § 2, which declares that the citizens of each state shall be entitled to all the privileges and immunities of the citizens of the several states. *Speer v. Commonwealth (Va.)* 23 Grat. 935, 939, 14 Am. Rep. 164.

#### Person not owning land.

"Resident," as used in Act June 2, 1873, § 2, providing that when any person unlawfully herding horses or cattle shall be requested by any resident of the state residing within one-half mile of the place where such stock is unlawfully herded to remove the same, and shall fail, he shall be deemed guilty of misdemeanor, does not imply that he must be the owner of the land on which he resides. *Caldwell v. State*, 2 Tex. App. 53, 55.

#### Permanent residence indicated.

"Resident," as contained in a plea that the "defendant was a resident citizen," indicated that he had a fixed home within the county alleged; the word "resident" being as forcible in this connection as the words "permanent residence." *Powers v. Bryant's Adm'r (Ala.)* 7 Port. 9, 15.

A resident is a person having a permanent abode in a particular place, and does not include persons sojourning temporarily in a place for a particular purpose, not intending to continue to live there after such time or purpose is accomplished. *Fry's Election Case*, 71 Pa. (21 P. F. Smith) 302, 10 Am. Rep. 698.

A person residing in Indiana, who has an agent in Illinois to receive applications for loans and transact other business, and who goes to Illinois at regular intervals temporarily for the purpose of transacting business with reference to these credits, is not a resident of Illinois, so as to be taxable on the credits due him in such state. *Hayward v. Board of Review of Christian County*, 59 N. E. 601, 602, 189 Ill. 234.

"Resident," as used in Act 1831, providing that no person shall be arrested on civil process in suits brought on contracts, express or implied, except in cases where the defendant shall not have been a resident of

the state for at least one month previous to the commencement of a suit against him, means one having a fixed, settled abode, with an intention to remain permanently, at least for a time, for business or other purposes, and does not include one making a transient visit for a time at a place. It requires actual residence, without regard to domicile. *Frost v. Brisbin* (N. Y.) 19 Wend. 11, 12, 32 Am. Dec. 423.

"Resident," as used in Comp. St. c. 17, art. 3, § 1, requiring a petition for the removal of a county seat to be signed by "resident electors" of the county, means actual residents of the county, and not such persons as are temporarily therein. *Ayres v. Moan*, 51 N. W. 830, 832, 34 Neb. 210, 15 L. R. A. 501.

"Resident," as used in 3 Rev. St. (Banks' 8th Ed.) p. 2111, § 29, providing that every person of full age, who shall be a resident and inhabitant of any town for one year, shall be deemed settled in such town, means a person having a locality of existence as permanent and firmly fixed as is legally conveyed by the word "domicile." "Resident" is a flexible word, having different meanings, according to the context. In *re Town of Hector*, 24 N. Y. Supp. 475, 476.

A foreigner, who, after a residence of seven years in the state of New York, transacting business as a commission merchant, returns home, taking with him his effects, uncertain whether he will return or not, loses his character as a resident, so that, though he returns to the state after a sojourn of only three weeks in his native land, he is not entitled to be discharged as an insolvent debtor, if after his return he engages in no business, and his residence is merely of a temporary character. In *re Wrigley* (N. Y.) 8 Wend. 134, 140.

A "resident of the state" is one who resides in the state; one who resides permanently or for a time in the state. There is not necessarily the idea of permanency connected with the signification of the words "resides" and "residence." A resident may have a settled abode for a time, to be determined by circumstances. His residence may be temporary, for temporary purposes. He may retain his citizenship of another state, and still be subject to the law of this state, intended to protect the rights of residents and to provide remedies against them. *Mann v. Taylor*, 43 N. W. 220, 223, 78 Iowa, 355.

The word "resident," as used in Act Pa. May 4, 1855, declaring that any person desiring to adopt a child may present a petition therefor to the court of common pleas of the county where he may be resident, includes both a permanent and a temporary resident; and therefore the court has juris-

diction to decree an adoption by a petitioner who lives in another state, and who is merely a temporary resident in the county where the petition is filed. *Glos v. Sankey*, 36 N. E. 628, 631, 148 Ill. 536, 23 L. R. A. 665, 39 Am. St. Rep. 196.

The word "resident," as used in Act Cong. March 28, 1806, c. 9, providing that all commercial intercourse between any person or persons resident within the United States, and any person or persons resident within any part of the Island of St. Domingo, not in possession and under the acknowledged government of France, shall be prohibited, does not include a mere transitory coming into the United States for a special purpose, but the person must come with the intent of staying or abiding for permanent purposes. Hence a British subject coming from Bermuda to Philadelphia in his own sloop to take his children home from school, and who, after remaining in the United States 13 days, purchased a cargo for St. Domingo, was not a person resident within the United States, within the prohibition of the act. *United States v. Penelope* (U. S.) 27 Fed. Cas. 486, 489.

#### Unmarried man.

The words "owner, resident, or householder," as used in the homestead statute to describe the persons entitled to the homestead exemption, are not limited to married men, and therefore a widower, whose children are all married and away from home, and who has rented the premises claimed as his homestead, but who still boards and lodges in the house, is entitled to the homestead exemption. *Myers v. Ford*, 22 Wis. 139, 141.

#### RESIDENT ALIEN.

Under Const. art. 1, § 14, providing that no distinction shall ever be made by law between resident aliens and citizens in reference to the possession, enjoyment, or descent of property, an alien resident of the state, whose wife and children still remain in England, is entitled to the protection of the exemption laws. These benefits are secured to him, not because of the residence of his family, but his own. They attach to him in his own right as the head of a family actually residing here. That his family did not accompany him in his removal to our state is of no consequence, so long as he came with the settled purpose of abandoning his residence in England, and on his arrival fixed upon this state as his home, to which he intends to bring them. *People v. McClay*, 2 Neb. 7, 9.

#### RESIDENT AND INHABITANT.

The term "resident and inhabitant," in Poor Law 1896, § 40, providing that



every person of full age who shall be a resident and inhabitant of any city for one year, and the members of his family who have not gained a separate settlement, shall be deemed settled in such city, means the locality as permanent and permanently fixed, as is legally conveyed by the word "domicile." In reaching this conclusion the court said: There are very few adjudged cases in this state defining who are residents and inhabitants, within the meaning of our poor laws. In *re Town of Hector*, 24 N. Y. Supp. 475, 479, is a carefully considered decision of the learned county judge of Schuyler county upon this subject. The poor persons under consideration were two Italian laborers, who had left their homes and families in Italy, and were employed in railroad construction, and liable to be discharged at any time, and free to leave their employment, and living in rough shanties built by railroad contractors. It was held that they had not gained a settlement in the town of Hector, although they had actually been located and lived in that town for over a year. The county judge points out the difference between the construction of the courts in construing the meaning of the word "residents," when used in those statutes seeking to give a remedy against absent debtors, and those in relation to levying taxes, and the statute in question. In the former case a man may have more than one residence, but only one domicile. The county judge holds that the cases furnishing the best analogy are those where the jurisdiction of the court depends upon the residence or inhabitancy of one or both parties in a particular locality, and, after citing several cases, states, on page 481, as follows: "It seems to the court that these cases may be regarded as establishing the legal proposition that the words 'resident and inhabitant,' in the statute under consideration, mean a locality of existence as permanent and firmly fixed as is legally conveyed by the word 'domicile,' and that at once disposes of this appeal. It has long been settled law that every person has a domicile somewhere. If he has not acquired one elsewhere, he retains his domicile of origin, and, to effect a change of domicile, the fact and intent must concur; that is, there must be, not only a change of residence, but an intention to abandon the former domicile, and acquire another as the sole domicile." *De Meli v. De Meli*, 120 N. Y. 485, 491, 24 N. E. 996, 17 Am. St. Rep. 652; *Dupuy v. Wurtz*, 53 N. Y. 556. The question involved in the last case was whether there was a change of domicile for the purpose of succession. On page 561 *Rapallo, J.*, says: "There must be both residence in the alleged domicile, and intention to adopt such place of residence as the sole domicile. Residence alone has no effect per se, though it may be most important as a ground from which to infer

intention. Length of residence will not alone effect the change; intention alone will not do it; but the two taken together do constitute a change of domicile." In the case of *People v. Platt*, 117 N. Y. 159, 22 N. E. 937, the defendant was appointed to an office, one of the qualifications of which was that he must be "a resident of the metropolitan police district," and it was claimed that he was not such a resident. Upon the trial it appeared that the defendant had for many years actually resided within the required territory, but during the same period he had always voted, whenever he exercised that right, in the village of Owego, Tioga county, his previous residence; and he testified that he never intended to change his domicile in Owego. *Danforth, J.*, says, on page 167, 117 N. Y., and page 938, 22 N. E.: "The relation [a residence] is one which has a legal sanction, and in some cases secures its possessor a settlement and pauper privileges under the poor laws, or, under the election laws, a right to vote; and in all cases where the statute prescribes 'residence' as a qualification for the enjoyment of a privilege or the exercise of a franchise, the word is equivalent to the place of domicile of the person who claims its benefit." *City of Syracuse v. Onondaga County*, 55 N. Y. Supp. 634-636, 25 Misc. Rep. 371.

#### RESIDENT FREEHOLDER.

"Resident freeholder," as used in Laws 1863, c. 133, § 2, as amended by Laws 1868, c. 51, § 2, providing that the power to lay different highways could only be exercised "upon petition of not less than 30 resident freeholders, and not less than 15 from each town through or into which, or along or near to the line of which, it is proposed to lay out such highway," means a resident of the particular town in question, who owns a freehold interest in lands situated therein. The principle of the law and its evident intent is that a highway shall not be laid out without the advice and sanction of the requisite number of residents of the proper town, who by reason of their property interests in such town and their liability to be taxed to pay the resulting damages would not be likely to petition for the highway unless it was needed by the public. *Damp v. Town of Dane*, 29 Wis. 419, 427.

"Resident freeholder," as used in Rev. St. 1881, § 3153, authorizing a city incorporated under the general law to subscribe to the stock of any railroad, hydraulic company, or water power running in or through such city, etc., a petition of a majority of the resident freeholders of such city means all persons who reside within the city and who are the owners of an estate in lands within the city amounting to a freehold interest. *State v. City of Kokomo*, 8 N. E. 718, 720, 108 Ind. 74.

The phrase "resident freeholders," as used in Rev. St. 1894, § 3844, providing that, on confirmation of an order for street improvement, the same shall become final, unless within 10 days two-thirds of the resident freeholders on such street remonstrate against the improvement, includes only freeholders residing on the street, and not residents within the city owning property upon the street. *Kirkland v. Board of Public Works of City of Indianapolis*, 41 N. E. 374, 376, 142 Ind. 123.

#### Corporations.

The charter of Indianapolis (Act March 6, 1891), authorizing it to annex territory, and providing, in section 38, that an appeal may be taken from such annexation by one or more "resident freeholders in the territory sought to be annexed," means persons who are citizens and freeholders of the territory to be annexed, and does not extend to a railroad company owning land within such territory. *Pittsburg, C., O. & St. L. Ry. Co. v. City of Indianapolis*, 46 N. E. 641, 147 Ind. 292.

#### RESIDENT HOUSEHOLDER.

The term "resident householder," within the statute exempting from execution property belonging to a resident householder, includes a judgment debtor, who, after the death of his wife, while he is residing in a certain house, employs a family to keep house for him and his adopted daughter, who is dependent on him for support. *Bunnell v. Hay*, 73 Ind. 452, 453.

The phrase "resident householder," as embraced in Act March 5, 1859, exempting certain property of resident householders, includes one who is head of a family, but who is in the act or course of moving the family from a house in one county to a house in another. *Mark v. State*, 15 Ind. 98, 100.

"Resident householders," as used in Rev. St. 1881, § 703, exempting certain property of resident householders from execution sale, cannot be construed to include one who, with his family and part of his household goods, leaves the state for government service in one of the territories, with the intention of returning when such service shall terminate; for, to be a resident householder, he must reside and keep house in the state. *Ross v. Banta*, 34 N. E. 865, 871, 140 Ind. 120.

The term "resident householder," within the meaning of a statute creating exemptions in favor of such householders, includes a person maintaining a residence, although he is not married. *Abell v. Riddle*, 75 Ind. 345, 348.

An exemption of property not exceeding \$300 in value from execution for debt to

any "resident householder" is held to include also property owned by the wife, where the husband and wife are living together, and the property of the husband is not of the value of \$300, and the wife is the owner of property levied on under execution; and the plain intent of the statute is to preserve a home or support for the family, and not for its head, as distinguished from its members. *Crane v. Waggoner*, 33 Ind. 83, 85.

#### RESIDENT PAUPER.

A "resident pauper" is one who has a legal settlement in some town in the state, and is residing in a town in which aid is needed, and liable to be removed to the town of legal settlement, or to an order of removal to such town. *Town of Topsham v. Williamstown*, 60 Vt. 467, 471, 12 Atl. 112, 114.

#### RESIDUARY.

A residuary bequest is one which, if valid, carries all the personal property not otherwise disposed of. *Kerr v. Dougherty*, 79 N. Y. 327, 359.

A residuary bequest is that which consists of a residue of an estate, and not of a particular article. *Patterson v. Devlin* (S. C.) *McMull. Eq.* 459, 468.

A residuary clause in a will is a clause which operates to pass all of testator's property not perfectly disposed of, and it includes legacies which may lapse by events subsequent to the making of a will, or property covered by illegal legacies, or legacies which for some reason are prevented from taking effect. *Riker v. Cornwell*, 20 N. E. 602, 604, 113 N. Y. 115.

A general residuary clause includes all property of the testator not otherwise disposed of. The presumption is that it includes everything not otherwise disposed of, and the burden rests upon the heir at law or next of kin to show that the testator did not intend his residuary clause to include such property. It carries every real interest, whether known or unknown, immediate or remote, unless it is manifestly excluded, and, when not circumscribed by clear expression in other parts of a will, includes any property or interest of the testator not otherwise perfectly disposed of, and all that for any reason eventually falls into the general residue. *Lamb v. Lamb*, 14 N. Y. Supp. 206, 210, 60 Hun, 577.

"A devise of the whole of an estate is not a residuary devise, notwithstanding a residuary devise might dispose of nearly the whole of the estate, inasmuch as a residuary devise is a devise of the balance after certain devises have been carried out." *Jewett v. Jewett*, 12 O. C. D. 131, 133.

**RESIDUARY ESTATE.**

In order that there should be a residuary estate, the provisions of the will must be fulfilled, and something must be left over. Debts and legacies must be paid, and then the residue goes to residuary legatees. *Wetmore v. St. Luke's Hospital*, 9 N. Y. Supp. 753, 756, 56 Hun, 313.

The words "residuary estate," as used in Rev. St. § 5971, providing that a devise or bequest shall not lapse by the death of the devisee or legatee, is used in its technical sense, and is defined in Bouvier to be "what remains of testator's estate after deducting the debts and the bequests and devises." *Jewett v. Jewett*, 12 O. C. D. 131, 133.

**RESIDUARY FUND.**

Where a testator gave to his widow one-third of all his personal property, and after certain other bequests gave the residue of his estate to others, there is no merit in the widow's claim to have the testator's debts, the expenses of the administration, and costs of audit deducted from the residuary fund. There is no "residuary fund" until the debts and expenses are paid. The gift of one-third of the personal estate was a gift of one-third of what may be left after the payment of debts and expenses. *Appeal of Barnett*, 104 Pa. 342, 349.

**RESIDUARY LEGACY.**

A residuary legacy embraces only that which remains after all the bequests of the will are discharged. Civ. Code Cal. 1903, § 1357, subd. 4; Civ. Code S. D. 1903, § 1071.

A residuary legacy embraces only that which remains after all the other bequests are discharged, and a specific legacy payable out of the residue, after the other legacies are paid, is not a residuary legacy, where the gift of the residuum is to another. *In re Williams' Estate*, 44 Pac. 803, 810, 112 Cal. 521, 53 Am. St. Rep. 224.

**RESIDUARY LEGATEE.**

A legacy is a bequest of goods and chattels by will or testament. The person to whom it is given is styled the "legatee"; and, if the gift is of the residue of an estate after payment of debts and legacies, he is then styled the "residuary legatee." *Probate Court v. Matthews*, 6 Vt. 269, 274.

"Residuary legatee," as used in a will, by which the testatrix, owning real estate, made a certain person her residuary legatee, should be considered as showing that the testatrix intended that the residuum of her estate, both real and personal, should pass

to such legatee. *Laing v. Barbour*, 119 Mass. 523, 525.

A residuary legatee is a legatee who is given all the residuum of a testator's estate after specific devises and bequests have been made therefrom. After giving a bond, as required by statute, he becomes the sole and absolute owner of the estate of the testator, real, personal, and mixed, with all the rights and remedies of an absolute owner, subject to none of the conditions, restrictions, or accountabilities of an executor. *Lafferty v. People's Sav. Bank*, 43 N. W. 34, 36, 76 Mich. 35.

**RESIDUE.**

See "Rest and Residue"; "Rest, Residue, and Remainder."

"Residue," as defined by Bouvier, is that which remains of something after taking away some part of it. *Morgan v. Huggins* (U. S.) 48 Fed. 3, 5, 9 L. R. A. 540.

"Residue," in its natural and popular force and effect, signifies what is left of a number or quantity after something has been abstracted. Of a blended mass of real and personal estate, it is what remains after the mass has been diminished by something abstracted. *Stevens v. Flower*, 19 Atl. 777, 779, 46 N. J. Eq. (1 Dick.) 340.

**In administration and wills.**

A residue is what is left after something has been taken out, and, as used in a will, is ordinarily what remains after the payment of debts, funeral charges, expenses of administration, and legacies. *Addeman v. Rice*, 31 Atl. 429, 19 R. I. 30; *In re Harvey*, 14 Or. 171, 172, 12 Pac. 307, 308.

"Residue," as used in a will giving several legacies, and then, without creating an express trust to pay them, giving the "residue," can only mean what remains after satisfying the previous gifts. *Lewis v. Darling*, 57 U. S. (16 How.) 1, 10, 14 L. Ed. 819.

The residue of an estate is that only which remains undisposed of after satisfying all particular legacies and devises, including any which may be made by a codicil. *Duffield v. Pike*, 42 Atl. 641, 643, 71 Conn. 521.

"Residue" means all that of which no effectual disposition is made by will, other than by the residuary clause. *Morton v. Woodbury*, 47 N. E. 283, 287, 153 N. Y. 243 (citing 1 Jarm. Wills, 764); *Sturgis v. Work*, 122 Ind. 134, 138, 22 N. E. 996, 17 Am. St. Rep. 349.

The residue of the testator's estate and effects means what is left after all liabilities are discharged and all the purposes of

the testator are carried into effect. *Graves v. Howard*, 56 N. C. 302, 305.

The gift of a residue is a gift of what remains after the debts and legacies are paid, and is subject to the precedent claims on the estate. *Nickerson v. Bragg*, 43 Atl. 539, 540, 21 R. I. 296.

The ordinary meaning of "residue," as used in wills, is that portion of an estate which is left after the payment of charges, debts, and particular bequests. The presumption is that the testator uses it in this sense, unless a contrary intent clearly appears. *Stevens v. Underhill*, 36 Atl. 370, 372, 67 N. H. 68.

The words "rest, residue, and remainder," in a will first giving certain legacies, and then giving the rest, residue, and remainder of his property, were construed to mean the property remaining after the preceding legacies had been paid. *Hoyt v. Hoyt*, 85 N. Y. 142, 150.

The use of the word "residue," in a will bequeathing all testator's personal estate and devising one-third part of all the income, rents, and use of his real estate to his wife, and giving all the residue of his estate to his son, operates to give to his son all his property in which he has given his wife no right. *In re France's Estate*, 75 Pa. 220-224.

The residue of a man's estate, in testamentary language, means whatever is not specifically devised or bequeathed; and in whatever part of the will it may happen to be found it ought to have that meaning, unless the whole will, taken together, shows clearly that it was not so intended. A will bequeathing the residue of personalty passes everything not otherwise effectually disposed of. *In re Williard's Estate*, 68 Pa. (18 P. F. Smith) 327, 332 (quoted in *Re Pittman's Estate*, 38 Atl. 133, 135, 182 Pa. 355).

The word "residue," in a clause of a will giving each of testator's sons one-half his share, payable \$5,000 at 21, and thereafter the income absolutely, etc., leaving the residue of each share in strict trust, was held to mean the other half; that is, the portion left after the distribution of the half which the first clause provided for. *In re Baeder's Estate*, 44 Wkly. Notes Cas. 73, 75, 190 Pa. 606, 42 Atl. 1102.

**Same—As including all descriptions of property.**

The term "rest and residue," in a will, naturally includes all property of every description. *Bragaw v. Bolles*, 25 Atl. 947, 950, 51 N. J. Eq. (6 Dick.) 84.

In construing wills the intention of the testator is the object to be sought; and when a doubt arises as to the extent of the appli-

cation of the word "residue," as to whether it was intended to apply to the whole residue of the estate or be confined to a particular part, courts generally incline to extend it to the whole, where there is no other residuary claim. *Carr v. Dings*, 58 Mo. 400, 407.

"Residue" signifies what is left of a number and quantity after something has been abstracted. The residue of a farm is what remains of it after something has been taken away. The residue of a blended mass of real and personal estate is what remains after the mass has been diminished by something which has been subtracted. Hence, when pecuniary legacies are first given, and afterwards the residue of the testator's estate, real as well as personal, his intention to have the legacies payable out of the realty if the personal estate be insufficient appears, in the absence of any inconsistent words or provisions in the will, by necessary implication from the words "residue or remainder," when applied to the two kinds of property combined. *Johnson v. Poulson*, 32 N. J. Eq. (5 Stew.) 390, 393.

**Same—As not changed by enumeration of items.**

The character of a gift contained in a will of the "residue" of the testator's personal estate, after a previous direction to pay debts and funeral expenses, is not changed by an enumeration of the items composing the residue. *In re Storey's Estate* (Pa.) 13 Wkly. Notes Cas. 99.

**Same—Legacy distinguished.**

See "Legacy."

**Same—As modified by location in will.**

The residue of a man's estate, in testamentary language, means whatever is not specifically devised or bequeathed; and in whatever part of a will it is found it ought to have that meaning, unless the whole will, taken together, clearly shows it was not so intended. If a testator should begin his will with a bequest or devise of all his residuary estate, and then proceed to make various bequests and devise, it would not vary the proper construction of either; and hence where a testator, having bequeathed his residuary estate to his daughters, then provided: "I give to my sons, I. and J., \$1,000 each, the interest to be paid them annually"—the intent was to bequeath them each a legacy of \$1,000, and not merely the interest of \$1,000. *Appeal of Sproul*, 105 Pa. 438, 441.

Residue "means that which remains of something after taking away a part of it. The residue of an estate is what has not been particularly devised by will." As used in wills, its ordinary meaning is that portion of the estate which is left after the payment of charges, debts, and particular

legacies; and it is presumed to be used in this sense, unless a contrary intention clearly appears. The mere circumstance that, in the arrangement of a will, the word "residue" is used, and the greater part of the particular legacies and bequests are subsequently given, will not of itself be sufficient evidence of such an intention, especially if such an arrangement can be otherwise accounted for. *Phelps v. Robbins*, 40 Conn. 250, 264 (quoting *Bouv. Law Dict.*).

#### Same—As residue of realty.

A will directed the sale of testator's real estate, and gave all his personal property and the sum of \$2,000, to be paid out of the proceeds of the sale of his real estate, to his wife, and certain other legacies, and then directed that the residue of his estate should pass to a certain beneficiary. Held, that the words "residue of my estate" ought to be construed to mean the residue of the proceeds of the sale of the real estate. *Applegate v. Birdsall*, 20 N. J. Law (Spencer) 244, 247.

"Residue," as used in a will by which testator authorized and empowered his executors to sell and convey all and any part of his real estate, to pay all his debts out of the proceeds, and gave the net residue, after payment of all such debts, to the executors and to the survivor of them as joint tenants, means the residue of the property he authorized them to sell, whether sold or unsold, and is an absolute gift to the executors of the net proceeds of the sale of testator's real estate after paying debts and mortgages. *Forster v. Winfield*, 23 N. Y. Supp. 169, 170, 3 Misc. Rep. 435.

#### Same—As conferring power of sale.

Testator's will devised property to his daughter, on condition that, in case of her death before majority, the whole of the residue in the hands of the executors should go to a third person. Held, that the use of the word "residue" did not of itself confer on the executors power to dispose of the principal of the estate. In *re Miller's Will*, 42 N. Y. Supp. 148, 151, 11 App. Div. 337.

#### Same—As including subject of void devises.

The word "residue," as used in a will containing several void specific devises and then devising all the residue of testator's estate, is to be construed to include all the estate. "Residue," in such connection, means all "of which no effectual disposition is made by will." *Gallavan v. Gallavan*, 64 N. Y. Supp. 329, 331, 31 Misc. Rep. 282 (quoting from *Beekman v. People* [N. Y.] 27 Barb. 260, and *Mortou v. Woodbury*, 153 N. Y. 243, 47 N. E. 283).

A gift of the residue of the testator's estate is not defeated by the failure of the primary gift, but the residue will include all

the estate remaining after payment of debts and administration expenses. In *re Miller's Will*, 55 N. E. 385, 386, 161 N. Y. 71.

## RESIDUUM.

### See "General Residuum."

A residuum is what is left after a process of separation. There are as many "residuums" of a substance as there are distinct products which may be taken away from it. Pursuant to this definition, it is held that showing that both residuums come from the same source, and that all in the residuum of the earlier of two patents is also in and is obtained by separation from that of the patent of the later date, does not make it an infringement on the former. It does not show that they are the same; otherwise, a prior patent for the same use of the common source would cover both. The proper effect is to limit the application of the term "residuum." *Parsons v. Colgate* (U. S.) 15 Fed. 600, 603.

### Of estate.

"The residuum of an estate is not a part of it to be administered; but what remains after administration, properly so called, is included." *Robinson v. Millard*, 133 Mass. 236, 239.

No particular form of word is required to pass a "residuum." Thus the words "balance of estate," "balance of my capital," "what is left of my books and furniture and all other things," or "the balance of my estate," are apt words for the purpose. *Delehanty v. St. Vincent's Orphan Asylum*, 8 N. Y. Supp. 797, 798, 56 Hun. 55.

## RESIDUUM OF THE RESIDUUM.

An administratrix, after several bequests, directed that the "rest and residue" of her estate be converted into cash, and certain other legacies and annuities be paid out of it, and that the principal of the annuities should "fall into and be disposed of as part of the residuary estate." By another clause she directed that, after providing for such legacies and annuities, there should be paid "out of the residue of the proceeds of my residuary estate the following legacies," enumerating them, and that "all the rest and residue of my residuary estate, any principal otherwise disposed of," should go to certain persons. Held, that there was created what has been termed a "residuum of the residuum." *United States Trust Co. v. Black*, 30 N. Y. Supp. 453, 454, 9 Misc. Rep. 653.

## RESIGN.

A conveyance reciting that the maker "resigned up," forever, all the right and title

that he had in certain lands, indicates clearly the maker's intention of surrendering up possession. In *re Narragansett Indians*, 40 Atl. 347, 355, 20 R. L. 715.

### RESIGNATION.

A resignation of an office, to be complete, implies the consent of the incumbent. Where the resignation tendered by a city councilman was to the mayor and council, and on its face stated that acceptance by the body thus composed was requested, which acceptance was refused, the councilman has the right to regard the attempt at resignation as ineffectual and ended. *Fryer v. Norton*, 50 Atl. 661, 662, 67 N. J. Law, 23.

A resignation, in terms immediate and unconditional, by an army officer, means an entire severance of the officer's connection with the army. *Turnley v. United States* (U. S.) 24 Ct. Cl. 317, 327.

A resignation, made and accepted, is a complete transaction; for then the minds of the parties have met, and the legal consequence of a mutual assent is shown. Hence, if a mayor of a city send in his resignation, and the aldermen in due exercise of their authority accept the same, the official life of the mayor ceases. But under Act Cong. Aug. 15, 1861, providing that any commissioned officer of the army, navy, or marine corps, who, having tendered his resignation, shall, prior to due notice of the acceptance of the same by the proper authority, and without leave, quit his post or proper duties with intent to remain permanently absent therefrom, shall be registered as a deserter, the resignation of an army officer is not complete until he receives notice of the acceptance of the same. *Mimmack v. United States* (U. S.) 10 Ct. Cl. 584, 596.

Acquiescence by an officer on the retired list for a long time in the action of the Secretary of War dismissing him is an abandonment of the office, equivalent to a resignation. *Fletcher v. United States* (U. S.) 26 Ct. Cl. 541, 563.

Where an officer has been appointed during a recess of the Senate, and after taking the oath of office and notifying the Department of War of his acceptance is ordered to return the order of appointment, and is told that it was transmitted to him prematurely, his obeying the order is not a resignation of the office. *O'Shea v. United States* (U. S.) 28 Ct. Cl. 392, 402.

"Resignation" implies that the person resigning has been elected into the office he resigns. One cannot resign that which he is not entitled to, and which he has no right to occupy. A person disqualified as elector of the President and Vice President of the United States, by reason of holding an office of trust or profit under the United States,

cannot remove the disqualification by resigning the office, unless his resignation precedes his appointment or his election to the position of elector. In *re Corliss*, 11 R. L. 638, 643, 23 Am. Rep. 538.

### RESIST.

To "resist" is to oppose by a direct, active, and quasi forcible means. Crabb tells us that resistance is always direct, and, applied to persons, always implies more or less force. Bouvier defines it to be the opposition of force to force. The word is Latin, and its use seems to be singularly true to its etymology, and to retain the exact classical meaning. The word means to stand against, or to withstand, as used in Rev. St. c. 167, § 18, providing for punishing every person who shall knowingly resist any sheriff, etc., while engaged in the lawful execution of process. This is the popular, the scholarly, and the legal sense of it. *State v. Welch*, 37 Wis. 196, 201.

### RESISTANCE.

"Resistance," as used in Rev. St. § 725 [U. S. Comp. St. 1901, p. 583], relating to the power of the court to punish for contempt any one who willfully exercises any resistance to the execution of the lawful process or commands of the court, is understood as implying a willful purpose to interfere, so as to prevent the execution or enforcement of such process. *United States v. Jose* (U. S.) 63 Fed. 951, 954.

"Resist," as used in Rev. St. § 5359 [U. S. Comp. St. 1901, p. 3639], making it criminal for any of the crew on any American vessel to solicit, incite, or stir up any other of the crew to disobey or resist the lawful orders of the master or other officer, is not synonymous with "disobedience"; for, "while resistance embraces the former, it implies much more, and requires an active element of opposition to authority in any connection with the refusal or neglect to obey." *United States v. Huff* (U. S.) 13 Fed. 630, 639.

### RESISTING AN OFFICER.

To constitute the offense of "resisting an officer," under Act March 8, 1831, § 9, it is not necessary that the officer should be assaulted, beaten, or bruised. *Woodworth v. State*, 26 Ohio St. 196, 200.

The term "resisting an officer in the execution of legal process," in Code 1876, § 4137, making such act criminal, does not include resisting or striking a constable when commanding the peace, if he has no writ or process in his hands. *Jones v. State*, 60 Ala. 99.

"Resist," as used in Code, § 4476, providing for the punishment of any person who

shall knowingly and willfully obstruct, resist, or oppose any officer or other person duly authorized in serving or executing any lawful process, imports force. The words "obstruct," "resist," or "oppose" mean the same thing, and the word "oppose" would cover the meaning of the word "resist" or "obstruct." It does not mean to oppose or impede the process with which the officer is armed, or to defeat its execution, but that the officer himself shall be obstructed. *Davis v. State*, 76 Ga. 721, 722.

## RESOLUTION.

A resolution is not a law, but merely the form in which the legislative body expresses an opinion. *Village of Altamont v. Baltimore & O. S. W. Ry. Co.*, 56 N. E. 340, 341, 184 Ill. 47 (citing *Chicago & N. P. R. Co. v. City of Chicago*, 174 Ill. 439, 51 N. E. 596); *Reynolds v. Blue*, 47 Ala. 711, 713.

A resolution of a city council is nothing more than the formal expression of the will of the city council. *El Paso Gas, Electric Light & Power Co. v. City of El Paso*, 54 S. W. 798, 799, 22 Tex. Civ. App. 309.

"Resolutions" adopted by municipal corporations are special and temporary, applicable only to a single matter of passing moment. A city council cannot fix the amount, terms, and manner of issuing licenses for the sale of intoxicating liquors by a resolution. *People v. Mount*, 58 N. E. 360, 364, 136 Ill. 560.

The characteristic feature of a resolution of a legislative body is its enacting clause, "Be it resolved." Were any other term used, it would cease to be a resolution. *State v. Delesdenier*, 7 Tex. 76, 95.

According to ordinary parliamentary practice a resolution is a very different thing from a law or an ordinance. A resolution is merely a suggestion or direction in writing, concurred in by the two houses of the Assembly, if there be two houses, or passed by one house, if there be but one, and not submitted to the executive for his approval. A resolution is ordinarily passed without the forms and details which are generally required by Constitutions and municipal charters as prerequisites to the enactment of valid laws or ordinances. It need be read but once, and may be passed by a viva voce vote, without calling the ayes and noes, whereupon, when engrossed, it becomes operative. It is a form of action different from an ordinance, and less formal and solemn. *City of Cape Girardeau v. Fougau*, 30 Mo. App. 551, 556.

### As contract.

See "Contract."

### By-law distinguished.

See "By-Law."

### As limited by context.

Gen. Laws, p. 896, declares that on the passage or adoption of every by-law or ordinance, and every resolution or order to enter into contract by any board of trustees of any municipal corporation the ayes and nays shall be called and recorded, and that a majority of the members elected shall be required. Held, that the words "resolution or order" were used in a restricted sense, as only applicable to resolutions or orders adopted for the purpose of entering into contracts. *Tracey v. People*, 6 Colo. 151, 153.

### Ordinance distinguished.

The distinction between a resolution and an ordinance is stated as follows: "An ordinance prescribes a permanent rule of conduct or government. A resolution is of a temporary character." An ordinance is the proper form for state legislation, and requires concurrence of the executive head of the municipality. An order or resolution is the proper form for such acts of a council as are temporary or ministerial in character, and do not require executive approval. A resolution by the common council of a city authorized to transact business by resolution, directing its mayor to offer a reward for any persons setting incendiary fires, is binding on the city only during a reasonable time, because it is a resolution, and not an ordinance. Seventeen years after the date of resolution, and 10 years after the last proclamation thereunder, is not such reasonable time. *Shaub v. Lancaster City*, 26 Atl. 1067, 1068, 156 Pa. 362, 21 L. R. A. 691.

A municipal corporation may declare its will as to matters within the scope of its corporate powers by a resolution or an ordinance, unless its charter requires it to act by ordinance. If the action of a municipality amounts to prescribing a permanent rule or condition thereafter to be observed by the inhabitants of the municipality or by its officers in the transaction of the corporation business, such rule shall be expressed in the form of an ordinance; but it is proper to act by resolution, if the action taken is merely declaratory of the will of the corporation in a given matter, and is in the nature of a ministerial act. Municipalities may therefore submit to the voters the question of borrowing money and issuing bonds therefor by means of a resolution, rather than by an ordinance, where there is nothing in the statute expressly requiring an ordinance in such a case. *City of Alma v. Guaranty Sav. Bank*, 60 Fed. 203, 206, 8 C. C. A. 564, 19 U. S. App. 622.

A resolution or order is not a law, but merely a form in which the legislative body expresses an opinion. An ordinance prescribes a permanent rule of conduct or government, while a resolution is of a special and temporary character. Acts of legislation by a municipal corporation, which are

to have and continue in force and effect, must be embodied in ordinances, while mere ministerial acts may be in the form of resolutions. *McDowell v. People*, 68 N. E. 379, 381, 204 Ill. 499; *City of Paxton v. Bogardus*, 66 N. E. 853, 858, 201 Ill. 628 (citing *Chicago & N. P. R. Co. v. City of Chicago*, 174 Ill. 439, 51 N. E. 596).

When the law requires a proceeding to be instituted by an ordinance, it cannot be effected by resolution merely. The latter, wanting the solemnities of the former, is not regarded as a legal equivalent. *City of Paterson v. Barnet*, 46 N. J. Law (17 Vroom) 62, 66.

"A distinction is sometimes drawn between an ordinance and a resolution, by which the one prescribes a permanent rule of conduct or government, while the other is of a temporary character and prescribes no permanent rule of government"; but it is apparent that such distinction between the words does not exist in Rev. St. § 1694, providing that by-laws, resolutions, and ordinances of a general or permanent nature shall be fully and distinctly read on three different days, except, etc., as the resolution there referred to is made of a general or permanent nature by the express terms of the statute. *Campbell v. City of Cincinnati*, 31 N. E. 606, 607, 49 Ohio St. 463.

"Resolution," in reference to the acts of a city council, is only a less solemn or less usual form of an ordinance, and is included within the term "ordinance." *Fuller v. City of Scranton (Pa.)* 4 Atl. 467, 469.

A resolution is not a statute. A legislative body may by a resolution express an opinion, may govern its own procedure within the limitations imposed on it by its constitution or authority, and, in case it have ministerial functions, may direct their performance, but it cannot adopt that mode of procedure in making laws, where the power which created it has commanded that it shall legislate in a different form; and hence where a city charter gives the city council power to create by ordinance any office or employ any agent, etc., and provides that "the style of the ordinance shall be" a prescribed form, such city council cannot by resolution abolish an office created by ordinance. *City of San Antonio v. Micklejohn*, 33 S. W. 735, 736 89 Tex. 79.

#### Verbal motion included.

A verbal motion, made and carried in a city council, to accept a proposed contract, was not a "resolution," in the proper sense of the term. *City of Galveston v. Morton*, 58 Tex. 409, 414.

### RESOLUTORY CONDITION.

A resolutive condition is one in which the obligation depends on an uncertain event,

but which is to take effect immediately, though liable to be defeated when the event happens. *Moss v. Smoker*, 2 La. Ann. 989, 991.

### RESOLVE.

"Resolved," as used at the head of a bill by the Legislature, is as potent to declare the legislative will as the word "enacted," and a resolution may or may not take the force of law, depending on the occasion and object of its use, and resolutions may be resorted to as vehicles to convey the opinions and wishes of the Legislature, without prescribing any rule of conduct to be observed; but whenever a general resolution does undertake to lay down a rule of conduct, it becomes a law, and will take effect as such, notwithstanding the word "resolved" was used in its title, instead of the word "enacted." *Swann v. Buck*, 40 Miss. 268, 293.

The fifth definition of the word "resolve," given by Webster, is "to express an opinion or determination by resolution or vote; as 'it was resolved by the Legislature.'" It is of similar force to the word "enact," which is defined by Bouvier as meaning "to establish by law; to perform or effect; to decree." In re Senate File No. 31, 41 N. W. 981, 984, 25 Neb. 864.

### RESORT.

See "Common Resort"; "Public Resort."

A "resort," according to Webster's Dictionary, is a place of frequent assembly, a haunt. In re Sic, 14 Pac. 405, 410, 73 Cal. 142.

"Resort" is the "act of visiting; assembly; meeting; concourse; frequent assembly." *Bandalow v. People*, 90 Ill. 218, 220 (citing Webster's Dict.).

A house or apartment kept as a place of resort is a place for the entertainment of others than the inhabitants or occupants of the premises. *State v. On Gee How*, 15 Nev. 184, 187.

#### As temporary residence.

A place wherein people live during the whole year, and not merely during the summer season, is not a "seaside resort," within the meaning of Act May 3, 1880, providing that any railroad company whose road is constructed at any seaside resort, not exceeding four miles in length, etc., shall be exempted from the provisions of Act Feb. 12, 1874, etc. In re Delaware Bay & C. M. R. Co. (N. J.) 11 Atl. 261, 263.

### RESORT TO.

An allegation that a house had been "resorted to for immoral purposes" meant some



thing of a common occurrence. *People v. Pinkerton*, 44 N. W. 180, 181, 79 Mich. 110.

"Resort," as used in Gen. St. 1889, par. 2533, providing that all places where persons are permitted to resort for the purpose of drinking intoxicating liquors, etc., means something of a common occurrence; the habitual frequenting of a place by more than one person. *State v. Owens*, 58 Pac. 240, 241, 9 Kan. App. 595.

"Resorted," as used in an instruction in a prosecution for keeping a house of ill fame, declaring that, in order to find defendant guilty, it must have been shown that the house was resorted to for the purpose charged, signifies visited frequently. *O'Brien v. State*, 28 Mich. 213, 214.

St. 1879, p. 121, § 6, declaring that it shall not be lawful for any person to "resort to any house," room, or other place kept for any of the purposes forbidden by this act, for the purpose of indulging in the use of opium by smoking or otherwise, means to go once or more to a place kept for opium smoking. *State v. Ah Sam*, 15 Nev. 27, 32, 27 Am. Rep. 454.

A resort to an outhouse for the purpose of playing cards on more than one occasion may constitute it an outhouse where people resort, within the meaning of the statute prohibiting gaming in such a place. *Downey v. State*, 8 South. 869, 870, 90 Ala. 644.

"Resort," as used in a statute imposing a punishment on playing cards for money in an outhouse where people resort, means one to which the people have resorted on more than one occasion, or that more persons than those actually engaged in playing are assembled on the particular occasion at which the offense is charged to have been committed. *State v. Norton*, 19 Tex. 102, 105; *Wheelock v. State*, 15 Tex. 260, 262.

#### Single visit.

"Resorted to," as used in a Michigan statute punishing any person keeping a house of ill fame resorted to for the purpose of prostitution, means something of a common occurrence, and a single visit is insufficient proof thereof. *People v. Pinkerton*, 44 N. W. 180, 181, 79 Mich. 110.

#### As used.

The term "resorted to," as used in Gen. St. c. 87, § 6, making the keeping or maintaining of a building resorted to for illegal gaming an offense, etc., does not mean "used." *Commonwealth v. Stahl*, 89 Mass. (7 Allen) 304, 305.

"Resorted to," as used in an indictment charging a person with keeping and maintaining a building occupied by himself as a saloon and resorted to for the illegal sale of intoxicating liquors, is not equivalent to

"used for" in Rev. St. c. 17, § 1, declaring all places used for the illegal sale or keeping of intoxicating liquors to be common nuisances. Neither word has any technical meaning attached to it. Both must therefore be construed in their ordinary and usual signification. The building may be used by the occupant or keeper. It is resorted to by other persons. If used for sale, it must be understood that sales are made by the keeper or under his authority. If resorted to for that purpose, sales may or may not be made, and, if made, are supposed to be made by the persons so resorting. *State v. Dodge*, 6 Atl. 875, 78 Me. 439.

#### RESORT TO CHANCE.

A verdict obtained according to an agreement by the jury that each member thereof shall mark the sum which he thinks the plaintiff is entitled to recover on a slip of paper, and then ascertain by addition the amount of the sums so marked, and to then divide said amount by 12, the number of jurors, and that the quotient resulting from such division shall be the amount of the verdict, is obtained by "resort to a determination by chance," within the meaning of Rev. St. 1837, § 4439, subd. 2, making a finding on any question submitted to the jury by resort to a determination by chance misconduct of such jury. *Flood v. McClure*, 32 Pac. 254, 255, 3 Idaho (Hash.) 587.

A verdict obtained by averaging the amount marked down by all the jurors was not a verdict obtained "by resort to the determination of chance," prohibited by Code Civ. Proc. § 657; there having been no agreement among the jurors that the result obtained should be binding. *Hunt v. Elliott*, 20 Pac. 132, 77 Cal. 588.

#### RESOURCES.

See "Available Assets and Resources."

"Resources" is defined by Webster as "money or other property that can be converted into supplies; means of raising money or supplies; capabilities of producing wealth or to supply necessary wants; available means or capability of any kind." *Ming v. Woolfolk*, 3 Mont. 380, 386.

#### As money in hand.

"Resources" does not necessarily mean money in hand. "A debtor may have ample resources to pay all his debts to become due, and yet have no money in his pocket or in bank." *Sacry v. Lobree*, 23 Pac. 1088, 1090, 84 Cal. 41.

#### As products of state.

"Resources," as used in Acts 1895, c. 25, authorizing the county courts to appropriate

money to provide for an exhibit of their resources at the Tennessee Centennial Exhibition, included products of farm, forest, manufacture, art, education, etc. *Shelby County v. Tennessee Centennial Exposition Co.*, 38 S. W. 694, 697, 96 Tenn. (12 Pickle) 653, 33 L. R. A. 717.

## RESPECT.

See "In Respect To."

"Respect" is a voluntary tribute of the people to worth, virtue, and intelligence. *Carter v. Commonwealth*, 32 S. E. 780, 784, 96 Va. 791, 43 L. R. A. 310 (citing *State v. Frew*, 24 W. Va. 416, 49 Am. Rep. 257).

## RESPECTABLE.

"In *Freleigh v. State*, 8 Mo. 606, it is held error for the court to deny a change of venue on the grounds that it did not appear that affiants were respectable people, as required by law; it being said that the word 'respectable,' as used in the statute, was intended to be synonymous with the word 'competent.'" *Cox v. United States*, 50 Pac. 175, 177, 5 Okl. 701.

"Respectable witnesses," as used in Act Feb. 9, 1843, requiring two respectable witnesses to a petition for a change of venue, was equivalent to the phrase, "credible, disinterested witnesses," as used in the act of 1835, which act it superseded; and both phrases are synonymous with the words "competent witnesses." *Freleigh v. State*, 8 Mo. 606, 610.

It is slanderous per se to state to a person that his house is not respectable. *Loranger v. Loranger*, 74 N. W. 228, 115 Mich. 681.

## RESPECTIVE.

"Respective," as used in a will giving property "to my two grandchildren, Richard and Elizabeth, equally to be divided, and to the heirs of their respective bodies, and in default of such issue, I give the same to Anna," the word "respective" was that which "such" might refer to. The effect was not to create cross-remainders, but would cause the will to have the same operation as if the devises had been by separate clauses, giving one half to the grandson and the other to the granddaughter, and, for default of issue, respectively, giving the same to Anna. *Comber v. Hill*, 2 Strange, 969, 970.

As used in a will, which provided that under a limitation (after an estate for life to A. and B.) of premises to all and every the younger children of B. to be equally divided among them, and to the heirs of their

respective body and bodies, as tenants in common, and, if only one child, then to such only child and to the heirs of its body, and, for want of such issue, then the said premises should go to C., the word "respective" did not disjoin the title and prevent the raising of cross-remainders between such children, but the cross-remainders were to be implied from the apparent intention of the testator from the whole of the will, notwithstanding the use of the word "respective." *Watson v. Foxon*, 2 East. 36, 41.

## RESPECTIVE CLAIMS.

An assignment for the benefit of creditors "in proportion to their respective claims" means the claims which they respectively held at the time the assignment was made. *Allen v. Danielson*, 8 Atl. 705, 707, 15 R. I. 480.

## RESPECTIVE HEIRS.

"Respective heirs and assigns," as used in a will devising to the children of testator's son and to their respective heirs and assigns to be divided between them, mean more than the quantity of estate the children of such son were to take. They repel the idea of a survivorship, and show that the testator intended by this devise a benefit, not only to his son's children, but to the families of such of them as might die before the contingency happened when they were to take. *Manners v. Manners*, 20 N. J. Law (4 Har.) 142, 145.

## RESPECTIVE SERVICES.

"Respective services," as used in Act March 3, 1891, c. 517, § 9, 26 Stat. 829 [U. S. Comp. St. 1901, p. 552], providing that the marshals, criers, clerks, bailiffs, and messengers of the Circuit Court of Appeals shall be allowed the same compensation for their respective services as are allowed for similar services in the existing Circuit Courts, are used to distinguish between the different classes of officers named. *United States v. Morton* (U. S.) 65 Fed. 204, 208, 13 C. C. A. 151.

## RESPECTIVELY.

The obvious and most usual meaning of the word "respectively" is as relating to each. *Theberath v. Celluloid Mfg. Co.* (U. S.) 3 Fed. 143, 148.

"Respectively," as used in a will giving to testator's wife the use and improvement of the real and personal estate, to have and to hold until his children should "respectively" attain to the age of majority, must be taken as a word of division or separation. *Alsop v. Russell*, 38 Conn. 99, 103.

The word "respectively" means singly or severally considered; singly in the order designated; as relating to each. Hence, as used in an instruction requiring the jury to assess damages for the beneficiaries respectively, it means that such damages shall be assessed for the beneficiaries distributively; that is, the jury shall ascertain how much pecuniary injury each beneficiary singly has sustained, and then bring in a verdict in gross made up of the single sums combined. *Wolf v. Lake Erie & W. Ry. Co.*, 45 N. E. 708, 711, 55 Ohio St. 517, 36 L. R. A. 812.

"Respectively," as used in Act 1887 providing that in certain cases a child and its issue should inherit from its parents respectively, and from their lineal and collateral kindred, conveys the idea that such child shall inherit in each case from the parent or parents of whom the act has declared him to be an heir and from the kindred of such parent or parents. *Messer v. Jones*, 34 Atl. 177, 179, 88 Me. 349.

**As creating tenancy in common.**

A devise or bequest to several persons "respectively" makes the objects tenants in common. *Stetson v. Eastman*, 24 Atl. 808, 870, 84 Me. 366.

In *Pearce v. Edmeades*, 3 *Younge & C.* 252, Lord Abinger very correctly says that "it has been settled by a series of decisions that the words 'respectively in equal shares,' when not controlled by other words in the will, shall be taken to indicate the nature of an estate or interest bequeathed, and shall constitute a tenancy in common." Where a devise is to a son and daughter, and the remainder is to the children of the son and daughter "respectively," that word has the effect of dividing the devise between the son and daughter. This was the construction given by Lord Mansfield in *Pery v. White*, 2 Cowp. 777. *Doe ex dem. Patrick v. Royle*, 13 Q. B. 98, 112, 114.

**RESPITE.**

A respite is a temporary suspension of the execution of a sentence; a delay, a forbearance, or the continuation of time. *Mishler v. Commonwealth*, 62 Pa. (12 P. F. Smith) 55, 60, 1 Am. Rep. 377 (citing *Bouvier Law Dict.*, *Wharton's Law Lexicon*).

A respite is an act by which a debtor who is unable to satisfy his debts at the moment transacts with his creditors and obtains from them time or delay for the payment of the sums which he owes to them. *Civ. Code La.* 1900, art. 3084.

A respite is a privilege granted to a debtor, and always derogatory to the rights of creditors who are in a minority, by changing their contracts without their consent.

Effect should not be given to it, unless obtained under strict observance of law. *Dauphin v. Soulie (La.)* 3 Mart. (N. S.) 446, 448.

**RESPONDEAT OUSTER.**

The judgment of "respondeat ouster" is merely interlocutory, and never given either upon a demurrer or trial of a plea in bar. It is confined to a plea in abatement, put in before any plea in bar pleaded, and decided upon by demurrer in favor of the plaintiff. *Bauer v. Roth (Pa.)* 4 Rawle, 83, 91.

**RESPONDEAT SUPERIOR.**

The maxim "respondeat superior" means that a master is responsible for the acts of its servants if the particular act causing the injury be within the scope of and be done in the exercise of the servant's delegated authority. The test of the existence of the relation of master and servant is found in the exercise of authority in appointing the servant, in directing his acts, in receiving the benefits of his acts, and in reserving the power of dismissal. *Southern Ry. Co. v. Morrison*, 31 S. E. 564, 566, 105 Ga. 543.

The principle of "respondeat superior" applies only when what is complained of was done in the course of the employment. The principal is responsible, not because the servant has acted in his name or under color of his employment, but because the servant was actually engaged in and about his business and carrying out his purposes. He is then responsible, because the thing complained of, though done through the agency of another, was done by himself; and it matters not in such case whether the injury with which it is sought to charge him is the result of negligence, or of unskillful or wrongful conduct, for he must choose fit agents for the transaction of his business. But if his business is done, or is taking care of itself, and his servant, not being engaged in it, not concerned about it, but impelled by motives that are wholly personal to himself, and simply to gratify his own feeling of resentment, whether provoked or unprovoked, commits an assault upon another, when that has and can have no tendency to promote any purpose in which the principal is interested, and to promote which the servant was employed, then the wrong is the purely personal wrong of the servant, for which he alone is responsible. *Haehl v. Wabash R. Co.*, 24 S. W. 737, 740, 119 Mo. 325.

The rule of "respondeat superior," as its terms imply, belongs to the relation of superior and subordinate, and is applicable

to that relation wherever it exists, whether between principal and agent or master and servant, and to the subjects to which that relation extends, and is coextensive with it, and ceases when the relation itself ceases to exist. The test in all cases is, who conducts and supervises the particular work, the doing of which, or the careless and negligent doing of which, causes the injury or damage? *State v. Gillespie*, 63 Pac. 742, 743, 62 Kan. 469.

## RESPONDENT.

"Respondent," as the term was used in the English court of chancery, meant the person against whom a bill was exhibited. *Brower v. Nellis*, 33 N. E. 672, 673, 6 Ind. App. 323.

The party appealing is known as the "appellant," and the adverse party as the "respondent." Cr. Code N. Y. 1903, § 516.

## RESPONDENTIA.

The word "respondentia" properly applies to a loan of money upon merchandise retained on board a ship the repayment whereof is made to depend upon the safe arrival of the merchandise at the destined port. *Maitland v. The Atlantic* (U. S.) 16 Fed. Cas. 522, 523.

"Respondentia" is a contract by which a cargo, or some part thereof, is hypothecated as security for a loan, the repayment of which is dependent on maritime risks. Civ. Code. Cal. 1903, § 3036; Rev. Codes N. D. 1899, § 4783; Civ. Code S. D. 1903, § 2143.

## RESPONSIBLE.

A promise to be responsible for the contract of another is merely a guaranty, and not a suretyship. An agreement to be responsible to a landlord for the true and faithful performance of the lease on the part of the tenant is a contingent liability, and becomes absolute by showing due and unsuccessful diligence to obtain a satisfaction of the principal. *Bickel v. Auner* (Pa.) 9 Phila. 499.

## RESPONSIBLE BIDDER.

See "Lowest Responsible Bidder."

Laws 1875, c. 634, declaring that all contracts for certain work should be awarded to the lowest bona fide "responsible bidder," meant that the successful bidder should be one able to respond or to answer in accordance with what is expected or demanded. *People v. Dorsheimer* (N. Y.) 55 How. Prac. 118, 120.

"Responsible," as used in a corporate charter providing that contracts for public improvements shall be let to the lowest responsible bidder, is not limited to financial, but means ability to perform all the conditions of the contract; and the commissioner of public works may reject a bid, notwithstanding it is the lowest made and the bidder is able to give the required bond, if, in the judgment of that official after due investigation, the materials customarily used and the workmanship exhibited by the bidder in the performance of the kind of work required are poor and unsatisfactory. *People v. Kent*, 43 N. E. 760, 761, 180 Ill. 655.

Act May 23, 1874, requiring all public work and materials which are capable of being contracted for to be awarded to the "lowest responsible bidder," means the bidder lowest in amount and pecuniarily responsible. The word "responsible," as defined by Webster, is liable to accounting, accountable, answerable, able to discharge an obligation, or having an estate adequate to the payment of a debt. As used in the statute, it refers to the pecuniary ability of the bidder to answer to the undertaking, so that the interest of the city should suffer no damage. Lowest in price and responsible, in the sense of being accountable, or able to discharge the obligation so as to save the city from pecuniary loss, is what is intended by the act of 1874. *Gutta Percha Co. v. Stokely* (Pa.) 11 Phila. 219, 221.

"Responsible," as used in Act May 23, 1874 (P. L. 230), declaring that all work to be done for the city shall be performed under contract, to be given to the lowest responsible bidder, means not only pecuniary ability to make a good contract by security for its faithful performance, but means the one who, under all the circumstances, will probably best perform the work. *Commonwealth v. Mitchell*, 82 Pa. 343, 349.

"Responsible," as used in Act May 23, 1874, directing municipal officers to award certain contracts to the lowest responsible bidder, applies not to pecuniary ability only, but also to judgment and skill. The duties imposed on the city authorities are not merely ministerial, limited to ascertaining whose bid was the lowest and the pecuniary responsibility of the bidder and his sureties, but the statute calls for the exercise of duties which are deliberative and discretionary. *Interstate Vitriified Brick & Paving Co. v. City of Philadelphia*, 30 Atl. 383, 164 Pa. 477; *Reuting v. City of Titusville*, 34 Atl. 916, 918, 175 Pa. 512.

"Lowest responsible bidder," as used in Act May 23, 1874, directing municipal contracts to be awarded to the lowest responsible bidder, refers, not to pecuniary ability only, but also to judgment and skill. Doug-

lass v. Commonwealth, 108 Pa. 559, 563, 42 Leg. Int. 337.

St. 1881, p. 59, § 5, providing that the board of commissioners having charge of the erection of an insane asylum may adopt or reject any or all bids for the erection of such asylum not being responsible or satisfactory, but in determining bids for the same work or material the "lowest responsible bid" shall be taken, means, not only the bid by the one whose pecuniary ability to perform the contract is best, but the one in point of skill, ability, and integrity who is most likely to do faithful, conscientious work, and fulfill the contract promptly according to its letter and spirit. *Hoole v. Kinkead*, 16 Nev. 217, 220.

The word "responsible," in a statute authorizing the letting of contracts to the lowest responsible bidder, means something more than pecuniary ability, and refers to ability to promptly, faithfully, and conscientiously perform the work in question. *State v. Rickards*, 40 Pac. 210, 213, 16 Mont. 145, 28 L. R. A. 298, 50 Am. St. Rep. 476.

Rev. St. § 3988, provides that in the erection of schoolhouses none but the lowest responsible bid shall be accepted. Held, that the word "responsible" has a broader meaning than is involved in the pecuniary ability to make a good contract by security for its faithful performance, and where the term is applied to contracts requiring for their execution, not only pecuniary ability, but also judgment and skill, the statute imposes not merely a ministerial duty, but also duties and powers which are discretionary, and therefore, where these authorities have exercised a discretion, mandamus will not lie to compel them to modify their decision. *State v. Board of Education of Columbus*, 6 Ohio N. P. 336, 338.

In the requirement that public work should be let to the lowest responsible bidder, the term "lowest responsible bidder" means one who complies with all the requirements of the statute, specifications, etc., and not merely one whose bid is less than his competitors. *Boseker v. Wabash County Com'rs*, 88 Ind. 267.

### RESPONSIBLE PERSON.

Strictly speaking, the word "responsible" means liable, answerable, rather than able to discharge an obligation; but the word is used in the latter sense in Rev. St. c. 183, § 17, requiring a writ to be indorsed by a responsible person. *Farley v. Day*, 26 N. H. (6 Fost.) 527, 531.

"Responsible," as used in Sess. Laws Okl. art. 1, c. 29, § 1, authorizing the Governor to enter into a contract with some responsible person to do all printing, etc., for the territory, means that the Governor

shall contract with some person who is able to do the printing and discharge the obligations required of him. While the element of trust is to some extent included in the word "responsible," it is simply that there would be a reasonable expectation that the person will faithfully carry out his provisions; in other words, the contract should be let to some trustworthy person. *Leader Printing Co. v. Lowry*, 59 Pac. 242, 244, 9 Okl. 89.

"Responsible," as used in a letter or certificate given to a person who desired credit in the purchase of goods, certifying that those signing such certificate had a personal acquaintance with the person named and that they could testify to his strict adherence to truth, punctuality in contracts, and perseverance in business, and concluding with the statement, "In a word, we look upon him as an honest and 'responsible' man, and worthy of all credit," meant capability to discharge obligations. It conveyed the idea that the person referred to possessed the means of making payment. *Clopton v. Cozart*, 21 Miss. (13 Smedes & M.) 363, 368.

Where a bequest was made upon condition that within six months after the testator's decease responsible citizens of a particular town and county should pledge a certain amount for the same object, and subscriptions aggregating more than the amount, but over 700 in number, were obtained, many from men of small means, to whom a long time of payment had been given, many signed by other parties than the subscribers, and some upon condition, the condition of the will had not been complied with. *Yale College v. Runkle* (U. S.) 8 Fed. 576, 581.

### RESPONSIBILITY.

See "Criminal Responsibility."

One's "responsibility" is his liability, obligation, or bounden duty. *Crockett v. Village of Barre*, 29 Atl. 147, 66 Vt. 269 (citing Soule, Syn. [Ed. 1890] p. 337).

"The credit and responsibility of a party may attach as well to his liability as security as to his sole undertaking. When, therefore, the general term 'credit and responsibility' is used, it may include a collateral, as well as an original and exclusive, liability." *Norris v. Graham*, 33 Md. 56, 58.

### REST.

Testatrix bequeathed one-tenth of all she possessed to charitable objects, and the rest, or nine-tenths, to a certain person. It was held that the words "the rest" have reference to what remains of the property in part previously given away. In re *Switzer's Estate*, 21 Atl. 885, 142 Pa. 541.

**REST AND RESIDUE.**

The term "rest and residue," in a will, naturally includes all property of every description. *Bragaw v. Bolles*, 25 Atl. 947, 950, 51 N. J. Eq. 84.

Where a will stated, "All the rest and residue of my property, personal or mixed, wheresoever situated, I give, devise, bequeath," etc., it was held that only the personal and mixed property, and not the real estate, of the testatrix, passed under the will. In arriving at this result the court observes that, while the testatrix uses the words "All the rest and residue of my property," and the word "devise," yet, in view of the words "personal and mixed," immediately following "property," they will be held to qualify and define the kind of property intended to be disposed of by the will, and that no broader significance would be given to the words "personal and mixed" than their usual technical meaning conveyed. *Miller v. Worrall*, 48 Atl. 586, 587, 62 N. J. Eq. 776, 90 Am. St. Rep. 480.

A will recited: "After the payment of all my just debts and funeral charges, etc., I order and direct the rest and residue of all my money in bank, stocks, and bonds to be paid to E. for his own." Held, that by the words "rest and residue," etc., the testator meant all his money deposited in banks and invested in stocks and bonds, after payment of debts, funeral charges, etc. *Sanborn v. Clough*, 10 Atl. 678, 680, 64 N. H. 315.

**REST HOME.**

"Rest home," as used in a will devising property for the establishment of a rest home for worthy working girls, is a place of rest for girls who are working for small wages, where they may go and board in the country at a low price. *Sherman v. Congregational Home Missionary Soc.*, 57 N. E. 702, 176 Mass. 349.

**REST OF MY HEIRS.**

"Rest of my heirs," as used by a testator in providing that a certain legatee should share in a bequest of \$5,000 with "the rest of my heirs," does not exclude from participation under the will a son who had received a grant of land in consideration of the relinquishment of all rights of heirship to his share, where no mention of such exclusion was made in any part of the will. *Appeal of Turner*, 18 N. W. 123, 124, 52 Mich. 398.

**REST, RESIDUE, AND REMAINDER.**

All the rest, residue, and remainder, see "All."

A residuary clause in a will, directing the disposition of the "rest, residue, and remainder" of the testator's property, both

real and personal, shows a clear intent on the part of the testator to make a full and complete disposition of his property, and the clause is sufficient to pass the property included in void devises. *Gallavan v. Gallavan*, 68 N. Y. Supp. 30, 33, 57 App. Div. 320.

The words "rest, residue, and remainder," in a will first giving certain legacies and then giving the rest, residue, and remainder of testator's property, was construed to mean the property remaining after the preceding legacies had been paid. *Hoyt v. Hoyt*, 85 N. Y. 142, 150.

"Rest, residue, and remainder," as used in a will, after other bequests and devises, means such portion of the personal and mixed estate as might remain after the debts and legacies were paid, but as to the real estate is a separate devise, altogether unconnected with the legacies. *White v. Kauffman*, 5 Atl. 865, 867, 66 Md. 89.

**RESTAURANT.**

"Restaurant" has no defined meaning, and is used indiscriminately for all places where refreshments can be had, from the mere eating house or cook shop to the more common shops or stores where the chief business is vending articles of consumption and confectionery, and the furnishing of eatables to be consumed on the premises is subordinate. *Richards v. Washington Fire & Marine Ins. Co.*, 27 N. W. 586, 588, 60 Mich. 420.

**Barroom.**

A restaurant means an eating house, a place where eatables can be obtained at all reasonable hours, and not a mere drinking house. To answer its purpose it should have an eating bar or room, where persons desiring eatables can be accommodated, separate from the drinking room. In re *Liquor Licenses (Pa.)* 4 Montg. Co. Law Rep'r, 77, 79.

**As an inn.**

The term "restaurant" has no definite legal meaning. As currently understood it doubtless means only or chiefly an eating house. But not unfrequently a bar forms a part of it, and sometimes lodgings in addition; and it is also just as currently understood that in numerous resorts termed "restaurants" some lodgings for travelers are provided or alleged to be provided, so as to obtain a license for the sale of liquors, which is allowed under the excise law of this state to hotels, taverns, or inns only. *Laws N. Y.* 1857, c. 628, §§ 2, 8, 13; *Behan v. People*, 17 N. Y. 516; *Schwab v. People (N. Y.)* 4 Hun. 520. However this may be, it is sufficient to say that the term "restaurant" has no such fixed and definite meaning as necessarily to exclude its being an inn in the legal sense. It may be an inn, or it may not be.

according to its real character. The name by which it goes is of little or no account. *Carpenter v. Taylor* (N. Y.) 1 Hilt. 103, 195. And the court cannot say judicially that the place in question, though described under a videlicet as a restaurant, may not also be an inn, as previously averred. *Lewis v. Hitchcock* (U. S.) 10 Fed. 4, 6.

A restaurant is a place to which a person resorts for the temporary purpose of obtaining a meal. Such a place cannot be called an inn. *Cromwell v. Stephens* (N. Y.) 3 Abb. Prac. (N. S.) 26, 35; *People v. Jones* (N. Y.) 54 Barb. 311, 317; *Carpenter v. Taylor* (N. Y.) 1 Hilt. 193, 195; *Wintermute v. Clark*, 7 N. Y. Super. Ct. (5 Sandf.) 242, 247.

#### Lemonade stand.

An apartment where only refreshing, soft drinks are sold at a single stand and by the draught is not a "restaurant" or "eating house," within the meaning of Civil Rights Act (Rev. St. c. 38) §§ 421, 421, providing that all persons coming within the jurisdiction of the state of Illinois shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, restaurants, eating houses, etc., and giving a right of action for a violation of the act, or any provisions of the act, by denying to any citizen, regardless of color or race, the full enjoyment of any of the accommodations, etc., enumerated. A colored man has not, under said act, a right of action against the keeper of such a stand for refusing to furnish him refreshments. *Cecil v. Green*, 60 Ill. App. 61, 63.

#### Music hall.

A "restaurant" is defined by Webster to be an eating house, and such it has always been considered under the law. A concert saloon is not a restaurant proper, and a girl employed as a singer and dancer at a concert saloon is not "a servant girl at a restaurant," within the meaning of Act June 13, 1883, giving preference to certain liens for wages. *Cleveland v. O'Neill*, 4 Pa. Com. Pl. 148, 149.

#### Tobacco and cigar store.

"Restaurant," as used in an ordinance requiring persons keeping a "restaurant" to procure a license, etc., means an eating house, a place where something to eat ready prepared, or which can be readily prepared may be obtained; and the word does not include a shop which is used for the manufacture and sale of tobacco, snuff, and cigars. *State v. Hogan*, 30 N. H. (10 Fost.) 268, 272.

#### RESTAURANT KEEPER.

Chinese restaurant keeper as laborer, see "Chinese Laborers."

A "restaurant keeper" is a caterer, who keeps a place for serving meals, and pro-

vides, prepares, and cooks raw materials to suit the taste of his patrons. A person in such business is not a merchant. In *re Ah Yow* (U. S.) 59 Fed. 561, 562.

#### RESTITUTION.

"Restitution," properly speaking, is made only to a defendant whose money or property has been taken from him by the erroneous order of a court, and is not available to third parties. *First Nat. Bank v. Avery Planter Co.* (Neb.) 95 N. W. 622, 624.

"Restitution" was a remedy at common law whose object was to restore to the appellant the specified thing or its equivalent, of which he had been deprived by the enforcement of the judgment against him during the pendency of the appeal. It was not created by statute, but it was exercised by the appellate tribunal as incidental to its power to correct error; and hence the court not only reversed the erroneous judgment, but restored to the aggrieved party that which he had lost in consequence thereof. It was usually a part of the judgment of reversal, which directed "that the defendant be restored to all things which he has lost on occasion of the judgment aforesaid." *Haebler v. Myers*, 30 N. E. 963, 132 N. Y. 363, 15 L. R. A. 588, 28 Am. St. Rep. 589.

"Restitution" is not a mere right. It is ex gratia, resting in the exercise of a sound discretion; and the court will not order it where the justice of the case does not call for it, nor where the process is set aside for a mere slip. It is settled law that one voluntarily paying money with full knowledge or means of knowledge of all the facts, without any fraud having been practiced on him, cannot recover it back by reason of the payment having been made in ignorance of law. Defendant, to avoid an execution sale, made a voluntary payment in satisfaction of plaintiff's claim. An appeal from the judgment had, however, in the meantime been prosecuted, resulting in a reversal. As the payment was voluntary, defendant was not entitled to restitution. *Gould v. McFall*, 118 Pa. 455, 456, 457, 12 Atl. 336, 4 Am. St. Rep. 606.

#### RESTORE.

"Restore" signifies to bring back; to heal. *Bowman v. McLaughlin*, 45 Miss. 461, 486.

The word "restore" etymologically signifies to bring back to a former and better state; to bring back or put back to a former position or condition. Cent. Dict. As used in Act April 22, 1898, requiring corporations diverting the water of navigable streams to restore such stream to a certain depth, the meaning is that the stream must be so deepened only in case the water is diverted after the passage of the act. *Town of Hempstead*

**v. City of New York**, 65 N. Y. Supp. 14, 17, 52 App. Div. 182.

A covenant by a lessee to "redeliver or restore the property in the same condition or plight, usual wear and tear excepted," does not bind the covenantor to rebuild in case of casual destruction by fire, or impose the burden of the loss upon him. *Levey v. Dyess*, 3 Cent. Law J. 221, 222, 51 Miss. 501, 509.

#### **As permitting impairment.**

The use of the word "restore" in a statute requiring a highway over which a railroad is constructed to be restored to its former usefulness, imports that the company must so restore it that its use by the public shall not be materially interfered with, nor the highway rendered less safe or convenient to persons and teams passing over it, except so far as diminished safety and convenience necessarily result from any crossing of the highway by the railroad. *Roberts v. Chicago & N. W. R. Co.*, 35 Wis. 679, 684. See, also, *State v. New Haven & N. Co.*, 45 Conn. 331, 344; *People v. New York Cent. & H. R. R. Co.*, 74 N. Y. 302, 305; *City of Moundsville v. Ohio River R. Co.*, 16 S. E. 514, 515, 37 W. Va. 92, 20 L. R. A. 161.

#### **Previous existence implied.**

"Restore," as used in Rev. St. § 1836, providing that every corporation constructing, owning, or using the railroad shall restore every street, highway, etc., to its former state, the use of the word "restore" relates to something having a previous existence; and hence such railroad is not compelled to keep in repair highways laid out across it after it has been constructed. *Chicago, M. & St. P. Ry. Co. v. City of Milwaukee*, 72 N. W. 1118, 1123, 97 Wis. 418.

#### **Repair synonymous.**

The words "restore and repair," according to the lexicographers, are synonymous. *State v. Gibson County Com'rs*, 80 Ind. 478, 481, 41 Am. Rep. 821.

#### **As surrender and deliver.**

The word "restored," as used in Rev. St. c. 9, §§ 78, 79, declaring that, if an attaching officer has notice of a mortgagee's debt, the property shall be restored to the mortgagee, means that it shall be surrendered and delivered to the mortgagee, from whom it was detained by the officer. *Esson v. Tarbell*, 63 Mass. (9 Cush.) 407, 415.

## **RESTRAIN.**

To "restrain" is to prohibit, limit, confine, or abridge a thing. The restraint may be permanent or temporary. It may be intended to prohibit, limit, or abridge for all

time, or for a day only. The law draws no distinction in this respect. In re Charge to Grand Jury (U. S.) 62 Fed. 828, 831.

A religious Jew, who believes it is his religious duty to abstain from work on Saturday, is not "hurt, molested, or restrained" in his religious sentiments or persuasions by a statute or municipal ordinance prohibiting the sale of goods to merchants on Sunday. *Frolickstein v. City of Mobile*, 40 Ala. 725, 727.

Const. art. 2, pt. 1, providing that no subject shall be "hurt, molested, or restrained in his person or estate" for worshipping God in the manner and season most agreeable to the dictates of his own conscience, or for his religious profession or sentiments, means "prosecution by punishing any one for his religious opinions, however erroneous they may be. But an atheist is without any religion, true or false. Disbelief in the existence of any God is not a religious, but an antireligious, sentiment. If, however, it were otherwise, the rejection of a witness for such a disbelief or sentiment as incompetent would be no violation of this article of the Constitution. It is not within its words or meaning. It would not hurt, molest, or restrain him in his person, liberty, or life." *Thurston v. Whitney*, 56 Mass. (2 Cush.) 104, 110.

"Restraining," as used in a statute authorizing towns to pass by-laws restraining certain kinds of animals from going at large, meant laws for preventing or hindering animals, and not merely that the authorities might impose a penalty on the owners for allowing the animals to go at large. The provision for "restraining"—that is, for preventing or hindering—the animals from going at large, implies direct action on the animals themselves. *Whitlock v. West*, 26 Conn. 406, 413.

#### **As giving power to license.**

A city charter, authorizing the municipality to "suppress and restrain" the use of billiard tables, includes the right to pass an ordinance imposing reasonable penalties upon those who use them without permission. *Village of Winooski v. Gokey*, 49 Vt. 282, 286.

Where a penal statute of Texas prohibits disorderly houses in the state, and another statute confers on a certain city power to "suppress and restrain" such houses, and authorizes the city council to "restrain and punish" the inmates and to prevent and punish the keeping of such houses, and authorizes the adoption of summary measures for the removal or suppression, or the regulation and inspection, of all such establishments, the words "suppress, restrain, and regulate" should not be construed as giving power to license such houses. *Ex parte Gar-*



sa, 13 S. W. 779, 781, 28 Tex. App. 381, 19 Am. St. Rep. 845.

Authority of a common council to restrain and suppress certain things implies that such things shall be permitted under such restraint and regulations as in the discretion of the common council may be proper. *Smith v. City of Madison*, 7 Ind. 86, 90; *City of Burlington v. Lawrence*, 42 Iowa, 681, 682.

Where a city council is given authority to regulate and restrain beer rooms and drinking shops, the words "regulate and restrain" should be construed to confer the power to require, as a proper measure of regulation and restraint, a bond to be given an applicant for a license. In *re Schneider*, 8 Pac. 289, 290, 294, 11 Or. 288.

A corporate charter, authorizing the city to "restrain, prohibit, and suppress" tippling shops, includes the power to license such shops, and to prescribe penalties for keeping one without a license. *City of Emporia v. Volmer*, 12 Kan. 622, 630.

"Restrain," as used in a village charter, authorizing the same to pass by-laws to "suppress and restrain" all description of gaming, was not synonymous with "suppress," but contemplated the continued existence of the business, placing it within bounds, or in effect licensing it. In *re Snell*, 58 Vt. 207, 209, 1 Atl. 566, 568.

Priv. Laws 1883, c. 111, § 1936, giving a city authority to regulate and restrain tippling houses, authorized the city to impose a license tax. *State v. Stevens*, 114 N. C. 873, 19 S. E. 861.

The power to restrain or tax the sale of liquor, when given to a municipal corporation, includes the power to license the sale thereof. *Town of Mt. Carmel v. Wabash County*, 50 Ill. 69, 73.

#### As power to prescribe limits.

"Restrain," as used in an act authorizing cities to restrain and prohibit tippling houses, means to keep them within certain limits as to the number and order, as the city should deem best; the word "prohibit" meaning that the council might prohibit the existence of such houses altogether, if deemed best to do so. *State v. Fay*, 44 N. J. Law (15 Vroom) 474, 476 (citing *City of St. Louis v. Smith*, 2 Mo. 113).

#### As giving power to prohibit.

"Restrain," as used in Rev. St. § 696, providing that municipal councils shall have the power to regulate and restrain all places where spirituous liquor is sold at retail, does not include the power to entirely prohibit. *Marnaugh v. City of Orlando*, 27 South. 34, 35, 41 Fla. 433.

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"Restrain," as used in Rev. St. 1881, § 3333, empowering towns to license, regulate, or restrain the sale of intoxicating liquors, cannot be construed to confer upon towns the power to prohibit the traffic. *Steffy v. Town of Monroe City*, 35 N. E. 121, 122, 135 Ind. 466, 41 Am. St. Rep. 436.

The primary meaning of the word "restrain" is to keep from action; to repress; to prevent; to debar. The word in the statute authorizing a town to license, tax, regulate, and restrain the retailing of spirituous liquors is the legal equivalent of the verb "prohibit." *Smith v. Town of Warrior*, 12 South. 418, 419, 99 Ala. 481.

A municipal power to license, regulate, and restrain the sale of intoxicating liquors authorizes a prohibition of the bartering or giving away of liquors without license. *Vinson v. Town of Monticello*, 19 N. E. 734, 735, 118 Ind. 103.

#### As giving power to punish.

In *City of Charlton v. Barber*, 6 N. W. 528, 54 Iowa, 360, 37 Am. Rep. 209, it was thought that the power to suppress or restrain did not authorize the city to punish a keeper of a disorderly house. *City of Centerville v. Miller*, 10 N. W. 293, 294, 57 Iowa, 56.

Ogden City Charter, § 35, empowering the council by ordinance "to restrain and punish . . . prostitutes," does not authorize an ordinance making it an offense to resort to a house of ill fame for lewdness. *Ogden City v. McLaughlin*, 16 Pac. 721, 722, 5 Utah, 387.

#### As regulate.

The word "restrain" is not more comprehensive than "regulate." The former term is usually employed to signify to hold back, to curb, to hold in, to check, to prevent, or to hinder, and to that extent it may mean to govern. But the power to regulate is surely as comprehensive as to restrain, and would seem to embrace the power to employ more and different means. It no doubt embraces the power to restrain by the same methods of restraint; and, if a license may be required as a means of restraint, we have no hesitation in saying that it may be as a means of regulation. *Chicago Packing & Provision Co. v. City of Chicago*, 88 Ill. 221, 228, 30 Am. Rep. 545.

#### RESTRAINING ORDER.

See "Temporary Restraining Order."

A restraining order is distinguishable from an injunction, in that a restraining order is intended only as a restraint upon the defendant until the propriety of granting an injunction, temporary or perpetual, can be

determined; and it does no more than restrain the proceedings until such determination. Such an order is limited in its operation, and extends only to such reasonable time as may be necessary to have a hearing on an order to show cause why an injunction should not issue. *Wetzstein v. Boston & M. Consol. Copper & Silver Min. Co.*, 63 Pac. 1043, 1044, 25 Mont. 135.

Code Proc. § 1409, provides that in all cases where a final judgment or decree shall be rendered by any superior court in a cause wherein a temporary injunction or restraining order has been granted, and the party at whose instance it was granted shall appeal therefrom to the Supreme Court, such restraining order or injunction shall remain in force until the appeal was finally returned, it was held that the words "injunction and restraining order," as thus used, are synonymous, and apply only to such as are granted after notice to the adverse party, and do not apply to an emergency restraining order. The court said that the Legislature, in speaking of injunctions and restraining orders, meant to use terms which would make it proper for the court to put its order in the shape of a formal injunction, as known to the common law, if it saw fit to do so, and that, if it did not see fit to go into all the formalities required by the use of such a writ, it could accomplish the same purpose by issuing a simple order restraining the acts complained of. *State v. Lichtenberg*, 30 Pac. 716, 717, 4 Wash. 407.

A "restraining order" is an interlocutory order made by a court of equity on an application for an injunction, and as part of the motion for a preliminary injunction, by which the party is restrained pending the hearing of the motion. *Bouv. Law Dict.* It is true a restraining order is an injunction; but the term is commonly used to designate a temporary injunction, as distinguished from the injunction which is to remain in force during the pendency of the suit. *Riggins v. Thompson*, 71 S. W. 14, 15, 96 Tex. 154.

### RESTRAINT.

"Restraint," as the term is used in speaking of "restraint sufficient to invalidate a will," means "that kind of influence which is exercised by force or threats, or coercion, physical or mental, which the testator is not able to resist, or from fear, by which the testator is prevented from exercising and expressing his own judgment and desire." In *Black's Estate* (Cal.) *Myr. Prob.* 24, 31.

By "restraint" is meant the kind of control which one person exercises over another, not to confine him within certain limits, but to subject him to the general au-

thority and power of the person claiming such right. *Code Cr. Proc. Tex.* 1895, art. 172.

### As constraint.

Code, § 2076, enacts that the certificate of privy examination of a married woman to a deed of her land shall recite the execution of the deed by her without constraint from her husband. Held, that where a certificate of the examination was in the words of a statute, save that the word "restraint" was used, instead of "constraint," the deviation was immaterial, inasmuch as both words mean "to restrain." *Edmondson v. Harris*, 2 Tenn. Ch. 427, 433.

### As detention.

Where a marine policy provides that the insurer shall be liable for all loss or damage arising from the restraint and detention of princes, the words "restraint and detention" are synonymous; each meaning the effect of a superior force bearing directly on the vessel. *Richardson v. Maine Fire & Marine Ins. Co.*, 6 Mass. 102, 109, 4 Am. Dec. 92.

### RESTRAINT OF COMMERCE.

The term "restraint of commerce," as used in Act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200], making all contracts in restraint of trade or commerce among the several states unlawful and illegal, is used in its ordinary business understanding and acceptation. Among the recognized meanings of the word are prohibition of action, holding or pressing back from action, hindrance, restriction, confinement. It is a restriction or hindrance created by the application of external force. A combination by railroad employes to prevent all the railroads of a large city engaged in carrying the United States mails and in interstate commerce from carrying freight and passengers, hauling cars, and securing the services of persons other than strikers, and to induce persons to leave the service of the road, is a combination or conspiracy in restraint of trade or commerce. *United States v. Elliott* (U. S.) 64 Fed. 27, 30.

### RESTRAINT OF MARRIAGE.

A devise of land to the testator's wife "so long as she shall remain my widow" contains no condition in restraint of marriage, within the meaning of *Rev. St.* 1881, § 2567, providing: "A devise or bequest to a wife, with a condition in restraint of marriage, shall stand, but the condition shall be void"—but a mere limitation, and if she marry, or, not marrying, die, the land goes to the heirs, in the absence of devise over. *Hibbits v. Jack*, 97 Ind. 570, 573, 49 Am. Rep. 478.

**RESTRAINT OF TRADE**

See "Combination in Restraint of Trade"; "General Restraint"; "Partial Restraint."

Agreements for as conspiracy, see "Conspiracy."

"Contracts in restraint of trade" have been known and spoken of for hundreds of years, both in England and in this country; and the term includes all kinds of those contracts which in fact restrain or may restrain trade. Some of such contracts have been held void and unenforceable in the courts by reason of their restraint being unreasonable, while others have been held valid because they were not of that nature. *United States v. Trans-Missouri Freight Ass'n*, 17 Sup. Ct. 540, 554, 166 U. S. 290, 41 L. Ed. 1007.

Whatever combination has the direct and necessary effect of restricting competition is, within the meaning of the Sherman act as now interpreted, a "restraint of trade." The general meaning of the term is no longer open to inquiry. It has been passed upon carefully by the Supreme Court in *United States v. Trans-Missouri Freight Ass'n*, 166 U. S. 290, 17 Sup. Ct. 540, 41 L. Ed. 1007, and in *United States v. Joint Traffic Ass'n*, 171 U. S. 508, 558, 19 Sup. Ct. 25, 43 L. Ed. 259. *United States v. Swift & Co. (U. S.)* 122 Fed. 529, 534.

A contract in "restraint of trade" may be against the use of premises for one or another particular purpose, as that no building thereon shall be used for the sale of alcoholic liquors, or as an inn, etc. Where the restraint is of such a nature as concerns the mode of occupying or dealing with the property purchased in the way of business operations, or even the omission of all business, or certain kinds of business, or of the erection or nonerection of buildings upon property, an agreement which is fair and valid in other respects is not invalid because restraining the use to which the premises may be put. *Hodge v. Sloan*, 17 N. E. 335, 338, 107 N. Y. 244, 1 Am. St. Rep. 816.

A covenant by which the grantor agrees not to engage in a specified business for a certain length of time is held not void as a contract in restraint of trade. While it is true that, to the extent that the contract prevents the grantor from carrying on a particular trade, it deprives the community from any benefit it might derive from his entering into competition, yet the business is open to all others, and there is little danger that the public will suffer harm from lack of persons to engage in a profitable industry. Such contracts do not create monopolies. They confer no special or exclusive privilege. *Diamond Match Co. v. Roeber*, 13 N. E. 419, 422, 106 N. Y. 473, 60 Am. Rep. 464.

Laws which merely impose a tax on sales of merchandise are not in restraint of trade. *Harrison v. City of Vicksburg*, 11 Miss. (3 Smedes & M.) 581, 586, 41 Am. Dec. 633.

"There are two principal grounds on which the doctrine is founded that a contract in restraint of trade is void as against public policy. One is the injury to the public by being deprived of the restricted party's trade; the other is the injury to the party himself by being precluded from pursuing his occupation, and thus being prevented from supporting himself and his family. It is evident that both these evils occur when the contract is general not to pursue one's trade at all, or not to pursue it in that part of the country. The country suffers the loss in both cases. \* \* \* But if neither of these evils ensues, and if the contract is founded on a valid consideration and a reasonable ground of benefit to the other party, it is free from objection and may be enforced." *Newell v. Meyendorff*, 23 Pac. 333, 9 Mont. 254, 8 L. R. A. 440, 18 Am. St. Rep. 738.

Within the rule that contracts in restraint of trade are void, *United States v. Trans-Missouri Freight Ass'n*, 166 U. S. 290, 329, 17 Sup. Ct. 540, 41 L. Ed. 1007, settles absolutely the proposition that contracts in restraint of trade must absolutely, or at least unreasonably, restrain trade, and that an agreement not to engage in business for a definite length of time, but within a restricted territory, entered into in aid of or collateral to the main sale of one's property, is not included. Thus an agreement by sellers of property that they would not become engaged or interested in the business of catching or manufacturing the products of certain classes of fish along the Atlantic seaboard for a term of 20 years is not void in restraint of trade. *Fisheries Co. v. Lennen (U. S.)* 116 Fed. 217, 220.

What is meant by "restraint of trade" is well defined by Chief Justice Savage in *People v. Fisher (N. Y.)* 14 Wend. 18, 28 Am. Dec. 501. He says: "The mechanic is not obliged by law to labor for any particular price. He may say that he will not make coarse boots for less than one dollar per pair, but he has no right to say that no other mechanic shall make them for less. Should the journeymen bakers refuse to work, unless for enormous wages, which the master bakers could not afford to pay, and should they compel all journeymen in the city to stop work, the whole population must be without bread. So of journeymen tailors, or mechanics of any description. Such combinations would be productive of derangement and confusion, which certainly must be injurious to trade."

The act declaring illegal "every contract or combination, in the form of a trust or

otherwise, in restraint of trade and commerce" among the several states or with foreign nations (Act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]), applies to combinations of laborers, as well as of capitalists. A combination of workingmen to secure and compel employment of none but union men in a given business, which causes a discontinuance of labor engaged in the business of transporting goods and merchandise in transit from one state to another and to and from foreign countries, is a combination in restraint of commerce, and is unlawful, and as such within the prohibition of the act of 1890. *United States v. Workingmen's Amalgamated Council* (U. S.) 54 Fed. 994, 996, 26 L. R. A. 158.

"Contracts in restraint of trade are either general or partial. Where the contract is unlimited as to space, it is general; where it is limited as to space, it is partial, although it may be unlimited as to time. Clark, Cont. p. 447. Contracts in partial restraint of trade, if they are reasonable and founded upon a legal consideration, will be enforced." Thus a contract of a physician not to practice medicine in a certain locality is a contract in partial restraint of trade only, and is binding. *Webster v. Williams*, 34 S. W. 537, 538, 62 Ark. 101.

"Contracts in general restraint of trade" are those contracts between individuals designed to prevent competition and keep up the price of articles of utility. A contract with the object and view to suppress the supply and enhance the price of lumber in four counties of the state is a contract in general restraint of trade. *Santa Clara Valley Mill & Lumber Co. v. Hayes*, 18 Pac. 391, 392, 76 Cal. 387, 9 Am. St. Rep. 211.

Where it is a question as to private parties engaged in private pursuits, and not dealing in staple commodities of prime necessity, it is not the existence of the restriction of competition, but the reasonableness of that restriction, that is the test of the validity of contracts that are claimed to be in restraint of trade; and contracts made for a lawful purpose, which are not unreasonably injurious to the public welfare, and which impose no heavier restraint upon the trade than the interest of the favored party required, have been uniformly sustained, notwithstanding their tendency to some extent to check competition. *Dueber Watch Case Mfg. Co. v. E. Howard Watch & Clock Co.* (U. S.) 66 Fed. 637, 643, 14 C. C. A. 14.

The action of a tobacco manufacturer in refusing to sell his products to a dealer, except at prices so exorbitant as to preclude the possibility of the dealer's being able to sell such products to his customers at a profit to himself, unless such dealer agrees, as a part consideration for the sale of such products at a price which will permit the dealer

to resell the same at a profit, that he will not sell or deal in the products of the competitors of the manufacturer, does not constitute a contract, combination, or conspiracy in restraint of trade, within the meaning of Interstate Commerce Act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200], although such manufacturer sells at a reasonable price to other dealers, who have agreed not to carry the products of the manufacturer's competitors. *Whitwell v. Continental Tobacco Co.*, 125 Fed. 454, 456, 60 C. C. A. 290, 64 L. R. A. 689.

## RESTRAINTS OF KINGS OR PRINCES.

See, also, "Detainment."

The "restraints and detainment of all kings, princes, or people," within the meaning of a clause of a marine policy in reference to the liabilities of the parties in case of restraints and detainment of all kings, princes, or people, means the operations of the sovereign power by an exercise of the *vis major* in its sovereign capacity, controlling or divesting for the time the dominion or authority of the owner over the ship, and not proceedings of a mere civil nature to enforce the private rights claimed under the owner for services actually rendered in a preservation of his property. It does not include the mere detention of an officer in admiralty proceedings. *Bradlie v. Maryland Ins. Co.*, 37 U. S. (12 Pet.) 378, 402, 9 L. Ed. 1123.

The words "arrest, restraint, and detainment of all kings," in a marine policy insuring against arrest, restraint, and detainment of all kings, cover a loss caused by a vessel being unable to enter her port of destination by reason of a blockade, though she proceeds to other ports without attempting to enter the blockaded port. *Schmidt v. United Ins. Co. (N. Y.)* 1 Johns. 249, 262, 3 Am. Dec. 319.

The clause in a bill of lading, excepting liability for damages caused by "restraint of princes, rulers, or people," is held to cover the loss caused by a quarantine detention. *The Bohemia* (U. S.) 38 Fed. 756, 757.

"Arrest, restraints, and detainments of kings, princes, or people," within the meaning of a marine policy on a cargo of slaves against such arrest, restraints, and detainments, includes the issuing of a writ of habeas corpus by a judicial officer of a government within the control of which the vessel is driven by stress of weather, which results in the slaves being taken from the vessel and set at liberty. *Simpson v. Charleston Fire & Marine Ins. Co. (S. C.)* Dud. 239, 242.

Quarantine regulations, which interfere with the charter engagements of a vessel, are

within the clause of a charter of a vessel excepting liability for results caused by "restraints of princes, rulers, and people." *The Progresso* (U. S.) 50 Fed. 835, 837, 2 C. C. A. 45.

## RESTRICT.

The word "restrict," as used in Rev. St. art. 278, providing that railroad companies and other common carriers shall not limit or restrict their liability as it exists at common law by any general or special notice, or in any other manner whatever, prohibits a common carrier from so contracting as to make its liability to depend on other facts than such as would fix its liability under the settled rules of the common law. *Gulf, C. & S. F. Ry. Co. v. Trawick*, 68 Tex. 314, 319, 4 S. W. 567, 2 Am. St. Rep. 494.

## RESTRICTION.

The word "restriction" is defined to mean limitation, or confinement within bounds, and, as used in the constitutional provision that the Supreme Court shall have appellate jurisdiction under such restrictions as may be provided, applies to the amount and time within which an appeal may be taken or a writ of error sued out. *Curry v. Marvin*, 2 Fla. 411, 415.

"Restrictions," as used in Act May 1, 1852, § 1, providing that any number of natural persons not less than five "may become a body corporate, with all the rights, privileges, and powers conferred by, and subject to all the restrictions of, this act," does not mean penalties or liabilities, but simply restrains or limits the powers of the association within the bounds of the corporate powers prescribed in the act. *Strobridge & Co. v. Winchell*, 6 Ohio Dec. 761.

A provision in a will that real estate, which had therein been devised in fee, should not be sold or alienated by the devisees for a certain number of years, is properly a "restriction," though called in the will a "condition." *Fowler v. Duhme*, 42 N. E. 623, 633, 143 Ind. 248.

## RESTRICTIVE COVENANT.

A "restrictive covenant" is one running with the land. *Terry v. Westing*, 5 N. Y. Supp. 99, 100, 52 Hun. 610.

## RESTRICTIVE INDORSEMENT.

A "restrictive indorsement" precludes the person to whom it is made from transferring the instrument over to another, so as to give him a right of action either against the person imposing the restriction or against any of the preceding parties. Such an indorsement may give a bare authority to the

indorsee to receive the money from the indorser, as if it says, "Pay the money to S. for my use" or use any expressions which necessarily imply that he does not mean to transfer his interest in the bill or note, but merely to give a power to receive the money. *Drew v. Jacocks' Adm'r*, 6 N. C. 138.

"Restrictive indorsement" is a term used to designate indorsements of negotiable paper which stop the negotiability of the paper. The term applies to indorsements on a bill of exchange that it be credited to the indorser's account. Whether an indorsement be restrictive or not depends upon the intention of the parties as expressed. "Pay to J. S. only;" "Pay to A. for my account;" "Pay the contents to my use;" "Pay the contents to the use of" a third person; "Carry this bill to the credit of A.," a third person; "Pay to A. B. or order for my use;" "Pay to A. B. for my account;" "Pay the within to A. B., for the use of C. D.;" "Pay the money to my use;" "Pay the money to my servant for my use"—are specimens from cases where the indorsements have been held restrictive. *Lee v. Chillicothe Branch of State Bank* (U. S.) 15 Fed. Cas. 151, 153.

An indorsement such as "for collection" or "on account of" is a restrictive indorsement. *People's Bank v. Jefferson County Sav. Bank*, 17 South. 728, 729, 106 Ala. 524, 54 Am. St. Rep. 59.

An indorsement is restrictive which either (1) prohibits the further negotiation of the instrument, or (2) constitutes the indorsee the agent of the indorser, or (3) vests the title in the indorsee in trust, for or to the use of some other person. But the mere absence of words implying power to negotiate does not make an indorsement restrictive. *Bates' Ann. St. Ohio* 1904, § 3172h; *Negotiable Instruments Law* N. D. § 36; *Rev. Codes N. D.* 1899, § 1044.

## RESTRICTIVE PROVISIONS.

The words "restrictive provisions," as used in Code, § 3252, providing that no condition or restrictive provision of a policy of insurance shall be valid as a defense to an action on the policy, unless printed in type of a certain size or written with pen and ink, are not used in a narrow or technical sense, but are intended to cover any clause, expression, or provision, included in or appended to a policy, whereby the effect of the principal and essential part of the policy is modified, changed, restricted, or otherwise affected, so as to materially influence the rights and liabilities of the insured thereunder, and to make such clause or provision of no effect as a defense, unless it be printed in type of the size prescribed, and therefore it is of no consequence whether the language used be in the form of a condition, an agreement, or a restrictive provi-

sion. *National Life Ass'n v. Berkeley*, 34 S. E. 469, 97 Va. 571.

## RESULT.

### See "Direct Result."

The word "result" is in common use by all classes—the lettered, as well as the unlettered. The lettered know that the word means that which springs or rebounds back from some pre-existing thing. The unlettered know from its daily practical application that it means the same thing—as the floods in the rivers are the result of rains or the melting of snow; the earth is parched as the result of heat and drought; a person lost his life as the result of a fall; a building fell as the result of fire. Indeed, the meaning of the word is so generally understood by all classes that a person who failed to readily comprehend its meaning, though not scholar enough to express it classically, should be excluded from a jury box on the ground of incompetency. Thus an instruction that defendant was not liable unless the building fell as a result of fire was equivalent to a request for an instruction that defendant was not liable unless the building fell from fire existing previously in time to the fall. *Trans-Atlantic Fire Ins. Co. v. Bamberger* (Ky.) 11 S. W. 595, 596.

"It is necessary," says the court, "to distinguish somewhat between the term 'result,' as applied to an injury, and 'results,' as applied to the proximate consequences of the injury." *Fisher v. Western Union Tel. Co.*, 96 N. W. 545, 548, 119 Wis. 146.

As used in a statement that, where a contractor submits himself to the direction of his employer as to the details of the work, fulfilling his wishes, not merely as to the result, but also as to all the means by which that result is to be obtained, the contractor becomes a servant in respect to that work, "result" means a production or product of some sort, and not a service. Thus, one may contract to produce a house, a ship, or a locomotive, and such ship, house, or locomotive produced is the result; but plowing a field, mowing a lawn, or driving a carriage or horse car for one trip or many trips a day, is not a result, in the sense in which the word is used. Such acts will not result in a product. They are simply service. *Jensen v. Barbour*, 39 Pac. 906, 908, 15 Mont. 582.

## RESULTING POWERS.

It is important to observe that Congress has often exercised, without question, powers that are not expressly given nor ancillary to any single enumerated power. Powers thus exercised are what are called by Judge Story, in his Commentaries on the Constitution, "resulting powers," arising from the ag-

gregate powers of the government. He instances the right to sue and make contracts. Many others might be given. The oath required by law from officers of the government is one. So is building a capitol or a presidential mansion, and so, also, is the Penal Code. It is not indispensable to the existence of any power of the federal government that it can be found specified in the words of the Constitution, or to be clearly and undoubtedly transferable to any specified power. Its existence may be deduced fairly from one or more specified powers. It is allowable to group together any number of them, and infer from them all that the power claimed has been conferred. *Legal Tender Cases*, 79 U. S. (12 Wall.) 457, 535, 20 L. Ed. 287.

## RESULTING TRUST.

Resulting trusts are defined in 1 Perry, Trusts, § 124, as a class of trusts which result in law from the acts of the parties, whether they are intended to create a trust or not, and they are aptly designated as resulting trusts. A resulting trust arises where the purchaser of an estate pays the purchase money and takes the title in the name of a third person, and also where a person standing in a fiduciary relation uses fiduciary funds to purchase the property, and takes the title thereto in his own name. *Thum v. Wolstenholme*, 61 Pac. 537, 540, 21 Utah, 446; *Gottstein v. Wist*, 61 Pac. 715, 718, 22 Wash. 581; *Kaphan v. Toney* (Tenn.) 58 S. W. 909, 913; *Gabert v. Olcott* (Tex.) 23 S. W. 985, 987, 86 Tex. 121 (citing 1 Perry, Trusts, § 24); *Hodgson v. Fowler*, 43 Pac. 462, 463, 7 Colo. App. 378; *Pollard v. McKenney* (Neb.) 96 N. W. 679, 681.

A resulting trust is defined by Pomeroy to be such as arises when the legal estate is disposed of or acquired, not fraudulently or in the violation of any fiduciary duty, but the intent and theory of equity appears or is assumed from the terms of the disposition, or from the accompanying facts and circumstances, that the beneficial interest is not to go with the legal title. In such a case a trust results in favor of the person for whom the equitable interest is thus assumed to have been intended, and which equity declares to be the real owner. *Sanders v. Steele*, 26 South. 882, 885, 124 Ala. 415 (citing *Lee v. Browder*, 51 Ala. 288; *Lehman v. Lewis*, 62 Ala. 129; *O'Bear Jewelry Co. v. Volfer*, 106 Ala. 205, 17 South. 525, 28 L. R. A. 707, 54 Am. St. Rep. 31); *Lewis v. Lindley*, 48 Pac. 765, 771, 19 Mont. 422; *Springer v. Young*, 12 Pac. 400, 402, 14 Or. 280; *Tenney v. Simpson*, 15 Pac. 187, 196, 37 Kan. 353.

A resulting trust is a trust that the courts presume to arise out of the transaction of parties, as, if one man pays the purchase money for an estate, and the deed is taken in the name of another, courts presume in

such a case that the trust is intended for the person who pays the money. *Burks v. Burks*, 66 Tenn. (7 Baxt.) 353, 356; *Malin v. Malin* (N. Y.) 1 Wend. 625, 649; *Keller v. Kunkel*, 46 Md. 565, 569, 570; *Bates v. Kelly*, 80 Ala. 142, 145; *Tiedeman v. Imperial Fertilizer Co.*, 34 S. E. 999, 1000, 109 Ga. 661.

Resulting trusts arise by construction of law and the acts of the parties, based on confidence, which equity will enforce. *Runnels v. Jackson*, 2 Miss. (1 How.) 358, 360.

A resulting trust is a purely equitable interest, and may be destroyed and cut off as against all bona fide purchasers or mortgagees from the trustee for a valuable consideration and without notice. *Murphy v. Clayton*, 45 Pac. 267, 269, 113 Cal. 153.

A resulting trust is raised only from fraud in obtaining title, or from payment of the purchase money when the title is acquired. *Brower v. Brower*, 17 Montg. Co. Rep'r (Pa.) 39, 42; *Bickel's Appeal*, 86 Pa. 204, 211 (citing *Barnet v. Gougherty*, 32 Pa. [8 Casey] 371); *Watson v. Watson* (Pa.) 47 Atl. 1096, 1100.

When the evidence shows the payment of the purchase money by one, and the conveyance of the title thereby purchased to another, between parties who are strangers to each other, the law so construes these two facts as to make them constitute a resulting trust. If the legal title is taken in the name of the wife, such implication does not arise; it being the presumption that the same was intended as an advancement. Such presumption may, however, be rebutted by parol testimony, if the same is clear and satisfactory. *Dorman v. Dorman*, 58 N. E. 235, 236, 187 Ill. 154, 79 Am. St. Rep. 210; *Malin v. Malin* (N. Y.) 1 Wend. 625, 649.

There is a resulting trust where one buys property and pays the purchase money with his own funds, and has the title placed in the name of another, in favor of him who has so paid the purchase money, and he is regarded as the actual owner of the property bought. Such a trust is a mere creature of equity, founded on presumptive intention, and designed to carry that intention into effect. If it is not the intention that the estate shall vest in him who pays the purchase price, then no resulting trust in his favor attaches to the property, and there may be a resulting trust as to a part of the property, or a part of the interest therein, and not as to the residue, according to the intent existing in each particular case. *Cook v. Patrick*, 26 N. E. 658, 659, 135 Ill. 499, 11 L. R. A. 573.

Whenever the purchase money for land is paid by one person, and the conveyance is to another, or whenever the consideration for the conveyance, if other than money, moves from a person who is not the grantee, the law, unless the person stands in the rela-

tion of husband or parent to the grantee, so that the conveyance may be presumed to be an advancement, raises an implied trust, ordinarily termed a "resulting trust," in favor of him who pays the purchase money, or from whom the consideration proceeds. The principle on which the rule is based is that the beneficial estate follows the consideration, and attaches to the person from whom it comes. The principle itself is founded in the natural presumption that he who supplies the purchase money or other consideration intends the purchase for his own benefit, and not for the benefit of a stranger, and that the conveyance is taken to the grantee as a matter of convenience to the purchaser. *Aborn v. Searles*, 27 Atl. 796, 18 R. I. 357.

"The resulting trust not within the statute of frauds, and which may be shown without writing, is when the purchase is made with the proper moneys of the cestui que trust, and the deed not taken in his name. The trust results from the original transaction at the time it takes place, and at no other time, and is founded on the actual payment of money, and on no other ground." *Woodside v. Hewel*, 42 Pac. 152, 153, 109 Cal. 481.

Where two persons together advance the price, and title is taken in the name of one of them, a trust results in favor of the other to such proportion of the property as is equal to the proportion of the consideration contributed. The trust must arise, if at all, at the time of the execution of the conveyance, and when the legal title vests in the grantee. It is not created by contract, but by implication of law apart from the contract. When the two facts, to wit, payment of the purchase money by one, and conveyance of the title thereby purchased to another, are found to exist, then the law so construes these two facts as to make them constitute a resulting trust, and for this reason such a trust is said to arise by operation of law. *Van Buskirk v. Van Buskirk*, 35 N. E. 383, 384, 148 Ill. 9.

A resulting trust is such a one as arises where the legal estate in property is transferred or conveyed, but it is inferred from the terms of the disposition, or from the accompanying facts and circumstances, that the beneficial interest is not to pass to, or be enjoyed with, the legal title. Familiar examples of this character of trust are cases where property is conveyed by will or deed upon trusts, but no trusts are in fact declared, or where the trust, although in fact declared, has failed, or, where attempted to be declared, the declaration of trust is so imperfect that it cannot be carried into effect. Another example of a resulting trust occurs where a conveyance is made to A., the price or consideration being paid by B., whereupon, according to well-settled principles in equity, A. takes the title in trust for

**B. Fulton v. Jansen**, 34 Pac. 331, 332, 99 Cal. 587; **Williams v. Williams**, 78 N. W. 792, 793, 108 Iowa, 91.

A resulting trust does not arise out of the contract of the parties, but it is an implication of law from the existence of facts necessary to sustain the implication. It cannot be created by contract, but exists, if at all, independent of any contract. **Monson v. Hutchin**, 62 N. E. 788, 194 Ill. 431.

It is well settled that, when one person becomes invested with the title to real property under circumstances which in equity obligate him to hold the title and to exercise his ownership for the benefit of another, a trust arises in favor of the latter person, commensurate with his interest in the subject-matter. Such trusts are known as implied or resulting trusts, and are not prohibited by statute. **Western Union Tel. Co. v. Shepard**, 62 N. E. 154, 157, 169 N. Y. 170, 58 L. R. A. 115.

Resulting trusts have been considered, since the decision of Lord Hardwicke in **Lloyd v. Spillet**, 2 Atk. 148, to fall naturally within one of three classes, and the distinction has frequently been recognized by our courts. One class arises when title to lands purchased in whole or in part with the money of another is taken in the name of another. Another class of such trusts arises when a trust is declared in respect to a portion of the title to lands, and nothing is declared with respect to the other portion. The remaining class is that where title to lands is acquired by fraud. **Aller v. Crouter**, 54 Atl. 426, 429, 64 N. J. Eq. 381.

A trust may arise in different ways. If one uses the funds of another for the purchase of property, taking title thereto in his own name, as a general rule it will be held that the purchaser holds the property thus acquired in trust for the benefit of the owner of the funds. Such is known as a resulting trust, which is sometimes spoken of as an equitable lien; and, while it is, the lien extends no further than the property acquired with the money of the other. **G. Ober & Sons Co. v. Cochran**, 45 S. E. 382, 386, 118 Ga. 396.

A resulting trust rests on presumed intention, and is founded on the equitable principle that the beneficial ownership follows the consideration. The trust results to the party from whom the consideration moves, before or at the time of the purchase or of the making of the conveyance. Generally, in the absence of circumstances showing any contrary intention, a trust arises whenever the purchase money of land is paid by one person, and the title taken in the name of another, whether the purchase is made by an advancer of the purchase money personally or by the grantee. Though a resulting trust arises where an agent, on a parol undertak-

ing, purchases land for the benefit, and pays for it with the money, of his principal, and takes a deed for it in his own name, if, nevertheless, in such case, the agent pays his money for the land, not having any funds of the principal in hand, and not as a loan, a trust is not created, notwithstanding the principal may subsequently reimburse the agent for the amount expended. The foundation of a resulting trust being the payment of the consideration price by the person claiming to be the beneficial owner, if the party who sets it up has made no payment, he cannot show by parol evidence that the purchase was made on his account. There must be in the transaction something more than the breach of a parol agreement. In order to constitute a resulting trust arising from the fact that the purchase money of land is paid by one person, and the title taken in the name of another, payment in money is not essential, but it may be made in labor, property, securities, credit, or anything of value. The mode, time, and form in which the consideration was rendered are immaterial, provided they are in pursuance of a contract of purchase. **Bibb v. Hunter**, 79 Ala. 351, 356.

#### **Express trust distinguished.**

See, also, "Express Trust."

A resulting trust is a trust which is raised or created by the act or construction of law. It differs from an express trust, which is a trust created by act of the parties. **Lovett v. Taylor**, 34 Atl. 896, 899, 54 N. J. Eq. 311.

A resulting trust does not arise out of the contract of the parties, but is an implication of law from the existence of facts necessary to justify the implication. It cannot be created by contract, but exists, if at all, independent of any contract. **Monson v. Hutchin**, 62 N. E. 788, 194 Ill. 431.

#### **As extending to part of tract.**

Where one furnishes only a part of the amount paid for realty taken in the name of another, no trust arises, unless his part is some definite portion of the whole, and is paid for some aliquot part thereof; and there must be no uncertainty as to the proportion of the property to which the trust extends. **O'Donnell v. White**, 29 Atl. 769, 770, 18 R. I. 659.

#### **As founded on presumed intention.**

The doctrine of resulting trust from payment of the consideration money has its origin in the natural presumption that he who supplies the money means the purchase to be for his benefit, rather than that of another. It is founded upon a presumed intention of the parties. A trust is never presumed or implied unless, taking all the circumstances, that is a fair and reasonable interpretation



of the acts of the parties. *Klamp v. Klamp*, 70 N. W. 525, 527, 51 Neb. 17 (citing 2 Story, Bq. Jur. § 1195).

A resulting trust arises in favor of one who pays the purchase money of an estate and takes title in the name of another, because of the presumption that he who pays for a thing intends a beneficial interest therein for himself. But this presumption cannot arise when a contrary intent appears, since it is based on absence of evidence of such intent. *Manning v. Screven*, 34 S. E. 22, 24, 56 S. C. 78

A resulting trust has its origin solely in the facts that the purchase money of land is paid or advanced by one person at the time of the purchase, and the title is taken in the name of the other. It is founded on the presumption that he who pays the purchase money intends to become the owner of the land, and therefore presupposes the authorized use of the money of him who asserts the trust, and is implied independently of any fraud, or of any fiduciary relation between the person who pays the money, and him in whose name the title is taken, although the mere existence of such a relation will not prevent the implication of such a trust. *Long v. King*, 23 South. 534, 535, 117 Ala. 423.

A resulting trust, though by no means an express one, because not declared in the deed out of which it arises, rests upon a presumed intention, from which results the rule that the purchase money must have been paid at the time of the purchase, whereas a constructive trust is supported by no such presumption. *Robinson v. Pierce*, 24 South. 984, 991, 118 Ala. 273, 45 L. R. A. 66, 72 Am. St. Rep. 160.

A resulting trust is one which is presumed to exist, owing to a supposed intention of the parties to create a trust. The books sometimes say that the law presumes an intention, but this is a legal fiction, and the real foundation of the resulting trust is the natural equity springing into life through fraudulent or inequitable advantages obtained by means of agreement, express or implied. *Kayser v. Maugham*, 6 Pac. 803, 800, 8 Colo. 232.

Trusts resulting from the operation or construction of law are divided into two classes: First, those which are said to result by operation or presumption of law from certain acts or relations of parties from which an intention to create a trust is supposed to exist, and which are called resulting or presumptive trusts; second, those which exist by construction of law alone, without any actual or supposed intention that a trust should be created, but merely to assert the rights of parties or baffle fraud. *Williams v. Williams*, 78 N. W. 792, 793, 108 Iowa, 91.

**As arising at time of purchase.**

A trust is ordinarily presumed to result in favor of one paying the purchase money for land, as against the grantee named in the deed. *In re Davis* (U. S.) 112 Fed. 129, 130.

A resulting trust must arise, if at all, at the time of the execution of the conveyance. *Dick v. Dick*, 50 N. E. 142, 143, 172 Ill. 578.

A resulting trust must grow out of the facts existing at the time of the conveyance, and cannot grow out of a mere parol agreement that the purchase will be for the benefit of another. *Hunt v. Friedman*, 63 Cal. 510, 513.

The payment of the purchase money at the time title is obtained will create a resulting trust, but neither a promise to pay nor after payment is sufficient. *Motherwell v. Taylor*, 10 Pac. 304, 305, 2 Idaho (Hasb.) 254.

A resulting trust arises by operation of law from contemporaneous circumstances which give the legal and equitable titles different directions. It must therefore arise at the instant the deed is taken and the legal title is vested in the grantee, and the situation of the transaction when the title passes is to be looked to, and not the situation preceding or following that time. *Whitley v. Ogle*, 20 Atl. 284, 285, 47 N. J. Eq. (2 Dick.) 67.

A resulting trust arises where one of two parties advances the purchase money for land, and the other takes the title, and it must arise at the time when the conveyance is executed. *Ellis v. Hill*, 44 N. E. 858, 859, 162 Ill. 557.

A resulting trust does not arise in favor of one furnishing money for the purchase of property, the title to which is taken in the name of another, unless such payments are coincident with the purchase and the deed. The trust, if at all, must arise from the circumstances and state of the parties as they existed at the time the title was acquired, and the money was appropriated and used in the purchase thereof. Money furnished for the purpose of making payments on lands theretofore acquired under a contract cannot create a resulting trust in favor of the person so loaning the money. Neither can a resulting trust arise in real estate by reason of the fact that money is loaned or used for the erection of buildings on the property. Therefore, if a corporation loans money to one of its officers to be used in paying for land previously purchased by him, and for the erection of buildings thereon for the use of the corporation in its business, no resulting trust in the property is created in favor of the corporation. *Pain v. Farson*, 53 N. E. 579, 582, 179 Ill. 180.

A resulting trust in favor of a purchaser can only arise where the party claiming the

benefit of the trust has furnished the consideration money, or some aliquot part thereof, as part of the original transaction, and he must have occupied such position then as to entitle him to be substituted for the grantee. *Pickler v. Pickler*, 54 N. E. 311, 312, 180 Ill. 168.

There is no resulting trust in favor of the wife in land purchased by the husband on his credit, though part of the purchase price was paid with money subsequently borrowed from her. *Woodside v. Hewel*, 42 Pac. 152, 153, 109 Cal. 481.

Where one person purchases real property, and takes in his own name a conveyance of the legal title, when the purchase money or consideration is paid by another, a trust immediately arises in favor of him who paid the purchase price, constituting him the beneficiary, and the holder of the legal title the trustee. *Chambers v. Emery*, 45 Pac. 192, 194, 13 Utah, 374.

Where the president and cashier of the bank voluntarily converted the funds and assets of the bank, and invested them in mill machinery, fixtures, real estate, and appurtenances of a corporation of which they were at the time the president and secretary, such corporation holds such property impressed with a trust in favor of the bank to the extent of the bank funds and assets that can be traced into such corporate property, unless such corporation can show that it acquired such funds and assets in good faith and for a valuable consideration. *Farmers' & Traders' Bank v. Kimball Milling Co.*, 47 N. W. 402, 403, 1 S. D. 388, 36 Am. St. Rep. 739.

A resulting trust is raised only from fraud in obtaining the title, or from payment of the purchase money when the title is acquired. *Stafford v. Wheeler*, 93 Pa. 462, 467, 468 (citing *Barnet v. Dougherty*, 32 Pa. [8 Casey] 371, 372).

A resulting trust is raised only from fraud in obtaining the title, or from payment of the purchase money when the title is acquired. Payment of the purchase money subsequently is not sufficient. *McCloskey v. McCloskey*, 55 Atl. 180, 181, 205 Pa. 491.

A resulting trust must arise at the time of the execution of the conveyance. It results from the original transaction at the time it takes place, and at no other time, and it is founded on the actual payment of money, and on no other ground. *McDevitt v. Frantz*, 85 Va. 740, 751, 8 S. E. 642.

A resulting trust in lands depends on the fact that the money of the person claiming a trust was used in the purchase, and it cannot be raised by any future payment or tender. The trust results from the original transaction at the time it takes place, and at

no other time. Three plaintiffs entered into an agreement with the defendant that the four should buy certain lands in equal shares. The defendant took a bond for a deed securing two-fifths to himself, and one-fifth to each of the plaintiffs, but it did not appear that the money to buy the land was contributed equally. The plaintiffs sought a decree that defendant held one-twentieth in trust for each of the plaintiffs. Held, that there was no trust. *Bailey v. Hemenway*, 17 N. E. 551, 645, 147 Mass. 326.

#### Right to pursue trust fund.

Where a trustee invests trust funds held by him in a fiduciary capacity in land or other property, and takes the title in his own name or in the name of a stranger, with notice of the trust, so long as such funds can be identified by being traced into specific property the cestui que trust can claim the entire property, if paid for exclusively with his money, or he can assert an equity to reimbursement pro tanto for his moneys so misapplied by the trustee. Though often classified in the books as a resulting trust, such a designation is not technically or strictly accurate. It is a trust implied or created by law, originating in the right to pursue a trust fund into a new investment in violation of the duties of the trustee. *Whaley v. Whaley*, 71 Ala. 159, 161.

A resulting trust is created by operation of law, and only because of being created by operation of law does it constitute an exception to the rule that a trust in land cannot be created or declared except in writing. A very common case of a resulting trust is where one holding a fund under an express trust, either with the duty of holding the fund intact, or with power of discretionary investment, invests the trust fund in his own name; and the law raises a resulting trust in the acquired property because of the ownership of the fund, notwithstanding it was originally held under an express trust. *Withnell v. Withnell* (Neb.) 96 N. W. 221, 224.

#### As arising from voluntary conveyance.

A voluntary conveyance cannot be held to create a resulting trust for the grantor. *Benson v. Dempster*, 55 N. E. 651, 654, 183 Ill. 297 (citing *Stevenson v. Crapnell*, 114 Ill. 19, 28 N. E. 379).

## RESUME.

The word "resume," as used in reference to the act of taking by the public of a road from its owners being a resumption, is used as an allusion to one of the rules of public right to take private property, whether held in fee or otherwise, and not as a suggestion that the owner's title is exceptionally de-

feasible. In re Opinion of the Justices, 33 Atl. 1076, 1080, 66 N. H. 629.

"Resume work," as used in Rev. St. U. S. § 2324 [U. S. Comp. St. 1901, p. 1426], providing that mining claims shall be open to relocation after the expiration of a certain time if the locator has not resumed work on the claim before such location, means to actually begin work anew, with the bona fide intention of prosecuting such work. *McCormick v. Baldwin*, 37 Pac. 903, 904, 104 Cal. 227.

"Resume," as used in a statute requiring proof, as a condition precedent to the appointment of a receiver, that an insolvent corporation will not be able to resume its business with safety to the public and advantage to its stockholders within a short time, predicates some interruption to the insolvent's business, but it does not contemplate an entire suspension of all its workings. *Ft. Wayne Electric Corp. v. Franklin Electric Light Co.*, 41 Atl. 217, 219, 57 N. J. Eq. 16.

## RESURVEY.

"Resurvey" means to survey again, and applies to land which has been surveyed once. *Trudeau v. Town of Sheldon*, 20 Atl. 161, 163, 62 Vt. 198.

### As relocate.

"Resurvey," as used in Rev. Laws, § 2920, providing that, if the terminations and boundaries of a highway cannot be ascertained, the selectmen may resurvey the highway, means to relocate it, and the lines may be where originally located, or may be elsewhere. To say that the word "resurvey" means nothing more than to locate the lines of the boundaries in their original location is to give the word too narrow a construction. *Culver v. Town of Fair Haven*, 31 Atl. 143, 144, 67 Vt. 163.

## RETAIL

House for, see "House for Retailing Spirituous Liquors."

The word "retail" means to sell in small quantities, and not in gross. *State v. Cassey* (S. O.) 1 Rich. Law, 90, 91; *State v. Lowenhaught*, 79 Tenn. (11 Lea) 13, 14; *Bridges v. State*, 37 Ark. 224, 225; *Koenig v. State* (Tex.) 26 S. W. 835, 839, 47 Am. St. Rep. 35; *McArthur v. State*, 69 Ga. 444, 445; *State v. Hawkins*, 91 N. C. 626, 627; *Harris v. Intendant and Council of Livingston*, 28 Ala. 577, 579.

"Retail," as used in Act Sept. 18, 1885, permitting the manufacture and sale of domestic wines or cider, but providing that

such wines and cider shall not be sold in barrooms by retail, means the sale of such liquor in quantities less than one quart. *Beiser v. State*, 4 S. E. 257, 258, 79 Ga. 326.

Selling, bartering, or loaning liquors in quantities of less than five gallons shall be deemed retailing. Ky. St. 1903, § 4199.

### Division of larger quantities.

A sale of 10 gallons of whisky drawn from a cask containing a much larger quantity was a sale at retail, and not at wholesale. A sale in such quantity according to the common and popular import of the term wholesale is not a sale at wholesale. The sale here involves the idea of breaking up, dividing, and parceling out the goods which are held by the seller in large parcels or packages, in which he has purchased, and excludes the idea of selling a thing whole and unbroken. *Tripp v. Hennessy*, 10 R. I. 129, 131.

The term "retail liquor bills," in Sess. Laws 1850, c. 139, § 5, providing that no suit for retail liquor bills shall be entertained by any courts of this state, includes a bill incurred for spirituous liquors in six or ten gallon kegs, consisting of brandy, gin, etc., and all amounting to the sum of only \$62. The term "wholesale" implies the selling in unbroken parcels, as by the barrel, pipe, or cask; while the term "retail" implies the cutting or dividing up of such pieces, parcels, or casks into smaller quantities, and selling to customers in such manner. *Gorsuth v. Butterfield*, 2 Wis. 237, 243.

### Sale for profit.

"Retail" means to dispose of in small quantities, either for or without a consideration, and may be a distribution of a whole into parcels. *Markle v. Town of Akron*, 14 Ohio, 586, 592.

To constitute the offense of carrying on the business of a retail liquor dealer without having paid the special tax, the accused must have procured the liquor sold with intent to retail it, or, having it on hand, formed the intent to retail it, and carried out that intent by one or more acts. It is not enough that, having the liquor on hand for his own use, he let others have it as a matter of kindness or liberal feeling, although he took money from them for the accommodation. *United States v. Bonham* (U. S.) 31 Fed. 808, 809.

### Sales to club members.

"Sale by retail" means sale to any member of the general public when they come to buy, and is so used in laws of New York requiring a license for the sale of liquor by retail, and does not apply to sales to members of a club. *People v. Platt*, 36 N. Y. Supp. 531, 536, 92 Hun, 349.

The clubroom of a German turnverein, maintained in connection with a hall for the usual purposes of such a society, and equipped with periodicals, billiard tables, and card tables for the free use of members and their guests, where intoxicants are furnished, without profit, to members only, for fees which are turned into the general fund and used to keep up the stock of liquors, is not a "house for retailing spirituous liquors," within Pen. Code, art. 355, prohibiting card playing in such a place. *Koenig v. State*, 26 S. W. 835, 837, 33 Tex. Cr. k. 367, 47 Am. St. Rep. 35.

#### **Sale of original package.**

Under Laws 1886, c. 272, forbidding any person, unless a registered pharmacist, to conduct a store for retailing, dispensing, or compounding medicines or poisons, the word "retailing" does not necessarily involve the opening of the ultimate original package and dividing its contents, in connection with the ordinary dispensing and compounding of medicines. The word differs radically in meaning from "dispensing and compounding." To retail is differentiated from to wholesale, and the selling of one bottle is a clear sale at retail, and it makes no difference that it is in the original package. *People v. Abraham*, 44 N. Y. Supp. 1077, 1079, 16 App. Div. 58.

#### **Single sale.**

"Retail spirituous liquors," as used in Acts 1801 (2 Faust, 400), making those who "retail spirituous liquors" without a license subject to a penalty of \$100, means to vend liquor in small quantities for gain. A single act of selling may constitute a violation of the statute. *State v. Mooty* (S. C.) 3 Hill, 187, 189.

#### **RETAIL DEALER.**

A sugar planter who keeps a store on his plantation is a retail dealer, where, though the bulk of the sales are made to employes on the plantation, yet other persons are not forbidden to purchase from the store, and is liable to pay a license under Act 4 Ex. Sess. 1881, imposing a license on every business of selling at retail. *Thibaut v. Dymond*, 37 La. Ann. 902, 903.

#### **Vegetable dealer.**

A vegetable dealer in the markets undoubtedly conducts a "business of selling at retail," within the license act of 1881, imposing a license upon every business of selling at retail. *State v. Cendo*, 38 La. Ann. 828, 829.

#### **RETAIL LIQUOR DEALER.**

A retail dealer in spirituous liquors is one who sells by small quantities, to suit

customers, liquors which are bought in larger amounts generally. *Webb v. State*, 79 Tenn. (11 Lea) 662, 665; *State v. Lowenhaupt*, 79 Tenn. (11 Lea) 13, 14.

The term "retail liquor dealer," within the meaning of Rev. St. U. S. §§ 3242, 3244 [U. S. Comp. St. 1901, pp. 2094, 2096], requiring the payment of a special tax by every one who carries on the business of a retail liquor dealer, and declaring that every person who sells or offers for sale foreign or domestic spirits or wines in quantities less than five wine gallons at the same time shall be regarded as a retail dealer in liquors, does not apply to one selling an occasional drink of spirits out of a bottle at a place outside a barroom, without intending to defraud the national revenues. *United States v. Jackson* (U. S.) 26 Fed. Cas. 556.

Under the express provisions of Acts 1897, p. 253, a wholesale dealer in liquors, within the meaning of the term as used in such statute relating to the licensing of liquor dealers, includes any person who sells in quantities of five gallons or more; a retail dealer being one who sells to consumers in quantities less than five gallons at a time. *Daniels v. State*, 50 N. E. 74, 79, 150 Ind. 348.

A retail dealer in spirituous liquors is one who sells to persons or customers for purposes of consumption. The distinction between wholesale and retail dealers does not depend on the quantity sold by either. *State v. Tarver*, 79 Tenn. (11 Lea) 658, 660.

"Retail dealer," as used in the Code, imposing a tax on those who sell goods and liquors at retail, means any one who sells goods in small quantities directly to the consumer, and would include a planter or farmer who sold only to his employes. *Thibaut v. Kearney*, 12 South. 139, 140, 45 La. Ann. 149, 18 L. R. A. 596.

A retail liquor dealer is defined as one who sells in less quantities than a quart (4 Revenue Act, § 112), but one act of selling does not constitute engaging in or carrying on the business, unless an intention to do so is concurrent with the selling. *Bryant v. State*, 46 Ala. 302, 303.

The term "retail liquor dealer," within the meaning of a statute prohibiting the business of retailing spirituous liquors without a revenue license, was construed to include a person who on a few occasions sold case whisky in quantities less than a quart. *Lemons v. State*, 50 Ala. 130, 132.

Retail dealers of spirituous and intoxicating liquors and brewed, malt, and fermented liquors shall be held and deemed to include all persons who sell any of such liquors by the drink, and in quantities of three

gallons or less, or one dozen quart bottles or less, at any one time, to any one person. Comp. Laws Mich. 1897, § 5380.

A "retail liquor dealer," as used in the act relating to licenses for the sale of liquor, means one dealing in malt, spirituous, or vinous liquors in quantities of not more than 4½ gallons to any one person at any one time. Comp. Laws N. M. 1897, § 4134.

#### Social clubs.

Under Act March 1, 1879, c. 125, § 1, 20 Stat. 333 [U. S. Comp. St. 1901, p. 2101], defining a retail dealer in malt liquors to be one who sells or offers for sale in less quantities than five gallons at one time, but who does not deal in spirituous liquors, an incorporated beneficial association which sells as such to its members, for five cents each, tickets entitling the holder to a glass of beer or other refreshment, or to participate in some amusement, at his option, who upon presentation of the ticket, or any number he may so see fit to purchase, obtains from the association beer therefor, which beer is the property of the corporation, as such, is a retail dealer in malt liquors, within the statute. *United States v. Giller* (U. S.) 54 Fed. 656.

A club or association of persons, not incorporated, combining together to promote social and literary objects, which bought lager beer at wholesale, permitting the members to take beer at the rooms of the club on giving as many checks as they received glasses of beer, which checks cost five cents each—the price being intended to cover the cost of the beer, though there was sometimes a small profit—was a "retail dealer in malt liquors," within the meaning of the law of the United States requiring such dealers to be licensed. *United States v. Wittig* (U. S.) 28 Fed. Cas. 744, 745.

Acts 1881, c. 149, § 4, authorizing a taxation of retail liquor dealers, does not include a social club maintaining a library, giving musical entertainments, and furnishing meals for its members, which keeps a small stock of liquors; the members paying for each drink as it is taken, but no profit being made on such sales. *Tennessee Club of Memphis v. Dwyer*, 79 Tenn. (11 Lea) 452, 461, 47 Am. Rep. 298.

"Retail dealers," as used in Pub. Acts 1887, No. 313, § 2, providing that retail dealers include all persons who sell liquors by the drink and in quantities of three gallons or less, or one dozen quart bottles or less, at any one time, to any person or persons, includes a club which distributes liquors among its members, receiving pay for them as they are distributed by the glass, the proceeds going into the treasury of the club, to be used in purchasing other liquors or in pay-

ing expenses. *People v. Soule*, 41 N. W. 908, 909, 74 Mich. 250, 2 L. R. A. 494.

A social club, composed of members who have no proprietary interest in the assets, which provides a reading room, restaurant, barroom, library, billiard rooms, and sitting rooms for its members, the expenses of which are defrayed by annual dues from each member, and by payments made by the members for food and drinks, is not engaged in the business of a retail liquor dealer, within section 11 of the Louisiana license tax law, imposing a tax on such business. *State v. Boston Club*, 12 South. 895, 45 La. Ann. 585, 20 L. R. A. 185.

A social club, not organized for the purpose of evading the liquor laws, but which furnishes its members with liquors and refreshments without profit to itself, is not a retail liquor dealer, within the statute imposing a license tax on all persons dealing in, selling, or disposing of intoxicating liquors by retail. *Barden v. Montana Club*, 10 Mont. 330, 25 Pac. 1042, 11 L. R. A. 593, 24 Am. St. Rep. 27.

#### RETAILER.

A retailer is one who sells goods in small quantities or parcels, and includes a person engaged in the sale of lumber. *Campbell v. City of Anthony*, 20 Pac. 492, 493, 40 Kan. 652.

*Bouvier* defines a retailer of merchandise as one who deals in merchandise in smaller quantities than he buys, generally with a view to profit. *State v. Lowenhaught*, 79 Tenn. (11 Lea) 13, 14.

Three classes of persons are retailers, within the meaning of the liquor law, as shown by Code, § 1058: First, one who sells spirituous or vinous liquors in quantities of less than a quart; second, a person who sells such liquor by the quart to a person of known intemperate habits; third, those who sell in any quantities to be drunk on or about the place. *Elam v. State*, 25 Ala. 53, 55.

Under Act July 28, 1831, authorizing the corporation of the city of Washington to provide for licensing, taxing, and regulating auctions, retailers, ordinaries, and taverns, hackney carriages, etc., the keeper of a woodyard in a city is a retailer. *Washington v. Casanave* (U. S.) 29 Fed. Cas. 343, 344.

#### As importing sale.

To retail is to sell in small quantities. To retail to any particular individual is to sell to him in a small quantity. An indictment charging a person with being a retailer of spirituous liquors to a certain person charges a sale of spirituous liquors to such person. *Commonwealth v. Kimball*, 48 Mass. (7 Metc.) 304, 308.

**As including liquor dealer.**

The term "retailers," in Acts 1888-89, p. 601, § 7, giving the mayor and city council power to license, tax, and regulate auctioneers, grocers, merchants, and retailers, and all other privileges, is used in the legal and ordinary signification which by long-continued use it has acquired in our statutory vocabulary, and includes retail liquor dealers. Unless so, the term, as employed, is without distinctive meaning, for merchants, grocers, confectioners, and other persons engaged in such pursuits who sell at retail are specially named. *Olmstead v. Cook*, 7 South. 776, 778, 89 Ala. 228.

**RETAIN.**

"Retain," as used in Laws 1871, c. 1, § 15, providing that the owner shall retain a sufficient sum to pay subcontractors, and shall not be liable to the principal contractor therefore, means to keep in possession or hold back; that is, the owner is to hold back from the principal contractor the amount due the subcontractor. He cannot retain that which he does not possess. *Cudworth v. Bostwick*, 45 Atl. 408, 409, 69 N. H. 536.

**Consideration implied.**

An allegation that the defendant, who was a carpenter, was retained by the plaintiffs to build and repair certain houses, did not necessarily show that there was a consideration. *Elsce v. Gatward*, 5 Term R. 143, 151.

**As hire.**

"To retain" means to keep in pay, to hire, so that, under an agreement to give an attorney a certain salary, an agreement to retain such attorney is implied. *Elderton v. Emmons*, 6 C. B. 160, 176.

**As conferring property right.**

"Retain," as used in Pub. St. c. 184, § 7, providing that the husband shall be entitled to administration of the personal estate of his wife in case of her intestacy, and shall not be compelled to distribute the same among the next of kin, but shall have and retain the surplus thereof after payment of her debts for his own use, is sufficient to cover his right to the property, if it is to depend upon his administration. *Kenyon v. Saunders*, 30 Atl. 470, 471, 18 R. I. 590, 26 L. R. A. 232.

**As giving right to restrain.**

In construing an act of the Legislature authorizing a certain asylum to "receive and retain all inebriates who enter such asylum, either voluntarily or by the order of the committee of any habitual drunkard," the court said: "The power given to retain inebriates who enter the asylum voluntarily only con-

fers the right upon the superintendent of the institution to keep them so long as they will voluntarily remain, and no longer." In re *Baker* (N. Y.) 29 How. Prac. 485, 489.

**RETAINER.**

See "General Retainer"; "Special Retainer."

**As to attorneys.**

A retainer is the act of a client by which he retains an attorney or counsel to manage a cause, either by prosecuting it when he is plaintiff, or defending it when he is defendant; the retaining fee. *Bouv. Law Dict.* The word is also used for a notice served by an attorney on the opposite party or attorney that he has been retained, in which use it is by elision for notice of retainer. *Abb. Law Dict.*

Whenever an attorney or counselor at law is employed generally to prosecute or defend in an action, he may, after the action has been terminated, recover from his client a retaining fee, although the contract of employment did not expressly or specifically mention a retaining fee. A retainer of an attorney is presumably worth something to the client, and presumably a loss to the attorney; and whether the attorney is ever called upon to perform any services, or not, in that case, he may, when the case is terminated, recover for whatever the evidence shows a retainer was worth. *Blackman v. Webb*, 17 Pac. 464, 38 Kan. 668; *Knight v. Russ*, 19 Pac. 698, 699, 77 Cal. 410.

Where a client procured an attorney to visit him at his house, and employed him to assist as counsel, and the attorney agreed to do so, and gave advice several times it constituted a retainer. *Perry v. Lord*, 111 Mass. 504, 506.

The word "retainer," as used in the statute authorizing the court to grant temporary alimony, and allowing the wife's attorney a retainer, is used in the sense that the judge allows the attorney the right to apply for additional fees as the exigencies of the case may require. *Rogers v. Rogers*, 30 S. E. 659, 660, 103 Ga. 763.

There are two classes of retainers by which the services of attorneys, solicitors, or counselors are secured: First, general retainers, having for their object the securing beforehand of the services of a particular attorney or counselor for any emergency that may afterwards arise. They have no reference to any special service, but take in the whole range of possible future contention which may render attorneyship necessary or desirable. Counsel thus retained is not at liberty to accept employment or render service adverse to the interest of the client thus retaining him. He is, as to such client, mon-

opolized. *Agnew v. Walden*, 4 South. 672, 673, 84 Ala. 502.

#### As to executors and administrators.

Retainer is a remedy by mere operation of law, and is thus explained and defined by Blackstone: "If a person indebted to another makes his creditor his executor, or if such a creditor obtains letters of administration to his debtor, in these cases the law gives him a remedy for his debt, by allowing him to retain so much as will pay himself before any other creditors whose debts are of equal degree." 3 Bl. Comm. 18. To constitute a retainer, and, of consequence, a satisfaction and extinguishment of the debt, there was no act to be done by the executor or administrator, no discretion or volition to be exercised by him, no election whether he would retain or not. The moment assets came to his possession which in the due course of administration were and could be legally applied to the payment of the debt, the law, of its own force, made the application. This right of retainer, with its legal consequences, is not limited to debts due to the personal representative individually, but also includes debts due to him as trustee or as executor or administrator of another person. *Miller v. Irby's Adm'rs*, 63 Ala. 477, 483.

The general principle in cases of retainer is that where the party unites in himself, by representation or otherwise, the character of debtor and creditor, he is entitled to retain, inasmuch as he cannot sue himself, and the law will presume a retainer in satisfaction of the debt if there are assets in his hands. Therefore, in the common case of a creditor executor, his action is gone forever if he has assets in his hands, because, as the court says in *Plow. 185*, "in judgment of law he is satisfied before, for, if the executor has as much goods in his hands as his own debt amounts to, the property of these goods is altered and vested in himself." *Taylor v. Deblois* (U. S.) 23 Fed. Cas. 763, 765.

#### RETAINING LIEN.

See, also, "Attorney's Lien."

A retaining lien is that which an attorney has on all the papers of his client in his possession, by virtue of which he may retain all such papers until his claim for services has been discharged. In *re Lexington Ave.*, 52 N. Y. Supp. 203, 206, 30 App. Div. 602.

An attorney's retaining lien is that which he has upon all papers, deeds, vouchers, etc., in his possession, upon which or in connection with which he has expended money or given his professional services. It is a general lien for whatever may be due to him, but is purely passive, authorizing the attorney to take no steps to procure payment of the debt out of the article so held. In *re Wilson* (U. S.) 12 Fed. 235, 239.

Liens of attorneys are retaining liens and charging liens; the former existing as against moneys or papers in the hands of the attorney, and the latter being one which gives the creditor the right to collect such debt as a priority out of property in the hands of another. *Whart. Ag. § 623 et seq.* It is not necessary that the attorney should have obtained a judgment for his client, in order to enforce his lien in a suit in equity. *Koons v. Beach*, 46 N. E. 587, 147 Ind. 137.

#### RETAXATION OF COSTS.

A retaxation of costs either affirms, modifies, or corrects the taxation had. A new taxation necessarily implies that the former taxation is vacated or annulled. *Baker v. Coddington*, 3 Misc. Rep. 512, 513, 23 N. Y. Supp. 5.

#### RETIRE.

The word "retire," in reference to a bill of exchange, is susceptible of various meanings, according as it is applied to various circumstances. If the acceptor retires the bill at maturity, he takes it entirely from circulation, and it is, in effect, paid; but, if an indorser retires it, he merely withdraws it from circulation in so far as he himself is concerned, and may hold it with the same remedies as he would have had if he had been called upon in due course, and had paid the amount to his immediate indorsee; and this latter is the ordinary meaning of the word "retire." *Elsam v. Denny*, 15 C. B. 87, 94, 25 Eng. Law & Eq. 423, 431.

#### RETIRED OFFICERS.

A finding of a retiring board that an officer be retired from active service for incapacity, etc., approved by the President, made him a retired officer, etc. *Potts v. United States*, 8 Sup. Ct. 830, 831, 125 U. S. 173, 31 L. Ed. 661.

#### RETIREMENT.

"Retirement," as used in a fidelity insurance policy, providing that the liability of the insurer for the acts of a president of a bank shall cease with his retirement, is not effected by the mere suspension of the bank and the taking possession thereof by an examiner; and, in the absence of some other action, he continues in such service at least until a receiver is appointed by the Comptroller. *American Surety Co. of New York v. Pauly*, 18 Sup. Ct. 563, 170 U. S. 160, 42 L. Ed. 987.

#### RETRANSFER.

Where defendant stored machines with complainant, its agent, to be conveniently de-

livered to other agents in the state, and the contract between defendant and complainant declared that he should be allowed compensation for the retransfer of such machines, but that he should ship at the order of defendant all unused machines free of charge, and on demand of an agent of defendant all machines were surrendered, and, by such agent's direction, immediately transferred to parties who had been appointed agents instead of complainant, there was not a retransfer of the machine, within the meaning of the contract. A surrender of the machines and goods on hand at the termination of the agency cannot be construed as a retransfer to other agents. *Brown v. McCormick Harvesting Mach. Co. (Tenn.)* 59 S. W. 196, 202.

## RETRAXIT.

A retraxit, at common law, is an open, voluntary renunciation of a claim in court, whereby the party making the same forever loses his action. *Pethelt v. McCullough*, 39 S. E. 199, 200, 49 W. Va. 520; *Westbay v. Gray*, 48 Pac. 800, 802, 116 Cal. 660; *Loomis v. Green*, 7 Me. (7 Greenl.) 386, 391; *Russell v. Rolfe*, 50 Ala. 56, 57. It has long been practically obsolete in England (*Chitty, Gen. Prac.* 1515), and certainly has never been recognized in this state or the earlier territory. *Walker v. St. Paul City Ry. Co.*, 52 Minn. 127, 53 N. W. 1068, 1069.

A retraxit occurred at common law when a plaintiff came into court in person and voluntarily renounced his suit or cause of action, and when this was done, and a judgment was entered in favor of the defendant, the plaintiff's cause of action was forever gone. *Westbay v. Gray*, 116 Cal. 660, 48 Pac. 800. An instance where, by agreement of the party, an order of dismissal is entered, which operated as a retraxit, is found in *Merritt v. Campbell*, 47 Cal. 542. *Hibernia Savings & Loan Soc. v. Portener*, 72 Pac. 716, 139 Cal. 90.

A technical retraxit is where a plaintiff, after declaration filed, comes personally into the court in which his action is brought, and declares he will not proceed further in it, and this is a bar to any subsequent suit for the same cause of action. A retraxit must always be in person. If it is by attorney, it is error. It cannot be before a declaration, for before a declaration it is only a nonsuit. In the case in hand, the plaintiff did not go personally into court, and there was no declaration filed. It cannot, therefore, be considered as a retraxit, for, although the words "withdraw forever" are used in the paper filed, we cannot suppose that the parties had in their mind a legal, technical rule, obliterated where it is not worn out, even in the professional mind, merely from the affinity of the word "withdraw" to the word

"retraxit." *Lowry v. McMillan*, 8 Pa. (8 Barr) 157, 163, 49 Am. Dec. 501.

A retraxit is a proceeding by which the plaintiff withdraws himself from the action altogether. It is an open, voluntary, and final renunciation of his suit in court, by which he forever loses his action. *Napier v. Gidiere (S. C.) Cheves*, 101, 102.

### Dismissal distinguished.

A dismissal, as the term is used in modern practice, does not amount to a retraxit at common law. Nor does a dismissal constitute a nonsuit. *Bullock v. Perry*, 2 Stew. & P. 319.

### Nolle prosequi distinguished.

The nature of a nol. pros. in civil cases was not accurately ascertained and defined until modern times, some of the older authorities considering it a retraxit operating to release or discharge the action, and an absolute bar to another action for the same cause; but in later cases, which have been adhered to ever since, a nol. pros. is considered not to be in the nature of a retraxit, but only an agreement not to proceed further as to some of the defendants or as to some of the suit, but he is at liberty to go on as to the rest. *Davenport v. Newton*, 42 Atl. 1087, 1092, 71 Vt. 11.

"A retraxit 'is where a plaintiff cometh in person in court, where his action is brought, and saith he will not proceed in it; and this is a bar to the action forever. It is so called because it is the emphatic word in the Latin entry.' \* \* \* It differs from a nolle prosequi, in that it is a bar to any future action for the same cause, whereas the nolle prosequi is not, unless made after judgment." *Broward v. Roche*, 21 Fla. 465, 477.

### Nonsuit distinguished.

A nonsuit is to be distinguished from a retraxit. *Minor v. Mechanics' Bank of Alexandria*, 26 U. S. (1 Pet.) 46, 7 L. Ed. 47. Blackstone defines the difference as follows: "A retraxit differs from a nonsuit in this: One is negative, and the other positive. The nonsuit is a mere default or neglect of the plaintiff, and therefore he is allowed to begin his suit again upon payment of costs; but a retraxit is an open, voluntary renunciation of his claim in court, and by this he forever loses his action." 3 Comm. 296. And it has been held that a judgment of dismissal, when based upon, and entered in pursuance of, the agreement of the parties, must be understood, in the absence of anything to the contrary expressed in the agreement and contained in the judgment itself, to amount to such an adjustment of the merits of the controversy, by the parties themselves, through the judgment of the court, as will constitute a defense to another action after-



wards brought upon the same cause of action. *United States v. Parker*, 7 Sup. Ct. 454, 458, 120 U. S. 89, 30 L. Ed. 601; *Evans v. McMahan*, 1 Ala. 45, 47; *Civ. Code Ga.* 1895, §§ 5042, 5053.

It is improper to enter a retraxit, or a judgment on the entry of a retraxit, having the effect of a judgment upon the merits, without the personal consent of the plaintiff in the action. Such is the rule of the English common law, and, in the absence of statute, such is the rule in this country. *Hallack v. Loft*, 34 Pac. 568, 570, 19 Colo. 74; *Worke v. Byers*, 10 N. C. 228, 231.

A retraxit is a form of estoppel by record which differs from a nonsuit, in that one is negative and the other positive. The nonsuit is a mere default and neglect of the plaintiff, and therefore he is allowed to begin his suit again upon payment of costs; but a retraxit is an open and voluntary renunciation of his suit in court, and by this he forever loses his action. When properly entered, the retraxit is a total relinquishment of the suit, and will operate as a present and perpetual release, surrender, and abandonment of all right of action in the subject-matter in dispute, so that at no subsequent time can the retractor in any form of action contest with the defendant his right or title to, or the possession of, the rights or property in the suit. *Thompson v. Thompson* (Ky.) 65 S. W. 457, 459. See, also, *Herring v. Poritz*, 6 Ill. App. (6 Bradw.) 208, 211.

Nonsuit is on default, but where plaintiff appears it is a retraxit. *South Branch R. Co. v. Long*, 28 W. Va. 692, 700.

## RETREAT TO THE WALL.

By the words "retreat to the wall," as applied to the case of a party threatened with assault by another, is not meant that a party must always fly, or even attempt to fly. The circumstances of the attack may be such, the weapon with which he is assailed of such a character, that retreat might well increase his peril. By "retreat to the wall" is only meant that the party must avail himself of any apparently reasonable avenue of escape by which his danger might be averted, and the necessity of slaying his assailant avoided. *People v. Iams*, 57 Cal. 115, 120.

## RETROACTIVE LAW.

See "Retrospective Law."

## RETROCESSION.

A retrocession means the restitution of an ancient title to the true owner. Such an act confers no new title. It merely recog-

nizes and confirms a previously existing title in another. *Amet v. Boyer*, 9 South. 622, 627, 43 La. Ann. 562.

## RETROSPECTIVE LAW.

A law is retrospective, in its legal sense, which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability in respect to transactions or considerations already past. *Perry v. City of Denver*, 59 Pac. 747, 748, 27 Colo. 93; *Deland v. Platte Co.* (U. S.) 54 Fed. 823, 832; *Society for the Propagation of the Gospel v. Wheeler* (U. S.) 22 Fed. Cas. 756, 767; *Dodin v. Dodin*, 40 N. Y. Supp. 748, 751, 17 Misc. Rep. 35; *Gaston v. Merriam*, 22 N. W. 614, 619, 33 Minn. 271.

A retrospective law is one which changes or injuriously effects a present right, by going behind it and giving efficacy to anterior circumstances to defeat it, which they had not when the right accrued. *Poole v. Fleeger*, 36 U. S. (12 Pet.) 185, 198, 9 L. Ed. 680, 955.

Upon principle, every statute which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a disability in respect to transactions or considerations already past, must be deemed retrospective. *Sturges v. Carter*, 5 Sup. Ct. 1014, 1018, 114 U. S. 511, 29 L. Ed. 240.

An act taking away vested rights, and giving rights which had been extinguished by the general laws of the state, is retrospective. *Town of Bradford v. Brooks*, 2 Aikens (Vt.) 284, 294, 16 Am. Dec. 715.

A retrospective law is one that relates back to and gives to a previous transaction some different legal effect from that which it had under the law when it transpired. *State v. Whittlesey*, 50 Pac. 119, 121, 17 Wash. 447.

A retrospective law is one that gives a right where none before existed, and, by relation back, gives a party the benefit of it. *Sutherland v. De Leon*, 1 Tex. 250, 305, 46 Am. Dec. 100.

Acts of the Legislature which look back upon interests already settled, or events which have already happened, are retrospective; and the Constitution has, in direct terms, prohibited them, because highly injurious, oppressive, and unjust. But perhaps their invalidity results no more from this express prohibition than from the circumstance that in their nature and effect they are not within the legitimate exercise of legislative power. For though, under the name of the *ex post facto* laws, when made for the punishment of offenses, they have long been severely reprobated, because more

common in times of commotion, and because they endanger the character and person as well as the property, yet laws for the decision of civil causes made after the facts on which they operate, *ex jure post facto*, are alike retrospective, and rest on reasons alike fallacious. *Merrill v. Sherburne*, 1 N. H. 199, 213, 8 Am. Dec. 52.

A retrospective law for the decision of civil causes is a law prescribing the rules by which existing causes are to be decided upon facts existing previously to the making of the law. Instead of being rules for the decision of future cases, as all laws are in their very essence, retrospective laws for the decision of civil causes are in their nature judicial determinations of the rules by which existing causes shall be settled upon existing facts. *Dow v. Norris*, 4 N. H. 16, 18, 17 Am. Dec. 400.

A statute does not operate retroactively from the mere fact that it relates to the antecedent facts. A retrospective law has been defined as one intended to affect transactions which occurred or rights which accrued before it became operative as such, and which ascribes to them effects not inherent in their language, in view of the law in force at the time of their occurrence. *Chicago, B. & Q. R. Co. v. State*, 66 N. W. 624, 627, 628. 47 Neb. 549, 41 L. R. A. 481, 53 Am. St. Rep. 557 (citing *Black, Interp. Laws*, p. 237).

"It is a principle which has always been held sacred in the United States that laws by which human action is to be regulated look forward, not backward, and are never to be construed retrospectively unless the language of the act should render that indispensable." *Ladiga v. Roland*, 43 U. S. (2 How.) 581, 589, 11 L. Ed. 387.

The words "retrospective law," as used in Const. art. 11, providing that no retrospective law, or law impairing the obligation of contracts, shall be made, does not mean retrospective laws in general, for then no law could be made for the remuneration of past services, not even of members of Assembly, their clerks and doorkeepers, at the end of each session of the assembly. Nor could further time be given for the probate and registration of deeds, of which there never was any doubt, from the first Assembly after the formation of the Constitution to this day. Nor can it mean laws made for the preservation and establishment of just rights and titles, which have become imperfect and infirm by the nonobservance of some legal ceremony, for these laws are not to take away rights, but to confirm and establish them. There are some retrospective laws which it does prohibit—*ex post facto* laws, for instance, and laws impairing the obligation of contracts. These are justly prohibited, because they destroy existing rights, not preserve them from destruction.

*Bell v. Perkins*, 7 Tenn. (Peck) 261, 266, 14 Am. Dec. 745.

A "retrospective statute," in its legal sense, according to text-writers and many well-considered cases on the subject, embraces a statute which abrogates an existing right of action or defense, or creates a new obligation on transactions or considerations already past. Such laws have always been regarded with distrust, for frequently thereby liabilities were imposed which were oppressive and unjust, the effect of which could not be avoided on the ground that they were *ex post facto* or impaired the obligation of contracts, and it was to prevent such legislation that several of the states have an express constitutional inhibition against legislation of this character. *Evans v. City of Denver*, 57 Pac. 696, 697, 26 Colo. 193.

Whether a statute falls within the prohibition of Const. art. 2, § 28, forbidding the General Assembly of the state from passing retroactive laws, depends on the character of the relief that it provides. If it creates a new right, rather than affords a new remedy to enforce an existing right, it is prohibited by this clause of the Constitution. In *Society for Propagation of the Gospel v. Wheeler* (U. S.) 22 Fed. Cas. 756, Judge Story defines a retrospective or retroactive law as follows: "On principle, every statute which takes away or impairs vested rights acquired under existing laws, or creates a new obligation imposing a new duty, or attaches a new liability in respect to transactions or considerations already passed, may be deemed retrospective." This definition was approved in *Rairden v. Holden*, 15 Ohio St. 207. *Commissioners of Hamilton County v. Rosche*, 50 Ohio St. 103, 111, 33 N. E. 408, 19 L. R. A. 584, 40 Am. St. Rep. 653; *Leete v. State Bank of St. Louis*, 115 Mo. 184, 199, 21 S. W. 788.

An act authorizing a probate court to renew a commission, appointing commissioners of claims upon the estate of a deceased person after such commissions have been closed, and after the expiration of the time limited by the general law for such renewal, is retrospective in its effect, and goes to take away rights vested by the general law, and to give rights extinguished by the general law, and is one which courts cannot enforce. *Town of Bradford v. Brooks* (Vt.) 2 Aikens, 284, 295, 16 Am. Dec. 715.

#### Curative acts.

The term "retrospective statute" includes curative acts. *Conde v. City of Schenectady*, 58 N. E. 130, 132, 164 N. Y. 258.

#### As *ex post facto* law.

A retrospective law, within the meaning of the Constitution, prohibiting retro-

spective laws, must be a law made to punish an act previously done, or to increase the punishment of such act, or in some way to change the rules of law in relation to its punishment to the prejudice of him who commits it. In other words, it must be a law establishing a new rule for the punishment of an act already done. *Woart v. Winnick*, 3 N. H. 473, 476, 14 Am. Dec. 384.

The word "retrospective," as used in the Constitution of Colorado, inhibiting the passage of any *ex post facto* law or one retrospective in operation, has reference to civil cases, and is synonymous with the term "*ex post facto*" as applied to the criminal law. *French v. Deane*, 36 Pac. 609, 612, 19 Colo. 504, 24 L. R. A. 387.

The term "retrospective law" includes every law that takes away or impairs rights vested agreeably to existing laws. Every *ex post facto* law is necessarily retrospective, but every retrospective law is not necessarily *ex post facto*, as the latter term is limited to criminal laws. *Calder v. Bull*, 3 U. S. (3 Dall.) 386, 390, 1 L. Ed. 648.

Const. art. 11, § 20, providing that no retrospective law shall be made, prohibits *ex post facto* laws. *Bell v. Perkins*, 7 Tenn. (Peck) 261, 267, 14 Am. Dec. 745.

A statute which repeals an act limiting the time within which crimes shall be prescribed is a retrospective law, but not an *ex post facto* one. *State v. Moore*, 42 N. J. Law (13 Vroom) 208, 231.

#### **As law impairing obligation of contracts.**

There is a marked distinction between a law which impairs the obligation of contracts and one which is retrospective in its operation. *Leete v. State Bank of St. Louis*, 115 Mo. 184, 199, 21 S. W. 788.

The clause of Bill of Rights, § 20, providing that no retrospective law or law impairing the obligation of contracts shall be made, taken in its common and unrestrained sense, extends to all prior times, persons, and transactions, whether civil or criminal; yet certainly there are some cases coming within its general scope to which it does not extend. It does not extend to *ex post facto* laws, for they are prohibited by Bill of Rights, § 11. It does not extend to a law for extenuation or mitigation of offenses, the remission of penalties or forfeitures. The whose clause, and both sentences taken together, mean that no retrospective law which impairs the obligation of contracts, or any other law which impairs their obligation, shall be made, the latter words relating equally to both the preceding substantives; and therefore the term "retrospective" alone, without the explanatory words, can have no influence in this discus-

sion. *Townsend v. Townsend*, 7 Tenn. (Peck) 1, 15, 14 Am. Dec. 722.

#### **Retroactive synonymous.**

The words "retroactive" and "retrospective," as applied to laws, seem to be synonymous. *Rairden v. Holden*, 15 Ohio St. 207, 210.

#### **As applying to rights alone.**

The word "retrospective," as used in the Constitution, providing that no retrospective law shall be made, embraces the rights, and not modes of redress. The last, from the nature of things, must be left open to legislative modification. *Jones v. Jones*, 2 Tenn. (2 Overt.) 2, 5, 5 Am. Dec. 645.

Laws affecting remedies are not within the scope of retrospective laws. *Paschal v. Perez*, 7 Tex. 348, 349, 365.

Retrospective laws which are prohibited by the Constitution are acts which give a right where none before existed, and, by relation back, give the party the benefit of it. But where a right already exists, it is within the legislative power to provide a remedy. *Sutherland v. De Leon*, 1 Tex. 250, 304, 46 Am. Dec. 100.

The term "retrospective," in the Bill of Rights, embraces laws which are not included in the description of *ex post facto* laws, or laws impairing the obligation of contracts, but which destroy or impair vested rights according to the laws of the land. A retrospective law literally means a law which looks backward, or on things that are past. If it be understood in its literal meaning, without regard to the intent, then all laws having an effect on past transactions are prohibited. Laws which affect the remedy merely are not within the scope of the inhibition against retrospective laws, unless the remedy be entirely taken away, or be incumbered with conditions which would render it impracticable. *De Cordova v. City of Galveston*, 4 Tex. 470, 473.

A law is not necessarily within the prohibition of the twenty-third article of the Bill of Rights, providing that retrospective laws are highly injurious, oppressive, and unjust, and declaring that no such laws should be made, either for the decision of civil causes or the punishment of offenses, because it looks back upon past transactions. It is not necessarily outside of the prohibition because it affects the remedy, or, if it affects the remedy only, and the court cannot say that it affects it injuriously, oppressively, or unjustly, the law should be regarded as constitutional. The question of the validity of a statute affecting the remedy merely is whether it is just or unjust. *Simpson v. City Sav. Bank*, 56 N. H. 466, 471, 22 Am. Rep. 491.

**RETURN.**

See "False Return"; "Sale and Return"; "Voluntary Return."

To return is to come back from him to whom it was given. *Micheau v. Crawford*, 3 N. J. Law (3 Halst.) 90, 112.

"Returns," as used in a will providing that, in case any of testator's sons or daughters die without issue, their share returns to testator's sons and daughters, equally among them, would seem to imply that the deceased son or daughter from whom the share was to return to the survivors should have already taken it under the devise. *Harris v. Dyer*, 28 Atl. 971, 972, 18 R. I. 540.

Under a charter party by which the owner agrees to deliver the vessel to the charterer, who agrees to return her in as good condition as when received, it is held that the words "deliver" and "return" are to be construed liberally, and not in a technical sense. *Auten v. Bennett*, 84 N. Y. Supp. 689, 692, 88 App. Div. 15.

**As to go to or pass.**

"Return," as used in a will bequeathing property to certain legatees, but providing that on the death of such legatees the property should return to testator's legatees, means to go or to pass. *Micheau v. Crawford*, 8 N. J. Law (3 Halst.) 90, 96.

**As remain.**

"Return," as used by a testator in devising his property to his son Abraham "during his life and to John during his life; for default of male issue the land shall return to the said Abraham and John"—means to "remain," in order to effectuate the testator's intent of creating estates in tail male. *McMurtrie v. McMurtrie*, 15 N. J. Law (3 J. S. Green) 276, 286.

**As repay.**

"Returning," as used in a municipal ordinance authorizing the raising of certain money by the pledge or hypothecation of stock held by the city, and afterwards speaking of returning the money so raised, means repaying. *City of Baltimore v. Gill*, 31 Md. 375, 388.

**As return day.**

The word "return" in a justice's docket reciting that the cause was called on, and judgment rendered on, the return of process, was construed to mean "return day," and not the actual return of process; the court saying that the two terms were frequently used as synonymous. *Aldrich v. Maitland*, 4 Mich. 205-211.

**As transmission and deposit.**

"Return," as used in land acts, requiring the certificate or other evidence of right

to land to be returned with the survey, means the transmission to and deposit of the certificate in the general land office, with intent that it should there remain, and not a retransmission and redeposit after the certificate or survey had once been deposited in the general land office and afterwards withdrawn. *Snider v. Methvin*, 60 Tex. 487, 495.

**In Limitations.**

"Return," as used in a statute of limitations, declaring that on the debtor's return into the state after an absence therefrom the statute should again be put in operation, means a bona fide return within the state for the purpose of taking up the debtor's domicile again therein. The word applies as well to persons coming from abroad as to citizens of the state going abroad and then returning. The coming into the state must not be clandestine; and the intent to defraud the creditor by setting the statute in operation and then departing. The return must be so public and under such circumstances as to give the creditor an opportunity, by the use of ordinary diligence and due opportunity, of arresting the debtor. *Campbell v. White*, 22 Mich. 178, 193 (citing *Fowler v. Hunt* [N. Y.] 10 Johns. 464, 465).

"Return," as used in the statute of limitations, where it is provided that actions are suspended as against persons out of the limits of the commonwealth, but that it begins to run from the time of such person's return, means a return with a design to again dwell within the jurisdiction of the commonwealth, and not to lurk in it as a place of concealment. *White v. Bailey*, 3 Mass. 271, 273.

A return into the state, sufficient to set the statute of limitations running, must be open and notorious, and under such circumstances that the creditor could, with reasonable diligence, find his debtor and serve him with process. A debtor might return to the state for a few hours in the nighttime or on Sunday, or he might be in the state on his progress through it, and a return might be of such a character that it might be concealed from and unknown to the creditor, and which would afford him no opportunity by use of reasonable diligence to serve his debtor with process. These are not a return to the state within the meaning of the act. *Engel v. Fischer*, 7 N. E. 300, 301, 102 N. Y. 400, 55 Am. Rep. 818.

"Return," as used in 2 Rev. St. 297, § 27, providing that if, at the time when a cause of action shall accrue against any person, he shall be out of the state, the action may be commenced within the terms limited after the "return" of such person into the state, is satisfied by deducting the first absence after the cause of action has accrued. If the defendant returns under such circum-

stances as to set the statute in operation, it continues to run notwithstanding any subsequent departure of the debtor. *Cole v. Jessup* (N. Y.) 2 Barb. 309, 315.

"Return," as used in the statute of limitations enacting that the time continues to run after a debtor's "return" to the state, contemplates but one return. *Ingraham v. Bowie*, 33 Miss. 17, 21.

The statute of limitations (section 10) excepts from its operations actions against debtors absent from the state at the time the cause of action accrues, and provides that after such absent persons coming or returning into the state the same time is limited for the bringing of the action as in other cases. It was held that a mere temporary return without the creditor's knowledge did not set the statute to running; the court saying: "It cannot be supposed that every coming or return into the state would set the statute in operation. It is admitted that it must be such as that by due diligence the creditor might cause an arrest. If the creditor should remove or return into the state publicly, and with a view to dwell and permanently reside within its jurisdiction, although in an extreme part from the place of his former residence or that of a creditor, this would undoubtedly bring the case, by a correct construction of the statute, within its operation, though the creditor should have no knowledge of his return. So, too, if a debtor, having no intention to reside here, comes or returns into the state, and this is known to the creditor, and he has opportunity to arrest the body, the case is brought within the statute. In the latter case it is necessary the creditor should be apprised of his debtor's being within the jurisdiction of this state. Within what distance of the creditor's residence the debtor shall come, how long he shall remain, and how publicly he shall sojourn, cannot be settled by any general rule. We therefore believe the only safe and practical rule is to require proof of actual knowledge where the residence is only temporary."—*Mazon v. Foot* (Vt.) 1 Aikens. 282, 285, 15 Am. Dec. 679.

The word "return," as used in Pub. St. 1882, c. 205, § 5, providing, if any person against whom there shall be a cause of action in favor of a resident of the state shall go out of the state, the person entitled to the action may commence the same within the time limited after such person shall return to the state, applies equally to a first entry as to a second one. *Cottrell v. Kenney* (R. I.) 54 Atl. 1010, 1011.

#### Same—Nonresidents.

"Return," as used in the statute of limitations, providing that if a cause of action accrues against any person who is out of the state it may be commenced within the time

limited after his "return" into the state, will be construed to mean to come into it, so that the statute applies to nonresidents. *Weber v. Yancy*, 34 Pac. 473, 474, 7 Wash. 84; *Allen v. Allen* (Cal.) 27 Pac. 30, 31; *Whitcomb v. Keator*, 18 N. W. 469, 470, 59 Wis. 609; *Tagart v. State of Indiana*, 15 Mo. 209, 210, 214; *Burrows v. French*, 13 S. E. 355, 34 S. C. 165, 27 Am. St. Rep. 811.

In the statute of limitations, providing that, if any person against whom there is or shall be a cause of action is or shall be without the limits of the republic at the time of the accruing of such action, or at any time during which the same might have been maintained, then the person entitled to such action shall be at liberty to bring the same against such person or persons "after his or their return" to the republic, and the time of such person's absence shall not be counted or taken as a part of the time limited by the statute after his or their return, is not equivalent to "after his or their emigration or removal to the republic." It does not make "returning to a place" and "coming to it for the first time" equivalent expressions. Foreigners residing abroad and coming into the state for the first time are not in the class included within the intent of the statute. In its terms reference is made only to persons within the territorial limits being subject to action, and their return. Although a foreigner who has always resided out of the country may be truly described as being without its limits, it cannot be predicated of him, if he afterwards come to the country, that he has returned, at least as long as the terms have the meaning imported to them by the given consent of those who employed them as a medium for the communication of ideas. *Snoddy v. Cage*, 5 Tex. 106, 107.

The statute of limitations (Rev. Code 1835, p. 394), providing that if at the time an action accrues against a person he be out of the state the statute shall commence to run on his "return," does not contemplate only residents who occasionally go abroad, but it was designed to apply to foreigners who always reside out of the state, and who may be found within it, to be served with process. *King v. Lane*, 7 Mo. 241, 243, 37 Am. Dec. 187.

"Returns," as used in reference to foreign corporations returning to the state within the meaning of the statute of limitations, means establishing an agent therein upon whom process can be served as its representative. *Burns v. White Swan Min. Co.*, 57 Pac. 637, 638, 35 Or. 305.

The provision in the statute of limitations that the time any defendant is absent from the state shall not be counted in allowing suit after his "return," does not apply to nonresidents who have never been

in the state. *Hyman v. Bayne*, 83 Ill. 256, 260.

"Return," as used in the statute of limitations, providing that, if the debtor is out of the state at the time the cause of action arises against him, the statute shall not commence to run until after the return of the defendant, does not confine the operation of the statute to citizens temporarily going abroad, but applies equally to foreigners who always resided abroad. *Rugles v. Keeler* (N. Y.) 3 Johns. 263, 267, 3 Am. Dec. 482.

#### **Return of advancement into hotchpot.**

A statute requiring advancements to be "brought into hotchpot" with the whole real and personal estate descended, and that such party returning such advancements as aforesaid shall be entitled to his proper portion, etc., "does not mean that the party should relinquish his interest in that particular property, but it is intended to be brought in for the purpose of being taken into consideration in making distribution of the entire estate, in order to ascertain whether it amounts to his full share of the estate." *Jackson v. Jackson*, 28 Miss. (6 Cushm.) 674, 680, 64 Am. Dec. 114.

#### **Return of attachment.**

Code 1873, § 3010, provides that "the sheriff shall return upon every attachment what he has done under it. The return must show the property attached, the time it was attached, and the disposition made of it, by a full and particular inventory," etc., and that such "return must be made immediately after he shall have attached sufficient property, or all that he can find, or, at latest, on the first day of the first term at which the defendant is notified to appear." There is no time fixed within which the levy must be made, and, as the return consists in the account in writing, made by the sheriff, of the manner in which he has executed the writ, the limitation as to the time when the return must be made refers necessarily to a time after the writ has been executed. *Westphal v. Sherwood*, 28 N. W. 640, 641, 69 Iowa, 304.

#### **Return of bill, as presented.**

"Return," as used in the constitution, providing that, if any bill shall not be "returned" within ten days after it shall have been presented to the Governor, the same shall be a law, must be a step taken by which his own time for deliberation is ended, and that for the deliberation of the Senate is begun; that the bill itself must be put beyond the executive possession; that it must be placed in the possession, actual or potential, of the Senate itself. The word "return," as applicable to the bill itself, is equivalent to the word "presented." Har-

pending *v. Haight*, 39 Cal. 189, 199, 2 Am. Rep. 432.

#### **Return of process.**

The return of a writ of summons is the answer made by the officer indorsed on the writ certifying to the court the fact and manner of service. *Horton v. Kansas City, Ft. S. & G. R. Co.*, 26 Mo. App. 349, 355 (citing *Burrill*, Law Dict.).

A "return" is a short account in writing, made by the sheriff, of the manner in which he has executed his writ. *Kingsbury v. Buchanan*, 11 Iowa, 387, 391.

"Return" of an officer is a written statement of what he has done in the process in his hands. *Davis v. Reaves*, 75 Tenn. (7 Lea) 585, 589; *Aultman v. McGrady*, 12 N. W. 233, 234, 58 Iowa, 118.

A "return" is an official statement by an officer of what he has done in obedience to a command from superior authority, or why he has done nothing, whichever is required. *State v. Bulkeley*, 23 Atl. 186, 188, 61 Conn. 287, 14 L. R. A. 637.

"Return" has the specific legal meaning of a short account in writing, made by a ministerial officer, of the manner in which he has executed a writ, and where it occurs in the statute regulating fees it will be presumed to have been used in its technical sense. *Phillips County v. Pillow*, 1 S. W. 686, 687, 47 Ark. 404 (citing *Steph. Pl.* 24).

The very term "return" implies that the process is taken back to the place where it is issued. A thing delivered by one person to another is not returned when it is delivered to a stranger, and at a place other than the place of original delivery. In contemplation of the statutes, every process is to be returned to the court or commissioner which issued it and for the purpose of computing the mileage of the marshal the place of return is the place of issue. So held in an action by a marshal for fees for travel from and to the place of issuing a warrant, where the warrant required him to arrest a prisoner and take him before a commissioner who resided nearer the place of arrest than the place where the warrant was issued. *United States v. Landrum* (U. S.) 6 Fed. Cas. 816, 817.

A "return" of an execution is the statement by the officer, certified to the court under the sanction of his official oath and responsibility, of what he has done touching the execution of the writ, according to the commands and requirements of the law, and may properly contain the facts touching his acts under the mandate and the law. *Hutton v. Campbell*, 78 Tenn. (10 Lea) 170, 173.

A "return to process" is the officer's answer touching the service or execution

of such process. It is usually in the form of a certificate, and is indorsed on the writ, process, or paper, but it must be signed by the officer making it. *Iselin v. Henlein* (N. Y.) 16 Abb. N. O. 73, 75 (citing *Crocker, Sheriffs* [2d Ed.] § 39).

A "return" is nothing but the sheriff's answer relative to that which he is commanded to do by the writ, and is intended to inform the court of the truth of that alone which it concerns them to know. Third persons ought not to be injured by a return because the sheriff has departed from its proper object and mingled with it a relevant matter. *Smith v. Kelly*, 7 N. C. 507, 510.

A "return" may be considered as the certificate of the officer to whom any process is directed, stating what he has done in obedience to the command therein given, or the reason of his neglect in not fulfilling them, and is a material part of his duty. *Herm. Ex'ns*, p. 373. Our statute requires this return to be made in writing, and that the name of the officer be signed to his return. *Sand. & H. Dig.* § 6003. But this would probably be the law even without the statute. The filing by a constable of an execution with the justice who issued it, with an oral report that it was still unsatisfied, which return was entered in the docket of the justice, held not a return within the above section. *Jones v. Goodbar*, 60 Ark. 182, 185, 29 S. W. 462, 463.

The word "return," as used in *Gen. St.* 1894, § 5204, providing that when defendant cannot be found within the state of which the "return" of the sheriff of the county in which the action is brought that the defendant cannot be found in the county is prima facie evidence, means merely the sheriff's certificate without regard to whether it has been filed or not, though literally the word "return," as applied to a writ, which a summons is not, includes not only the certificate of the sheriff, but also the filing of it in court. *Easton v. Childs*, 67 Minn. 242, 244, 69 N. W. 903.

The word "return," as used in the chapter relating to service and return of writs of habeas corpus, refers to and means the report made by the officer or person charged with serving the writ of habeas corpus, and also the answer made by the person served with such writ. *Code Cr. Proc. Tex.* 1895, art. 205.

#### **Return to writ of mandamus.**

The office of a return to a peremptory writ of mandamus by the respondent therein is to show a compliance by him with the order of the court. This return, however, is not conclusive, and the relator may controvert its truthfulness by a motion to require the respondent to show cause why he should not be attached for contempt for dis-

obeying the order of the court in the particulars set forth in the motion. *State v. Crites*, 28 N. E. 178, 48 Ohio St. 460.

The return made to an alternative writ of mandamus stands in place of an answer in ordinary pleadings, and is insufficient unless it shows a complete legal right to refuse obedience to the commands of the alternative writ. It must state the facts which justify such refusal clearly, specifically, and with sufficient certainty that the court can see at once that such fact, if admitted or established, would furnish a legal alternative for obedience to the writ. *Woodruff v. New York & N. E. R. Co.*, 59 Conn. 63, 86, 20 Atl. 17. The function of a return is not simply to show what would amount to a prima facie right in the respondent in the absence of any allegations to the contrary, but to show a right to refuse obedience to the writ in view of the allegations the writ contains. *Williams v. City of New Haven*, 36 Atl. 61, 62, 68 Conn. 263.

#### **RETURN DAY.**

Return day is the day appointed by law when writs are to be returned and filed. *Bankers' Iowa State Bank v. Jordan*, 82 N. W. 779, 780, 111 Iowa, 324.

The words "return day," as used in *Code Civ. Proc.* § 1115, providing that when an elector contests the right of a person declared elected he must, within 40 days after the "return day" of such election, file a statement, is not the day on which the result of the election is declared, but the day on which the canvass begins under *Pol. Code*, §§ 1278, 1280, 1281, declaring that the board of supervisors shall meet on the first Monday after the election to canvass the returns. *Carlson v. Burt*, 43 Pac. 583, 111 Cal. 129.

#### **RETURNABLE.**

"Returnable," is defined by Webster to mean capable of being returned; in law, legally required to be returned, as a writ returnable at a certain day. *Daniels v. Lewis*, 4 Pac. 57, 59, 7 Colo. 430.

#### **RETURNABLE PROCESS.**

The term "returnable process" is used to designate the process upon which the officer receiving it is bound to certify his doings. *Utica City Bank v. Buell* (N. Y.) 9 Abb. Prac. 385, 391.

#### **RETURNED UNPAID.**

The words "returned to us unpaid" in a notice of dishonor stating that, "Your draft is returned to us unpaid, and, if not

taken up in the course of this day, proceedings will be taken against you," operates as a sufficient notice of dishonor. *Robson v. Curlewis*, 1 Car. & M. 378, 379.

## RETURNS.

The "returns" from a board of election consist of the certificate of the officers conducting the election, together with a list of voters and one of the tally lists. *People v. Ruyle*, 91 Ill. 525, 528.

The word "returns" in a statute providing that the returns are to be sealed up and delivered to the sheriff, and that the sheriff must deposit with the county clerk the returns of the different precincts, includes undestroyed ballots. *Houston v. Steele*, 17 Ky. Law Rep. 1149, 1151, 34 S. W. 6, 8.

The word "returns," as used in the city charter of St. Paul (Sp. Laws 1874, c. 1, subc. 2, § 6), requiring "the returns for all city elections to be made to the city clerk," means an official statement of votes cast at an election transmitted to the clerk for the purpose of being canvassed by some proper authority. *State v. Common Council of City of St. Paul*, 25 Minn. 106, 108.

In election laws the word "returns" no doubt often refers particularly to the official count, but the poll lists are a part of the returns required to be transmitted by the judges of election to the county auditor under Laws 1889, c. 174. *Slingerland v. Norton*, 61 N. W. 322, 59 Minn. 351.

A certificate of the number of votes given for county commissioners at a town meeting, and of the result, signed, "Attest, J. S." without showing that it was a copy of the record, or that "J. S." was a town clerk, was not a "return" within Rev. St. c. 14, § 17, requiring the board of examiners to receive the return from the clerk. *Luce v. Mayhew*, 79 Mass. (13 Gray) 83, 85.

## REVEL

"Revel," as used in a complaint charging that the defendant did "revel," quarrel, commit mischief, and otherwise behave in a disorderly manner, means to behave in a noisy, boisterous manner, like a bacchanalian. The word "revel" has a precise and definite meaning. One of its definitions is to act like a bacchanalian. *In re Began*, 12 R. I. 309 (citing Webst. Dict. Unab.).

## REVENDECATION.

"Revendication" means to reclaim; to demand the restoration of. *Smart v. Bibbins*, 34 South. 49, 109 La. 986.

"Revendication" in the civil law has been defined to be the right of an unpaid

vendor on the insolvency of the vendee to reclaim in specie such part of the goods as remain in the hands of the vendee entire, and without having changed its quality. *Benedict v. Schaettle*, 12 Ohio St. 515, 520.

"Revendication" is an action which relates to claims made on immovable property, or to the immovable rights to which they are subjected, the object of which is to recover the ownership or possession of such property, and is the proper action to be brought for the purpose of ascertaining the legal title and consequent right of possession of the heir at law to the succession when another is in possession under claim of title by virtue of a will admitted to probate. *Ellis v. Davis*, 3 Sup. Ct. 327, 328, 109 U. S. 485, 27 L. Ed. 1006.

## REVENGE.

"Revenge" is defined to be a malicious injury inflicted in return for an injury. *People v. Pierson*, 3 Pac. 688, 690, 2 Idaho (Hasb.) 76.

## REVENUE.

See "General Revenues"; "Municipal Revenue."

The word "revenue" means the income of the government arising from taxation, excise, and the like. *State v. School Fund Com'rs*, 4 Kan. 261, 268; *Commonwealth v. Bailey*, 3 Ky. Law Rep. 110, 117.

The lexical definition of the term "revenue" is very comprehensive, and is given by Webster as "the income of a nation derived from its taxes, duties, or other sources, for the payment of the nation's expenses." *United States v. Norton* (N. Y.) 2 Cow. Cr. Rep. 358, 361.

"Revenue" is the product or fruit of taxation. It matters not in what form the power of taxation may be exercised or to what subjects it may be applied, its exercise is intended to provide means for the support of the government, and the means provided are necessarily to be regarded as the internal revenue. Duties upon imports are imposed for the same general object, and because they are so imposed the money thus produced is considered revenue, not because it is derived from any particular source." *United States v. Wright*, 3 Pittsb. R. 192, 194, 28 Fed. Cas. 789.

The first definition of the word "revenue" given by Worcester is "income or annual profit received from lands or other property." Where a canal company transferred all the tolls and revenues to be derived from the use of the canal for the payment therefrom of certain expenses and expenditures, the word "revenue" was held broad enough



to cover income derived from the sale of ice formed in the canal. *Cromie v. Trustees of Wabash & E. Canal*, 71 Ind. 208, 216.

#### **As estimated revenue.**

Under a statute (Pol. Code, § 4070) providing that the board of county supervisors must not contract debts or liabilities in excess of the "revenue" of the county for current expenses, it was held that the word "revenue" could not mean the actual money which shall be received in the county treasury, since to give the word this interpretation would render it impossible for the board to comply with the direction of the statute, as the amount can never be ascertained until all the assessments have been collected and paid into the treasury, but in view of the context the word "revenue" should be construed to mean "estimated revenue." *Babcock v. Goodrick*, 47 Cal. 488, 513.

#### **As license fee.**

Where a city levied a license fee in the exercise of its police power, and provided that the revenue derived from such license should be expended in a particular manner, the word "revenue" was used in the same sense as "money received from the license," and did not indicate that the tax was levied in the exercise of the city's power to tax for the purpose of defraying governmental expenditures, and not in the exercise of the police power and regulation of certain occupations. *Van Sant v. Harlem Stage Co.*, 59 Md. 330, 334.

A city charter empowered the city to make and enforce by-laws to protect the city from fire, to establish districts within which it should not be lawful to erect any wooden buildings except by license of the city, and to enact ordinances relating to the subject. An ordinance of said city provided that no person should build or enlarge any building within the fire limits without a license first issued by the fire marshal, for which license a fine of 50 cents was required to be paid. It was held that the license, if required, was not a "revenue tax" in any appropriate sense, but rather a reasonable sum collected of the party interested for the purpose of defraying any part of the expense of issuing and recording the license, and that the power to require such a fee was conferred by the charter by intentment is convenient, if not essential, to the full enjoyment of the powers expressly granted. *Welch v. Hotchkiss*, 39 Conn. 140, 142, 12 Am. Rep. 383.

#### **As moneys of ward.**

The word "revenue" in New Code, art. 334, directing a tutor to invest in the name of his minor the revenues which exceed the expense of his ward whenever they amount to the sum of \$500, means all moneys belonging to the minor that comes into the hands

of the tutor in the course of administration. *In re Watson*, 26 South. 409, 410, 51 La. Ann. 1641.

Under the rule that under no circumstances can the expense of a minor for board, clothing, tuition, etc., exceed her "revenues" (Rev. Civ. Code, art. 350), a minor's "revenues" must be taken to be what remains each year after the payment of taxes for that year. *Sims v. Billington*, 24 South. 637, 640, 50 La. Ann. 968.

#### **Postage included.**

"Revenue" is the income of a state, and the revenue of the Post-Office Department, being raised by a tax on mailable matter conveyed in the mail, and which is disbursed in the public service, is as much a part of the income of the government as moneys collected for duties on imports. *United States v. Bromley*, 53 U. S. (12 How.) 88, 99, 13 L. Ed. 905.

#### **As public revenue.**

"Revenue," as used in the Constitution, requiring bills for raising revenue to originate in the lower branch of the Legislature, means such as might be imposed for the support of the state government and the payment of its ordinary expenses. Webster defines "revenue" to mean the annual profits of taxes, excise, customs duties, rents, etc., which a nation or state collects and receives into the treasury for public use. A tax to build bridges and roads is not for revenue, for the money raised thereby is not revenue. Labor produces money. The timber, stone, and gravel used in the construction of the road may be converted into money. It requires money to procure the labor, timber, stone, and gravel that may be used in the construction of the roads. Money, in this instance, is placed in the same class of adjuncts as building roads and highways with timber, stone, gravel, or labor, and as such is not revenue. *Fletcher v. Oliver*, 25 Ark. 289, 295.

"Revenue," as used in Sess. Laws 1879, p. 222, providing that appeals may be prosecuted in all cases relating to revenue, was used to embrace public revenue, whether state or municipal—to embrace all taxes and assessments imposed by public authority. It would not embrace suits for the recovery of fines and forfeitures, or suits on contracts, or other suits of the city. *Webster v. People*, 98 Ill. 343, 346.

The word "revenue" means the income which a state collects and receives into its treasury and has appropriated for the payment of its expenses, and hence the title of an act, "An act for the preservation of oysters and to obtain revenue for the privilege of taking them within the waters of the commonwealth," sufficiently states the object of the tax imposed, as required by

Const. art. 10, § 16. *Commonwealth v. Brown*, 21 S. E. 357, 363, 91 Va. 762, 23 L. R. A. 110.

#### As return from capital invested.

"Revenue" means a return for capital invested or labor bestowed. In a general sense, it is the annual rents, profits, interests, or issues of any species of property, real or personal, belonging to an individual or the public. The revenue or income of a farm is the sum total which its owner receives from it. It is not the money borrowed by the owner, or an annuity which he may have owned and may have pledged to pay for it, or the money invested in stock, farming utensils, or fertilizers. *People v. New York Cent. R. Co.*, 24 N. Y. 485, 490.

"Revenue" is defined by Worcester to mean: (1) Income or annual profit received from lands or other property; (2) the income of the nation or state derived from the duties, taxes, and other sources for the payment of the national expenses. It is defined by Webster to be: (1) That which returns or comes back from an investment; the annual rents, profit, interest, or issue in any species of property, real or personal; (2) hence return, reward, as a rich revenue of praise; (3) the annual product of taxes, excise customs, duties, rents, etc., which a nation or state collects and receives into the treasury for public use. The word is used in many senses. It is, like thousands of others in our language, ambiguous in meaning, the significance of which can only be properly determined by the words with which it is connected. *Bates v. Porter*, 15 Pac. 732, 739, 74 Cal. 224.

"Revenue" is the yearly income of a government or a person natural or artificial, from the property belonging to such government or person. Thus we speak of the revenues of the state of New York, of the New York Central Railroad Company, and the like, and we may also speak of the revenues of any individual, though the word is not so often applied to individuals. The canals of the state, not being the state, nor a corporation, nor a natural or artificial being, nor possessed as such of property or income, but simply public works, material structures, made and used for travel and transportation, and capable of yielding an income to their owners from such use, in a strict sense have no revenues, because they have no recognized individual legal existence. Strictly speaking, the canals only yield revenue, but it is the revenue of their owners, the state or the people. *People v. New York Cent. R. Co.* (N. Y.) 34 Barb. 123, 135.

#### Special assessment.

Under a statute providing for appeals "in all cases relating to revenue," a judgment confirming special assessments or im-

proving a street made by a city relates to revenue, and is within the meaning of the statute. *Herhold v. City of Chicago*, 106 Ill. 547, 548.

Under a statute providing for appeals "in all cases relating to revenue" the word "revenue" embraces all taxes and assessments imposed by public authority. All public park assessments are included in the term. *People v. Springer*, 106 Ill. 542, 544.

Practice Act, § 88, as amended in 1879, provides that in all cases relating to the revenue, etc., appeals shall be taken directly to the Supreme Court. The word "revenue" in that clause embraces all taxes and assessments imposed by any public authority, and includes special assessments made by the city for any public improvement. *Potwin v. Johnson*, 106 Ill. 532, 533.

#### As taxes.

The term "revenue," when used in reference to funds derived from taxation, is best interpreted, in the absence of qualifying words or circumstances implying a different signification, as confined to the usual public income—taxation. The word is so used in the Revenue Laws of 1882, c. 62, in reference to the repeal of acts or parts of acts regarding the raising of revenue. "The statute did not contemplate other sources of public income than revenues and licenses of the classes enumerated in its several sections. *Laughlin v. Santa Fé County Com'rs*, 5 Pac. 817, 819, 3 N. M. (Johns.) 264.

The word "revenue," as used in the statute (section 88, Practice Act), as amended June 3, 1879, includes a proceeding to restrain the collection of taxes. In *Webster v. People*, 98 Ill. 343, it was held that the word "revenue," as used in the statute, embraces all taxes and assessments imposed by public authority. *Phoenix Grain Stock Exch. v. Gleason*, 22 Ill. App. 373, 374.

The word "revenue" in Practice Act, § 88, providing that all cases relating to the revenue shall be taken directly to the Supreme Court on appeal, embraces all taxes and assessments, including special assessments. *Claypool Drainage & Levee Dist. v. Chicago & A. R. Co.*, 81 Ill. App. 433, 434; *Gunning v. People*, 76 Ill. App. 574, 578.

The word "revenue" is defined by Webster as: "The income of the nation, derived from its taxes, duties, and other sources for the payment of the national expenses. The phrase 'other sources' would include the proceeds of sales of public lands, those arising from sales of public securities, the receipts of the Patent Office in excess of its disbursements, and those of the Post-Office Department, if there should be such an excess as there was at a time in the early history of the government. The phrase would

apply to all cases of such excess. In some of them the receipts might fluctuate; there being an excess at one time and deficiencies at another. The constitutional limitation (article 1, § 7), providing that all bills for raising revenue shall originate in the House of Representatives, has been confined to bills to levy taxes in the strict sense of the words, and has not been understood to extend to bills for other purposes which incidentally create revenue. *United States v. Norton*, 91 U. S. 566, 568, 23 L. Ed. 454 (citing *Story*, Const. § 880).

## REVENUE LAW.

### See "Internal Revenue Act."

The term "revenue measures" is commonly used to designate legislation providing for the assessment and collection of taxes to defray the expenses of the government. These measures include all the laws by which the government provides means for meeting its expenditures. *Peyton v. Bliss* (U. S.) 19 Fed. Cas. 407, 408.

"Bouvier, in his *Law Dictionary*, defines 'revenue' to be 'the income of the government arising from taxation, duties, and the like.' 'Revenue laws' \* \* \* should, then, mean laws relating to the income of government, arising from taxation, duties, and the like. The seventh section of the first article of the national Constitution provides that 'all bills for raising revenue shall originate in the House of Representatives.' I suppose that 'bills for raising revenue' are," then, to be classed as revenue laws, within the meaning of the act of July 14, 1866, punishing the violation of the revenue laws of the United States. "What bills are properly 'bills for raising revenue,' in the sense of the Constitution, has been a matter of some discussion. A learned commentator (Tucker) supposes that every bill which indirectly or consequentially may raise revenue is, within the sense of the Constitution, a revenue bill. He therefore thinks that bills for establishing the post office and the mint, and regulating the value of foreign coin, belong to this class; \* \* \* but the practical construction of the Constitution has been against this opinion, and \* \* \* it has been confined to 'bills to levy taxes' in the strict sense of the words, and has not been understood to extend to bills for other purposes which may incidentally create revenue. No one supposes that a bill to sell any of the public lands, or to sell public stock, is a bill to raise revenue in the sense of the Constitution. Much less would a bill be so deemed which merely regulated the value of foreign or domestic coin, or authorized the discharge of insolvent debtors upon assignment of their estates to the United States, giving priority of payment to the United States in case of insolvency, though all of them might incidentally bring revenue into the treasury.

\* \* \* The obvious meaning and common sense of the thing is that \* \* \* the act of July 18, 1866," punishing the violation of the revenue laws of the United States, intended those laws, and those only, which upon their face are plainly designed to raise revenue." *The Nashville* (U. S.) 17 Fed. Cas. 1176, 1178.

Laws 1893, p. 150 (Civ. Code, §§ 978-984), was a senate bill, entitled "An act to regulate the sale and redemption of transportation tickets of common carriers." It limits to agents authorized by certificates from the carriers the right to sell tickets, the certificates to be posted for inspection by travelers, and requires each agent, within 10 days after his appointment, to exhibit his certificate to the Secretary of State, and obtain a license as ticket seller, and pay to the secretary a fee of \$1. The act makes it unlawful for any one to sell tickets without a license, provides a penalty for violations, provides for the redemption of unused tickets, and makes it unlawful for tickets to be sold at other than the regular rate. Held, that the act was a police regulation, and not a bill for raising revenue, within Const. art. 5, § 32, requiring such a bill to originate in the House of Representatives; the true meaning of "revenue laws" being such laws as are made for the direct and avowed purpose of creating and securing revenue or public funds for the service of the government. *State v. Bernhelm*, 49 Pac. 441, 442, 19 Mont. 512.

While the primary object of all taxation is the raising of revenue for the support of the government, and all bills for that general purpose are bills for raising revenue in the sense of the Constitution, and therefore must originate in the House of Representatives, it does not necessarily follow that every bill for some other legitimate and well-defined general purpose becomes a revenue bill in the same sense, because, as an incident to the main object, it may contain a provision for the payment of certain dues, license fees, or special taxes. The fact that that portion of National Bank Act June 3, 1864, § 41 (13 Stat. 111), imposing a semiannual tax upon circulating notes of national banks organized under the act, had its origin in the Senate by amendment to the bill as originally introduced in the House, does not invalidate it, as the amendment was not an independent measure, and did not convert it into a bill for raising revenue in the sense of Const. art. 1, § 7, providing that bills for raising revenue must originate in the House of Representatives. *Twin City Nat. Bank v. Nebeker* (D. C.) 3 App. Cas. 190, 200, 201.

The expression "revenue laws of the United States," as used in Act Cong. 1804, c. 40, § 3, providing that "any person or persons guilty of any crime arising under the revenue laws of the United States or incurring any fine or forfeiture by breach of the said laws may be prosecuted," etc., does not

embrace Act Cong. 1803, c. 62, § 2, prescribing the penalty of \$500 for not depositing the ship's register with the consul on arrival in a foreign port. *Parsons v. Hunter* (U. S.) 18 Fed. Cas. 1259, 1261.

A "bill for raising revenue," as we understand it from the debates on the federal Constitution, authorities, and text writers, embraces all appropriations of money for the public treasury, where the bill either provides for the levy of duties or taxes, capitation or ad valorem, upon the people; or is a part of a system of laws or another bill which does so provide. *Commonwealth v. Bailey*, 81 Ky. 395, 399, 400.

#### **Appropriation bill.**

"A bill for raising revenue is one whose main purpose is to raise money by taxation. A mere appropriation of public money, though it may lead to the necessity of taxation, is insufficient to characterize a measure as one for revenue, such as must originate in the House, and not in the Senate." *Curryer v. Merrill*, 25 Minn. 1, 8, 33 Am. Rep. 450 (quoting 2 Story, Const. [4th Ed.] § 880).

#### **Embargo act.**

Within the meaning of United States statutes providing that any person guilty of any crime arising under the revenue laws of the United States, or incurring any fine or forfeiture by breach of said laws, may be prosecuted at any time within five years, an action to recover a penalty under the embargo law of 1808 is not an action for a penalty under the revenue laws. The true meaning of "revenue laws" in this clause is such laws as are made for the direct and avowed purpose of creating and securing revenue or public funds for the use of the government. No laws whose collateral and indirect operation might possibly conduce to the public wealth are within the scope of the provision. *United States v. Mayo* (U. S.) 26 Fed. Cas. 1230, 1231.

#### **Delegation of power to tax.**

An act incorporating a town is not an act for raising revenue, within the meaning of Const. art. 1, § 16, providing that all bills for raising revenue or appropriating moneys shall originate in the House of Representatives, although the act may, among the many powers it confers upon the town, confer the power to tax. In such a case taxing is not the end; it is a mere incident. Besides, the delegation of the power to tax and the laying of a tax are two things. The constitutional provision applies to an act laying a tax. *Harper v. Town of Elberton Com'rs*, 23 Ga. 566, 570.

#### **Imposition of direct tax.**

"Any law which provides for the assessment and collection of a tax to defray the expenses of the government is a revenue law. Such legislation is commonly referred to un-

der the general term 'revenue measures,' and these measures include all the laws by which the government provides means for meeting its expenditures. 12 Stat. 294, imposing direct taxes upon the states, is a revenue act, and therefore cases arising under the act are removable to the federal courts under the provision of 4 Stat. 632, authorizing such removal in cases of suits involving the revenue laws of the United States." *Peyton v. Bliss* (U. S.) 19 Fed. Cas. 407, 408.

#### **As excluding internal revenue law.**

The general term "revenue laws of the United States," as used in Act March 2, 1833, providing for removal of causes, standing alone, might include all revenue laws of every description, but, used as it is in an act entitled "An act further to provide for the collection of duties on imports," must be considered as not intended to include laws for the collection of internal revenue. *Stevens v. Mack* (U. S.) 23 Fed. Cas. 20.

#### **Postal law.**

The act of Congress entitled "An act to establish a postal money system" (13 Stat. 76) is not a revenue law within the meaning of the act for the punishment of certain crimes against the United States (2 Stat. 290), fixing the limitation for prosecution of crimes arising under the revenue laws of the United States at five years from the time of the commission of the offense. *United States v. Norton*, 91 U. S. 566, 567, 23 L. Ed. 454.

Revenue laws are not necessarily laws for raising "revenue," within the constitutional rule that a bill for raising revenue must originate in the House of Representatives, and hence an act increasing the rate of postage on certain mail matter is not unconstitutional although it originated in the Senate, and was not an amendment to a bill for raising revenue in the House of Representatives. Const. art. 1, § 7, subd. 1, providing that all bills for raising revenue shall originate in the House. *United States v. James* (U. S.) 26 Fed. Cas. 577, 578.

The post-office laws of the United States are "revenue laws" within the meaning of section 3 of the act of Congress of March 2, 1833 (4 Stat. 633), providing for the removal into a Circuit Court of the United States from a state court of a suit brought against a person for an act done under the revenue laws of the United States, or under color thereof. *Warner v. Fowler* (U. S.) 29 Fed. Cas. 255.

The term "revenue laws," within the meaning of 4 Stat. 633, providing for the removal into the Circuit Court of a suit brought against a person for an act done under the revenue laws of the United States or under color thereof, includes the post-office laws of the United States. "Laws relating to the revenue or revenue laws are such laws as are

enacted in reference to such collection; such as give rules as to the mode of its collection, and as to the manner in which the officers employed in such collection shall collect duties. Our taxes are no more the revenue of the state than are the duties or taxes collected under the post-office laws of the United States for the carriage of letters in the public mails." *Warner v. Fowler* (U. S.) 29 Fed. Cas. 255.

#### **Tariff act.**

Act Cong. March 2, 1799, c. 22, 1 Stat. p. 627, regulating the collection of duties on imports, is a revenue law, within the meaning of Act Cong. April 18, 1818, c. 70, providing for the mode of suing for and recovering penalties and forfeitures for violations of the revenue laws of the United States. *The Abigail* (U. S.) 1 Fed. Cas. 36.

#### **REVENUE LAWS OF A STATE.**

The ordinances of municipal corporations laying taxes cannot be regarded as the "revenue laws of a state" from which they derive their power of laying taxes, within the meaning of the act of June 30, 1870, making it the duty of the court to give to causes wherein the execution of the revenue laws of any state are enjoined, etc., preferences or priority over all other civil causes. *Davenport City v. Dows*, 82 U. S. (15 Wall.) 390, 392, 21 L. Ed. 96.

#### **REVENUE OFFICER.**

"Revenue," as used in Rev. St. § 989 [U. S. Comp. St. 1901, p. 708], providing that judgments recovered against an "officer of the revenue" shall be paid out of the United States treasury if there was probable cause for the commission of the act for which the judgment was rendered, does not include a postmaster. *Campbell v. James* (U. S.) 3 Fed. 513, 516.

#### **REVERSE.**

To reverse is to overthrow, set aside, make void, annul, repeal, or revoke, as to reverse a judgment, sentence, or decree, or to change to the contrary, or to a former condition. The distinction between the reversal of a judgment and an affirmance with a modification is said by the court to be too marked and radical to justify them in disregarding it, and it is held that the reversal of a judgment nullifies the same and entirely vacates it. *Cowdery v. London & San Francisco Bank*, 73 Pac. 196, 197, 139 Cal. 208, 96 Am. St. Rep. 115.

#### **REVERSAL.**

Unanimous reversal, see "Unanimous."

The reversal of a judgment annuls it, but does not necessarily set aside the founda-

tion on which it rests. This foundation may be sufficient to support a judgment of a different kind, and may be such as to require it. A reversal, therefore, is never, standing alone and *ex vi termini*, the ground of a new trial. *Coughlin v. McElroy*, 44 Atl. 743, 744, 72 Conn. 444.

The terms "affirmance" or "reversal," used in section 84 of the small cause act (Revision, p. 554), providing that courts of common pleas shall have cognizance of appeals in a summary way, and give judgment, with costs, and award execution thereon, either on the affirmance or reversal of the judgment so appealed, are employed to indicate the successful or unsuccessful party on the appeal; and costs on appeal will only be given to a successful party, who has judgment in his favor on the appeal. *Housel v. Higgins*, 47 N. J. Law (18 Vroom) 72, 73.

#### **REVERSED.**

The term "reversed," as used in opinions, judgments, and mandates, has received by long usage in the courts a settled construction, and means setting aside, annulling, or vacating. *Laithe v. McDonald*, 7 Kan. 254, 268.

"The word 'reversed' in its technical sense applies to the ultimate decision annulling expressly what had been done before." *King v. Sloan* (Pa.) 1 Serg. & R. 77, 79.

#### **REVERSED AND REMANDED.**

Where the order of a court on appeal is as follows: "Judgment reversed and cause remanded"—the effect of the reversal is only to set aside the judgment, unless it is apparent from the opinion of the court that the adjudication was intended to be a final disposition of the cause. *Ryan v. Tomlinson*, 39 Cal. 639, 646.

It is a settled rule, unless there is something in the opinion of the court or the order made by it restricting the operation of the words "reversed and remanded," they have the ordinary meaning, and it is error, on the entry of such order, for the court below not to award a new trial. *Myers v. McDonald*, 8 Pac. 809, 811, 68 Cal. 162.

#### **REVERSED CURRENT.**

An electric current, which is periodicaly reversed by a commutator, which thus breaks the current between the changes in direction and takes off the current in sections, is known as a reversed or alternated current. This distinction between an alternating and an alternated or reversed current should be carefully noted. An alternating current continues to act in opposite directions as originally generated. An alternated current has been so reversed that the whole

flows in one direction, and is then known as a continuous current. Every mechanically generated current is naturally and originally an alternating current. *Westinghouse Electric & Mfg. Co. v. New England Granite Co.* (U. S.) 103 Fed. 951, 952.

### REVERSIBLE ERROR.

A reversible error is such an error as warrants the appellate court in reversing the judgment. *New Mexican R. Co. v. Hendricks*, 30 Pac. 901, 902, 6 N. M. 611.

### REVERSION.

The term "reversion" signifies a return to a pre-existence or former state or place. *Clute v. New York Cent. & H. R. R. Co.*, 24 N. E. 317, 318, 120 N. Y. 267.

Sir Edward Coke describes a reversion to be the returning of land to the grantor or his heirs after the grant is over. *Barber v. Brundage*, 50 App. Div. 123, 125, 63 N. Y. Supp. 347; *Alexander v. De Kermel*, 81 Ky. 345, 350.

In *Co. Litt. c. 2, § 19*, it is said: "A reversion is when the residue of the estate always doth continue in him that made the particular estate, or where the particular estate is derived out of his estate." *De Kermel v. Alexander*, 4 Ky. Law Rep. 142, 147.

A reversion is a vested interest or estate, inasmuch as the person entitled to it has a vested right of future enjoyment. *Payn v. Beal* (N. Y.) 4 Denio, 405, 411.

The term "reversionary interest" implies that there is a preceding particular estate or interest, and is so used in Acts 1869-70, c. 1, § 21, providing that it shall not be lawful to sell on execution the reversionary interest in any lands included in a homestead until after the termination of the homestead interest therein. *Joyner v. Sugg*, 44 S. E. 122, 124, 132 N. C. 580.

4 Bl. Comm. p. 175, says "an estate in reversion is the residue of an estate left in the grantor, to commence in possession after the determination of some particular estate granted out by him." *Barber v. Brundage*, 63 N. Y. Supp. 347, 348, 50 App. Div. 123; *People v. Lawrence* (N. Y.) 54 Barb. 589, 619; *Todd v. Jackson*, 26 N. J. Law (2 Dutch.) 525, 540. And Lord Coke describes it as the return of land to the grantor or his heirs after the grant is over. *Powell v. Dayton, S. & G. R. Co.*, 16 Pac. 863, 866, 16 Or. 33, 8 Am. St. Rep. 251; *Alexander v. De Kermel*, 81 Ky. 345, 350; *Todd v. Jackson*, 26 N. J. Law (2 Dutch.) 525, 540. It seems to have two significations. The one is an estate left, which continues during a particular estate in being; and the other is the returning of the land after the particular es-

tate is ended. *Powell v. Dayton, S. & G. R. Co.*, 16 Or. 33, 38, 16 Pac. 863, 866, 8 Am. St. Rep. 251 (citing Abb. Law Dict.).

Blackstone attributes the doctrine of reversion to the feudal constitution; but Kent differs from him, and says that reversion, in the general sense, must be familiar to the laws of all nations which admit of private property in lands. *Alexander v. De Kermel*, 81 Ky. 345, 350.

A "reversion" is the return of an estate to the grantor and his heirs after the grant is over. A gratuitous permission by the owner to a third person to use a chattel for a specified time is a loan, and does not create a reversionary right in the lender. *Booth v. Terrell*, 16 Ga. 20, 25.

An "estate in reversion" is the residue of an estate left in the grantor, to commence in possession after the determination of some particular estate granted out by him. Sir Edward Coke describes a reversion to be the returning of land to the grantor or his heirs after the grant is over; as, if there be a gift in tail, the reversion of the fee is, without any special reservation, vested in the donor by act of law. So, also, the reversion after an estate for life, for years, or at will, continues in the lessor; for the fee simple of all lands must abide somewhere, and if he who was before possessed of the whole carves out of it any small estate, and grants it away, whatever is not so granted remains in him. *Barber v. Brundage*, 63 N. Y. Supp. 347, 348, 50 App. Div. 123 (quoting 4 Bl. Comm. p. 175).

A "reversion" is a present vested interest, to be enjoyed at some future time on the happening of some particular event. A reversion is an estate vested in present, though to take effect and profit in futuro, and may be aliened and charged as an estate in possession. It can only exist where the grantor has conveyed less than his whole interest or estate. *Wingate v. James*, 121 Ind. 69, 72, 22 N. E. 735.

The word "reversion," in the rule that "where property is given to a person expressly for life, and there is annexed to such gift a power of disposition of the reversion, the first taker takes but an estate for life, with the power annexed," is a word of the very greatest importance in its connections in its influence upon rules of construction. It implies that the devising clause has left something to revert to the testator after the estate given to the devisee. *Byrne v. Weller*, 61 Ark. 366, 373, 375, 33 S. W. 421, 423.

The term "reversion" is often used in such a sense as to be descriptive only of an interest in land. 4 Kent, Comm. 354. It is also used in speaking of the right to a return of such personal property as does not perish with a short term of using, the possession

of which property the general owner has parted with. *Frankenthal v. Meyer*, 55 Ill. App. 405, 414 (citing *Gordon v. Harper*, 7 Term Rep. 9).

An estate in reversion is the residue of an estate, usually the fee, left in the grantor and his heirs after the determination of a particular estate which he has granted out of it. Civ. Code Ga. 1895, § 3098.

A "reversion" is the residue of an estate left by operation of law in the grantor or his successors, or in the successors of the testator, commencing in possession on the determination of a particular estate granted or devised. Civ. Code Cal. 1903, § 768; Civ. Code Mont. 1895, § 1217; Rev. Codes N. D. 1899, § 3332; Civ. Code S. D. 1903, § 248; Gen. St. Minn. 1894, § 4373; Rev. St. Okl. 1903, § 4033; Comp. Laws Mich. 1897, § 8794; Rev. St. Wis. 1898, § 2036; Nicoll v. New York & El. R. Co., 12 N. Y. (2 Kern.) 121, 132; Rev. St. N. Y. p. 723, § 12. It necessarily assumes that the grantor has not parted with his entire estate. *Wood v. Taylor*, 30 N. Y. Supp. 433, 436, 9 Misc. Rep. 640 (citing 4 Kent, Comm. 353).

#### As an estate or fee.

See, also, "Estate."

"A reversion has been said to be the residue of the fee after a less estate has been carved out of it, both these interests being but one estate. *Jac. Law Dict.*; 1 *Coke*, c. 12, § 215. A fee simple of the land is the largest possible estate. *Id.* c. 1, § 11. Although there may be a remainder or a reversion in fee, it is not the entire property, or, in popular language, the land itself, that is held in fee in such case, but only the reversion or the remainder. A reversion or a remainder is described as such; the quality, value, and sometimes the validity, being dependent upon the precedent estate." Therefore a remainder or a reversion is not properly described in the certificate of appraisers in execution, reciting that the debtor holds certain real estate in fee simple.—*Stinson v. Rouse*, 52 Me. 261, 266.

## REVERT.

"Revert" means to turn back that which has been received. *Lewis v. Lewis*, 87 N. W. 280, 281, 114 Iowa, 399.

The word "revert," in connection with property, implies in a popular sense devolution upon one having an already existing interest. In *re Phillips' Estate* (Pa.) 48 Leg. Int. 232.

"The usual and ordinary meaning of 'revert' is to return. Its legal or technical signification is for property to return or go back to a person who formerly owned it,

but who parted with the possession or title to it by creating an estate in another." *Pearce v. Lott*, 29 S. E. 276, 278, 101 Ga. 395 (quoting *And. Law Dict.*).

As used in a provision of a will providing that any portion of a certain sum authorized to be appropriated to the relief of the testator's needy nephews and nieces therein referred to which should not be so appropriated should revert to the use of a hospital fund, the term "revert" means that it should go back to the hospital fund, from which it had been withdrawn. *Ingraham v. Ingraham*, 48 N. E. 561, 569, 169 Ill. 432.

"Revert," as used in a will giving a daughter of the testator a certain sum, and providing that, should she die leaving no issue, the legacy should revert to testator's estate, does not indicate that the testator contemplated the death of the daughter after she had come into possession of the legacy. *McDowell v. Stiger*, 42 Atl. 575, 576, 58 N. J. Eq. 125.

"Revert," as used in Code, § 2015, providing that if a railway is not used or operated for eight years, or if, its construction having been commenced, work has ceased and has not been in good faith resumed for eight years, the right of way, including the roadbed, shall revert to the owners of the land from which it was taken, is a technical word, and should be accorded its meaning as such. It is the return to the owner of the fee of the easement formerly operated, or, perhaps more accurately speaking, the removal of the burden cast upon the fee. The instant the right of way reverts to the owner, the easement, with all its incidents, is extinguished, and the owner of the tract from which it was taken is restored to complete dominion over the entire property. *Remey v. Iowa Cent. Ry. Co.*, 89 N. W. 218, 220, 116 Iowa, 133.

#### As go to.

The term "revert," as used in a clause of a will declaring that, if the legatee should die before attaining her majority, the legacy should revert back to the testator's lawful heirs, should be construed to mean "go to." *Beatty v. Trustees of Cory Universalist Soc.*, 39 N. J. Eq. (12 Stew.) 452, 463.

Where a holographic will bequeathed testator's residuary estate to his only surviving sister of the whole blood, and provided that, in case of the death of any of the legatees before distribution, the portion bequeathed to such legatee should "revert to the children of the family of which such legatee is a member," and it appeared that the only members of the testator's family surviving at the date of the will were a half-brother and half-sister living in different states, the phrase "revert to" should not be construed technically, but as meaning "go

to," so that, on the death of the sister before distribution, her share should be divided among her children, instead of between testator's half brother and sister. In re Bennett's Estate, 66 Pac. 370, 134 Cal. 320.

Testator devised his property to his own daughter in trust, she to have the income, and, should she die without issue, the property was to revert back to the heirs of testator and his deceased wife, but, should she die with issue, such issue was to inherit the estate. Held, that the words "shall revert back" should be read as "shall go to," as it would be impossible for the estate to "revert" to persons who had never had any interest therein. Johnson v. Askey, 60 N. E. 76, 77, 190 Ill. 58.

#### As terminating estate.

Where a deed conveyed land to a grantor's wife for the life of the grantor, providing that at the grantor's death the land should revert and reinvest in fee simple to his heirs at law or devisees, the provision that the land should "revert and reinvest" at the termination of grantor's life was equivalent to a grant of a life estate only. Wayne v. Davis (Ky.) 66 S. W. 827, 829.

A holographic will devised all the testator's land to his widow during widowhood, and at her death the land was directed to be sold, and the moneys arising therefrom to be equally divided among testator's four children or their heirs. In case of the widow's remarriage, the land was directed to be sold, and one-half of the money was to be used for her benefit and support, to revert back to the children at her death, and the other half to be equally divided among them. Held, that the phrase "revert back" clearly indicated the testator's intention to vest the fee in the children, subject to the widow's life estate. The court says: "We think that a fair and reasonable interpretation of the words 'revert back' indicates that the testator assumed and believed that by the preceding language he had already vested his real estate in his children in equal shares, subject to the use thereof of his widow during her life or widowhood." Therefore a conveyance by one of the children of his interest during the widow's lifetime was valid and binding. Miller v. Gilbert, 22 N. Y. Supp. 355, 357, 3 Misc. Rep. 43.

The word "revert," as used in a will whereby the testator gave a life interest in certain lands to his wife, and whereby he directed that after her death the property should revert to the executors and be disposed of by them in the same manner as the rest of his estate thereafter mentioned, showed that testator intended to give to the executors the remainder in fee. Therefore the executors could, with the widow's consent, sell the lands in question in her life-

time. Snell's Ex'rs v. Snell, 38 N. J. Eq. (11 Stew.) 119, 124.

"Revert to the United States," as used in Act Cong. July 25, 1886, granting lands to aid in the construction of a railroad and telegraph line from the Central Pacific Railroad, in California, to Portland, Or.—section 8 providing that, in case the company should not complete the same as provided in section 6, this act shall be null and void, and all lands not conveyed by patent to said company or companies, as the case may be, at the date of any such failure, shall revert to the United States—is equivalent to a declaration that the act granting such lands shall cease to be operative if the company fails to complete its road within the specified time. "It is no more than a provision that the grant shall be void if a condition subsequent be not performed." Bybee v. Oregon & C. R. Co., 11 Sup. Ct. 641, 643, 139 U. S. 663, 35 L. Ed. 305.

#### REVERTER.

A devise of land was to be used by the vendee for a certain purpose forever, and whenever the vendee should cease to use the land for such purpose the same was to revert to testator's heirs at law. Held, that testator had reserved to his heirs at law an interest not exactly a reversion, but what is rather the possibility of a reversion, and termed a "reverter." Loughheed v. Dykeman Baptist Church and Society, 40 N. Y. Supp. 586.

#### REVEST.

The word "revest," in law, simply means the return or the falling back into the possession of the donor or of the former proprietor. McPheeters v. Wright, 24 N. E. 734, 739, 124 Ind. 560, 9 L. R. A. 176.

#### REVIEW.

See "Bill of Review"; "Writ of Review."

#### As new trial.

In Comp. St. 1715, § 131, giving the prisoner, if a verdict of guilty were returned in the county court, an absolute right of review, a new trial is meant. State v. Main, 37 Atl. 80, 82, 69 Conn. 123, 36 L. R. A. 623, 61 Am. St. Rep. 30.

#### As review on appeal.

The word "review," as used in Code Civ. Proc. § 779, providing that where costs of a motion are awarded or proceedings in the action on the part of the party required to pay the same, except "to review or vacate the order," are stayed until the payment



thereof, must be taken to mean to review on appeal; for that is the only method whereby a review may be had. The word could not have meant renewal of the motion or a resettlement of the order. The word "review" means simply that the court on appeal may be asked to consider the question presented below as a ground for the determination in the order. *Weehawken Wharf Co. v. Knickerbocker Coal Co.*, 54 N. Y. Supp. 566, 567, 25 Misc. Rep. 309.

## REVIEWS.

"Reviews," as used in St. 1810, c. 108, § 25, providing that privates in the militia are not required to attend reviews held more than 15 miles from their residence, applies only to brigade reviews. *Commonwealth v. Richardson*, 13 Mass. 220.

## REVISE.

"Revise," as used in the title of Laws 1893, Act 118, to "revise" the laws relative to penal institutions and the government and discipline thereof, and to repeal all acts inconsistent therewith, implied an intention on the part of the Legislature to include the entire control over the subject; and, the provisions of the act being intended to cover the entire management of such penal institutions, the same did not violate Const. art. 4, § 25, providing that the act revised and the sections altered or amended shall be re-enacted and published at length. *Ellis v. Parsell*, 58 N. W. 839, 840, 100 Mich. 170.

"To revise is to review or re-examine for correction, and when applied to a statute contemplates the re-examination of the same subject-matter contained in the prior statute, and the substitution of a new, and what is believed to be a still more perfect, rule." *Casey v. Harned*, 5 Iowa (5 Clarke) 1, 12.

"Revise," as contained in Const. art. 15, § 11, providing that three persons learned in the law shall be appointed "to revise and rearrange the statute laws of the state," means to review, alter, and amend, and does not signify an act of absolute origination. It relates to something already in existence. *Vinsant v. Knox*, 27 Ark. 266, 272.

A law is revised when it is in whole or in part permitted to remain, and something is added to or taken from it, or it is in some way changed or altered to make it more complete or perfect, or to fit it the better to accomplish the object or purpose for which it was made, or some other object or purpose. *Falconer v. Robinson*, 46 Ala. 340, 348.

The phrase "revise, amend, and consolidate," as used in the title of Acts 1897, No. 209, entitled "An act to revise, amend, and consolidate the laws for the incorpora-

tion of ecclesiastical bodies," shows the plain purpose of the enactment, which was to collect the provisions essential to the incorporation of ecclesiastical bodies and embody them in one act. Therefore this act supersedes Acts 1895, No. 110, entitled "An act for the incorporation of Methodist Episcopal Churches." *Graham v. Muskegon County Clerk*, 116 Mich. 571, 572, 74 N. W. 729.

## REVISED STATUTES.

Though in 1862 there were in New York five so-called editions of the Revised Statutes in common use, yet the term "Revised Statutes" had a well-settled meaning in the state, which denoted the statutes published under that title pursuant to Laws 1888, c. 20, and the amendments to those statutes. *In re Norton*, 39 App. Div. 369, 371, 57 N. Y. Supp. 407.

## REVISION.

"Revision," as used in a statute authorizing the entering of an appeal, after the expiration of the time limited for such appeal, when the court is satisfied that justice requires a revision of the decree appealed from, does not mean reversal or modification, but simply review, re-examination, or looking at again. *Goodwin v. Prime*, 42 Atl. 785, 787, 92 Me. 355.

The words "revision or correction," as contained in a city charter (Sp. Laws 1893, p. 25, § 27), relating to special assessments, and providing that any person might present a petition to the city council showing wherein he had been or may be injured by a proposed improvement, and asking for a "revision or correction of the same," means that the council may be called upon to review that which had been done, and to make the proceedings conform to the law; but it does not empower the council to do anything that it or its officers could not have done in the first instance. *Hutcheson v. Storrie*, 51 S. W. 848, 852, 92 Tex. 685, 45 L. R. A. 289, 71 Am. St. Rep. 884.

"A 'revision of statutes' implies a re-examination of them. The words apply to a restatement of the law in a corrected or improved form. The restatement may be with or without material change. A revision is intended to take the place of the law as previously formulated. By adopting it the Legislature does the same thing in effect as when a particular section is amended by the words 'so as to read as follows.' The revision is a substitute. It displaces and repeals the former law as it stood relating to the subjects within its purview." *Cortesy v. Territory*, 32 Pac. 504, 505, 7 N. M. 89 (citing *Suth. St. Const.* § 154). See, also, *City of Helena v. Rogan*, 69 Pac. 709, 710, 27 Mont. 135.

**REVIVE.**

The primary meaning of the word "revive" is to give life to again. The first syllable indicates the use of old matter, and the latter means to give life to, which is one of the primary meanings of the word "create." In re Bank of Commerce, 53 N. E. 950, 954, 153 Ind. 160, 47 L. R. A. 489.

**Debts.**

The word "revive" means to bring again to life, to renew, to reanimate, or to bring into action after a suspension; as to revive a project or scheme that had been laid aside. It is a word which has been generally employed in the judicial decisions to express the effect of an admission of the existence of indebtedness or a promise to pay a debt otherwise barred by the statute of limitations. *Lindsey v. Lyman*, 37 Iowa, 206, 207 (citing *Webst. Dict.*).

"Revive," as used in Comp. Laws, § 1873, providing that actions on contracts shall be "revived" by admission that the debt is unpaid, etc., will be held to mean both the revitalization of a dead cause of action and the restoring of a lapsed period of a statutory life, so that the promise may be made either before or after the running of the statute of limitations. *Bullard v. Lopez*, 37 Pac. 1103, 1104, 7 N. M. 561.

**Judgments.**

The term "revive" means to restore or bring again to life. When a judgment is revived, it becomes a new judgment, on which execution may issue as a personal liability; and it continues in existence for five years longer from date of the order of revival, and the lien thereof, like the judgment and incident thereto, is a new creation, and dates from the order of revival. *Brier v. Traders' National Bank*, 64 Pac. 831, 835, 24 Wash. 695.

**REVIVAL.**

The revival of a suit, which is either abated or made defective by the death of a party interested, is not a new suit, but is still the same suit, in which both parties are entitled to the benefit of all former proceedings. Where a suit abates or becomes defective by the death of a party, and is revived by his heirs, they are not bound by proceedings taken after his death prior to revival. *Havens v. Sea Shore Land Co.*, 41 Atl. 755, 757, 57 N. J. Eq. 142.

"Revival of a will" is where a second will, which has revoked the former one, is canceled or destroyed, which operates to revive the first will. *Boudinot v. Bradford*, 2 Dall. 266, 268, 1 L. Ed. 375.

**REVIVAL BY AGREEMENT.**

See "Judgment of Revival by Agreement."

**REVIVOR.**

See "Bill of Revivor."

**REVOKE—REVOCATION.**

See "Express Revocation"; "Implied Revocation."

When an order of removal of the board of license commissioners was revoked, it was not rescinded from the beginning and made as if it never had been. That is not the meaning of "revoked," which imports that the order is in force until it is recalled. *Taber v. City of New Bedford*, 58 N. E. 640, 641, 177 Mass. 197.

**As annul**

"To revoke" sometimes denotes the right to annul, rescind, or abolish. *City of Houston v. Houston City St. Ry. Co.*, 19 S. W. 127, 130, 83 Tex. 548 (quoting *Webst. Dict.*).

**Revocation of bequest**

By a very loose and indeterminate use of language, anything which renders a bequest inoperative at the testator's death may possibly be called a "revocation." A satisfaction of a legacy by an advancement made by a testator in his lifetime, if under any circumstances a revocation of the bequest or an alteration of the will by which the bequest is made, in the sense in which those terms are used in the statute of wills (2 Rev. St. [1st Ed.] pp. 64-65, pt. 2, c. 6, tit. 1, §§ 42, 48), is not so in a case where the testator has declared in the will itself that the legacy should not be payable in the event of an advancement to be made and characterized in a specified manner, and that event has happened. A testator who concludes to anticipate a proposed testamentary gift cannot be said by any just use of language to revoke or recall it, when, so far from wishing to undo what he has done, he has concluded to do it sooner than he before intended. *Langdon v. Astor's Ex'rs*, 16 N. Y. 9, 39.

**Revocation of franchise.**

The provision in Const. 1831, art. 2, § 17, authorizing the Legislature to incorporate, with a reserved power of "revocation" by the Legislature, permits the withdrawal of a single right or privilege, without revoking the whole franchise. The revocation contemplated under the clause may be either direct or by necessary implication, by the passage of an act necessarily inconsistent with any right or privilege possessed by an

existing corporation. *Wilmington City Ry. Co. v. Wilmington & B. S. Ry. Co.*, 48 Atl. (Del.) 12, 18.

### Revocation of grant.

The word "revocation," when used in reference to a grant, "not only means the recalling of the power, but may denote the vacation of the grant for cause." *City of Houston v. Houston City Ry. Co.*, 19 S. W. 127, 130, 83 Tex. 548, 29 Am. St. Rep. 679 (citing *Bouv. Law Dict.*).

### Revocation of will.

Revocation of will occurs where a second will is made containing an express clause revoking the former one. *Boudinot v. Bradford* (Pa.) 2 Dall. 266, 268, 1 L. Ed. 375.

The word "revocation" means an act done by the party by which he recalls his will. The statute, therefore, with propriety says, not that the marriage of a testator revokes the will, but that it is to be deemed or considered the same as a revocation. The marriage is not a revocation, but it has the effect of a revocation. *Lathrop v. Dunlop* (N. Y.) 4 Hun, 213, 215.

By "revocation of a will" is generally understood an act by which the will ceases to have any effect or efficacy. It is not, however, uniformly used in this sense by legal writers or in English judicial opinions. But it is frequently applied to cases where the will operates on some estates, but does not operate on others, by reason of some conveyance or modification made therein by the testator in his lifetime. The alienation of real estate by the testator himself after he has devised the same by will is a revocation of the will only as to the part thus alienated. *Carter v. Thomas*, 4 Me. (4 Greenl.) 341, 342.

An intention to sell property does not revoke a will by which the property is devised, and hence, where a testator contracted to sell the land, prepared articles, and took bonds for the payment of the purchase money, but no money was received by him, and no deed executed, the will devising such property was not revoked. *Hall v. Bray*, 1 N. J. Law (Coxe) 212.

A will, or a provision in the will, is "revoked," in the proper sense of the term, when, although capable of being carried into effect according to its terms, it is rendered inoperative and void by a subsequent change of the mind of the testator, manifested by such evidence as in the particular case the law requires. *Langdon v. Astor's Ex'rs*, 10 N. Y. Super. Ct. (3 Duer) 477, 561.

"Revoke" means to recall, to take back, or to repeal; and where a testator merely changed the time of payment of the bequest, it was not a revocation, though testator called it by that name in his will. In *re Morrow's Estate*, 54 Atl. 342, 343, 204 Pa. 484.

Express revocation of a will can only be shown by evidence of some of the acts designated by the statute, and the provisions of the statute must be complied with; but the revocation of a will may be implied from subsequent changes in the condition or circumstances of testator, and hence a valid sale of an estate devised will effect a revocation *pro tanto*. An inoperative conveyance may so operate, if there be an intention to convey; but a contract of conveyance executed by one who is mentally incapacitated, or adjudged void for fraud or undue influence, is ineffectual as a revocation. *Graham v. Burch*, 49 N. W. 697, 698, 47 Minn. 171, 28 Am. St. Rep. 339.

### Same—As alter.

"Revoked," as used in Code, art. 93, § 302, providing that no devise in writing of lands, tenements, or hereditaments, or any clause thereof, shall be revoked, except in the manner designated, means annulled, and is not synonymous with "altered"; and in legal contemplation a revoked will ceases to exist, and is as inoperative as if it never existed. *Eschbach v. Collins*, 61 Md. 478, 499, 48 Am. Rep. 123.

A testator, who bequeathed a certain sum to an orphanage, afterwards executed a codicil which recited: "I hereby annul and revoke such bequest, and instead thereof I give the same to a trustee, to be invested during the life of A. for his benefit, and upon his death to be paid to the orphanage for the purpose expressed in the will." In construing the codicil, it was held that the words "annul and revoke," taken in connection with expressed purposes of the codicil, did not constitute a revocation of the will. "The fact that the testator called it by that name does not make it so." "Revoke" means to recall, to take back, to repeal. "Annul" means to abrogate, to make void. The codicil did not recall or make void the bequest in any part, except as to the time of payment; and this it changed. In *re Watt's Estate*, 32 Atl. 42, 44, 168 Pa. 422.

### Same—Alteration distinguished.

In *Swinton v. Bailey*, 45 L. J. Exch. 427, where testator had devised his real estate to E., her heirs and assigns, forever, and subsequently obliterated these words with a pen and ink, the judge said: "The difference between revocation and alteration seems to me to be this: If what was done simply takes away what was given before, or a part of what was given before, then it is a revocation; but if it gives something in addition, or gives something else, then it is more than a revocation." Appeal of Miles, 36 Atl. 39, 41, 68 Conn. 237, 36 L. R. A. 176.

### Same—As annul.

"To 'revoke a testamentary disposition' is to annul it, so that in legal contemplation

it ceases to exist and becomes as inoperative as if it had never been written. But when, by the substitution of certain words for others, a different meaning is imported, there is not a mere revocation. There is something more than the destruction of that which has been antecedently done. There is a transmutation, by which a new clause is created. There is another and different testamentary disposition." *Gardiner v. Gardiner*, 19 Atl. 651, 652, 65 N. H. 230, 8 L. R. A. 383.

**Same—As requiring both act and intent.**

"To establish a revocation, it is quite clear that a symbolic burning will not do, a symbolic tearing will not do, nor will a symbolic destruction. There must be the act, as well as the intention. \* \* \* All the destroying in the world, without intention, will not revoke a will, nor all the intention in the world, without destroying. There must be the two." *Cheese v. Lovejoy*, L. R. 2 Prob. Div. 251. There must be an act and an intention, in order to revoke. Neither can be inferred from evidence or declarations of the testator, apart from the acts, and with no proof that the testator ever performed an act of a revocatory nature. *Throckmorton v. Holt*, 21 Sup. Ct. 474, 488, 180 U. S. 552, 45 L. Ed. 603.

"Revocation" is an act of the mind, which must be demonstrated by some outward and visible sign. As said by a learned judge: "All the destroying in the world, without intention, will not revoke a will, nor all the intention in the world, without destroying. \* \* \* There must be the two." *Cheese v. Lovejoy*, L. R. 2 Prob. Div. 251. It is not the mere manual operation of tearing the instrument which will satisfy the law. The act must accompany the intention of revoking. There must be the act, as well as the animus. *Woodruff v. Hundley*, 29 South. 98, 102, 127 Ala. 640, 85 Am. St. Rep. 145.

"Revocation" of a will consists of two things: the intention of the testator and some outward act or symbol of destruction. A defacement, obliteration, or destruction, without the animus revocandi, is not sufficient. Neither is the intention, or the animus revocandi, sufficient, without some act of obliteration or destruction done; and where a will was defaced and mutilated by vermin, and the testator adopts this with intent to revoke the will, a revocation of the will will be deemed to have been made. *Cutler v. Cutler*, 40 S. E. 689, 130 N. C. 1, 57 L. R. A. 209, 89 Am. St. Rep. 854.

**REVOLT.**

See "Endeavor to Make a Revolt."

A revolt, in the contemplation of maritime law, occurs where the crew, or any part

of them, throw off all obedience to the commander and forcibly take possession of the vessel, by assuming and exercising the command and navigation of her, or by transferring their obedience from the lawful commander to one who has usurped the command. *United States v. Haskell* (U. S.) 28 Fed. Cas. 207, 209.

**REVOLUTION.**

"The term 'revolution,' when used in reference to government, has a positive and qualified meaning. When employed in the first, it supposes a radical change in the whole system and structure of the government; when in the latter, it conveys the idea of modification only. The revolution of Texas was clearly of the last description. As a seceding part of the Mexican government, she was not left without laws made by herself, or without the proper officers for administering them. This was practically the case: The old laws continued to be administered, through the instrumentality of the old officers, until the establishment of a new system, and, until changed, were supposed to exert the same binding influence in the protection of persons and property that had been claimed for them before the relations between Texas and other parts of Mexico had been changed." *McMullen v. Hodge*, 5 Tex. 34, 75.

**REVOLVER.**

"A revolver may or may not be such a weapon as is adapted to the usual equipment of the soldier, or the use of which may render him more efficient as such, and therefore it is a matter to be settled by evidence as to what character of weapon is included in the designation 'revolver.' We know there is a pistol of that name which is not adapted to the equipment of the soldier, yet we also know that the pistol known as the 'repeater' is a soldier's weapon, skill and use of which will add to the efficiency of the soldier." A carrying of a revolver of the latter character is within the protection of a constitutional provision protecting the right to carry arms. *Andrews v. State*, 50 Tenn. (3 Heisk.) 165, 187, 8 Am. Rep. 8.

**REWARD.**

See "Liberal Reward."

The term "reward" is usually applied to a sum paid for the performance of some specific act to some person or persons. *Kircher v. Murray* (U. S.) 54 Fed. 617, 621.

A "reward" is a recompense or a premium offered by a government or an individual in return for special or extraordinary services to be performed. *Kinn v. First Nat. Bank*, 95 N. W. 969, 970, 118 Wis. 537.

Const. art. 2, § 7, provides that every person shall be disqualified from holding office, during the term for which he may have been elected, who shall have given or offered a bribe or reward to procure his election. Under this statute it was held in *State v. Dustin*, 5 Or. 375-377, 20 Am. Rep. 746, that a promise by a candidate for the office of county judge, made to the voters of his county prior to his election, that he will, after elected, pay into the county treasury \$200 per annum of his salary as judge, is not an offer to reward voters, unless it also appeared that the voters influenced by such offer were taxpayers in such county, or would in some way be benefited by the performance of the offer. In arriving at this conclusion the court quoted with approval Burrill's definition of "reward" as a "compensation or remuneration for services; a sum of money paid or taken for doing or preparing to do some act."

The term "reward," in an ordinance prohibiting any person from running any hack, carriage, dray, sprinkling wagon, or other vehicle for reward, without a license, can only be applied to such vehicles as are run for the accommodation of the public, and for the use of which a fee is charged to the person using them; and therefore wagons used by coal merchants to deliver coal sold by them are not public vehicles or wagons within the meaning of the statute. *City of Henderson v. Marshall* (Ky.) 58 S. W. 518.

#### **Bounty distinguished.**

See "Bounty."

#### **As proposition for contract.**

An offer of reward is a proposal. The party making it may insert his own terms. *Haskell v. Davidson*, 40 Atl. 330, 91 Me. 488, 42 L. R. A. 155, 64 Am. St. Rep. 254.

The "offer of a reward" remains conditional until it is accepted by the performance of a service, and the one offering the reward has a right to prescribe whatever terms he sees fit, and such terms must be substantially complied with before any contract arises between him and the claimant. Under an offer of reward to be paid for the arrest and conviction of certain murderers, a person identifying parties already under arrest and not having done anything toward their capture or conviction would not be entitled to the reward. *Williams v. West Chicago St. R. Co.*, 61 N. E. 456, 457, 191 Ill. 610, 85 Am. St. Rep. 278.

A "reward" is a recompense or premium offered by the government or an individual for special or extraordinary services to be performed. Until acceptance by performance of the services, it is a mere proposition, which may be accepted by any part of the public,

if it be offered to the public, or by any particular person or class of persons, if such proposition is made to them. When accepted by performance it becomes a binding contract, subject to the laws governing contracts generally. *Campbell v. Mercer*, 33 S. E. 871, 372, 108 Ga. 103.

### **RHUMKORF COIL**

A rhumkorf coil is a coil constructed on the following principle: On a central core of soft iron is wound a certain number of turns of copper wire, each turn being insulated by a layer of paper or some other insulating material; then on top of this coarser wire is wound, in the same direction, a large number of layers of very thin wire, each one likewise insulated by a layer of paper or other insulating material, and the fine wires connect with the two poles on top, and the coarser wires connect with the lower, with the commutator running from one pole to the other. This box is filled with what is called "condenser," which is a series or number of plates of tin foil, that stores up electricity somewhat on the principle of the Leyden jar and keeps it stored, so that when a person uses it he gets a much greater shock than he would if the condenser was not there. It is used in schools and universities, by physicians, and to explode mines and dynamite cartridges. It has no practical use in telegraphing, and is commonly used for illustrating the law of electrical induction. It is a "philosophical instrument," within the tariff acts. *Robertson v. Oelschlaeger*, 11 Sup. Ct. 148-150, 137 U. S. 436, 34 L. Ed. 744.

### **RIBBON.**

Silk and cotton velvet ribbons, silk being the component material of chief value, are "ribbons," within Act Cong. June 30, 1864, § 8, levying a duty of 60 per cent. ad valorem on all dress and piece silks, "ribbons and silk velvets, or velvet of which silk is a component material of chief value." *Lane v. Russell* (U. S.) 14 Fed. Cas. 1085, 1087. See, also, *Chapon v. Smythe* (U. S.) 5 Fed. Cas. 500, 501.

### **RIBS.**

In mining parlance, "ribs" are the columns or partitions left in the coal vein to support the roof. *Reddon v. Union Pac. Ry. Co.*, 15 Pac. 262, 263, 5 Utah, 344.

### **RIDE.**

"Ride" means to be carried on a horse or other animal or in any kind of vehicle or carriage; to be carried or travel on horse-

back. As used in an ordinance providing that any person riding or driving shall check up or halt for pedestrians on approaching alley or street crossings, the term "riding" was probably used to signify something different from "driving," and was intended to designate one traveling on a horse or other animal, and does not apply to street cars. *Citizens' Ry. Co. v. Ford*, 53 S. W. 575, 576, 93 Tex. 110, 46 L. R. A. 457.

The term "riding," in a Sunday statute which operates to prohibit riding on Sunday, is to be construed as meaning unnecessary riding, and therefore does not operate to preclude riding in the open air for exercise necessary for the promotion of health. *Sullivan v. Maine Central R. R. Co.*, 19 Atl. 169, 170, 82 Me. 196, 8 L. R. A. 427.

### RIDER.

A "rider" is a new and unrelated enactment or provision attached to appropriation bills in the Legislature. *Commonwealth v. Barnett*, 48 Atl. 976, 977, 199 Pa. 161.

### RIDGELING.

A "ridgeling," as defined by Webster, is "an animal half castrated; a male of any beast half-gelt." Proof that a horse is a ridgeling will not support an indictment for the theft of a gelding. *Briscoe v. State*, 4 Tex. App. 219, 221, 30 Am. Rep. 162.

A ridgeling is the male of any beast half-gelt, and the fact that a horse was a ridgeling constituted a breach of a warranty that he was a gelding. *Douglass v. Moses*, 56 N. W. 271, 272, 89 Iowa, 40, 48 Am. St. Rep. 353.

### RIGIDLY.

In an instruction in a prosecution for receiving stolen goods, which stated that if the defendant knew that the goods were stolen, or the circumstances were such that he should have known, then the defendant should be as rigidly held responsible as if he had actual knowledge, the word "rigidly," taken in connection with the whole instruction, means no more than "to the same extent," or "exactly," and with this meaning there is no error. *State v. Feuerhaken*, 65 N. W. 299, 300, 96 Iowa, 299.

### RIGHT—RIGHTS.

See "Absolute Rights"; "Accrued Right"; "Acquired Rights"; "All Right"; "As of Right"; "Bill of Rights"; "Charter Rights"; "Civil Rights"; "Claim of Right"; "Color of Right"; "Common Right"; "Contingent Right"; "Corporate Rights"; "Due Rights";

"Established Right"; "Existing Right"; "Expectant Right"; "High Right"; "Homestead Right"; "Joint Right"; "Legal Right"; "Littigious Right"; "Marital Rights"; "Mining Right"; "Natural Rights"; "Patent Right"; "Perfect Right"; "Personal Right"; "Political Right"; "Pretended Right or Title"; "Private Right"; "Property Rights"; "Riparian Right"; "Sanctioning Right"; "Substantial Right"; "Substantive Right"; "Tunnel Right"; "Unalienable Right"; "Valuable Right"; "Vested Right"; "Water Right."

All right, title, and interest, see "All."  
All my right, see "All."

The word "rights" is generic and common, embracing whatever may be lawfully claimed. *Lonas v. State*, 50 Tenn. (3 Helsk.) 287, 306.

The word "right" denotes, among other things, property, interest, power, prerogative, immunity, and privilege. In law it is most frequently applied to property in its restricted sense; but it is often used to designate power, prerogative, and privilege, and especially when applied to corporations. A large proportion of the rights of political corporations consists of the powers conferred upon them. *People v. Dikeman* (N. Y.) 7 How. Prac. 124, 130.

"A 'right' has been defined by Mr. Justice Holmes to be a legal consequence which attaches to certain facts. Every fact which forms one of the group of facts of which the right is the legal consequence appertains to the substance of the right." *White v. Multnomah County Com'rs*, 10 Pac. 484, 486, 13 Or. 317.

The term "right," in civil society, is defined to mean that which a man is entitled to have, or to do, or to receive from others, within the limits prescribed by law. *Atchison & N. R. Co. v. Baty*, 6 Neb. 37, 40, 29 Am. Rep. 356.

A right, according to the Spanish civil law, "was either in the thing or to the thing." A right in the thing was that which belonged to one over anything, without respect to another person. A right to a thing was that which belonged to any one as against another person, to oblige him to give or to do something. Of the first kind are rights of dominion, of inheritance, of services, and of pledge and mortgage. Of the second kind were all species of obligations which arise from contract. *Sullivan v. Richardson*, 14 South. 692, 709, 33 Fla. 1.

Archbishop Whately says that which is conformable to the Supreme Will is absolutely right, and is called "right" simply, without any reference to a special act. The oppo-

site to "right" is "wrong." What, therefore, may be meant by a statement in a letter from a bankrupt, after his discharge, to his creditors, saying, "Be satisfied all will be right," is as difficult to determine as if no such standard had been raised by the archbishop. It is not absolutely certain that it is right for a creditor, seizing his debtor, to say, "Pay that which thou owest," or that it is wrong for the debtor to resist such an attack. It is not unnatural that the creditor should think that payment of the debt was right, and that it was the only right in the case. It is equally natural that the debtor should have a different opinion. When, therefore, the debtor said to the creditor: "I intend to do right. All will be right between my creditors and myself"—he cannot be understood as saying that he would certainly pay the debt, much less that he would pay it immediately. *Allen v. Ferguson*, 85 U. S. (18 Wall.) 1, 4, 21 L. Ed. 834.

The word "right" is defined by lexicographers to denote, among other things, property, interest, power, prerogative, immunity, and privilege. In law it is most frequently applied to property in its restricted sense, and it is often used to designate power, prerogative, and privilege, and especially when applied to corporations. *People v. Dikeman* (N. Y.) 7 How. Prac. 124, 130.

Where a statute relating to insurance companies saves the corporate existence of all companies organized prior to its adoption, and continues all the rights that they previously had, what is comprehended in the term "rights" is not very clear. In some respects it may be considered vague, and leave a good deal to implication; but where such a company had the authority before the enactment of such law to invest its funds in certain stocks or bonds, the word "rights" continued to the company, after the adoption of such statute, the power so to invest its funds. *St. Joseph Fire & Marine Ins. Co. v. Hauck*, 63 Mo. 112, 118.

"Right," as used in Sess. Laws 1861, p. 56, § 60, saving a right of action existing in favor of the party who holds a contract, obligation, right, or lien, must be construed as embracing some other right than those arising under an obligation, contract, or lien. *Gould v. Subdistrict No. 3 of Eagle Creek School Dist.*, 7 Minn. 203, 211 (Gil. 145, 152, 153).

A warranty of a horse as being "sound and right" will be construed to mean that the horse was right in conduct and behavior as to all matters materially affecting its value, as well as in physical condition. *Walker v. Hoisington*, 43 Vt. 608, 611.

#### As cause of action.

"Right," as used in R. L. § 28, which provides that the repeal of an act shall not

affect "a right accruing, accrued, acquired, or established," means a cause of action which has accrued at the time of the repeal, but does not require that suit shall have been commenced thereon at such time. *Harris v. Town of Townshend*, 56 Vt. 716, 719.

#### As deed.

The word "right" is generally used in the popular sense in this country as synonymous with a deed, and in that sense was properly used by a son in declaring that he had no right to his land, and that he feared his father never would make him a right to it. It did not have the effect of an acknowledgment that he had in fact no claim upon his father for the land.—*Rowton v. Rowton* (Va.) 1 Hen. & M. 92, 97.

#### As correlative with duty.

A duty or a legal obligation is that which one ought or ought not to do; the terms "duty" and "right" being correlative. When a right is invaded a duty is violated. *Lake Shore & M. S. Ry. Co. v. Kurtz*, 37 N. E. 303, 304, 10 Ind. App. 60.

The word "right," as used in a definition of tort as one's disturbance of another in a right which the law has created, etc., is employed strictly in a legal sense; that is, in the sense implying something with which the law invests one person, and in respect to which, for his benefit, another, or perhaps all others, are required by the law to do or perform acts, or to forbear or abstain from acts. *Galveston, H. & S. A. R. Co. v. Hennigan* (Tex.) 76 S. W. 452, 453.

#### As enforceable legal right.

The word "right," in Act April 2, 1890, (87 Laws 149), providing that no railroad company, etc., shall demand, expect, require, or enter into any contract, agreement, etc., with any person in the employ of any railroad company, whereby such person stipulates or agrees to surrender or waive any right to damages against any railroad company, thereafter arising for personal injury or death, etc., means a tangible legal right, one arising on contract or a tort, which would be recognized and enforced by law. *Pittsburg, C., C. & St. L. Ry. Co. v. Cox*, 45 N. E. 641, 644, 55 Ohio St. 497, 35 L. R. A. 507.

"Right lawfully accrued or established," as used in Acts 1880, c. 245, providing that the repeal therein enacted should not affect any other right lawfully accrued or established before the act took effect, etc., means an absolute right only, and does not include one resting in the discretion of the court. *People v. Cohocton Stone Road* (N. Y.) 25 Hun, 13, 17.

The word "rights," according to one definition given by standard lexicographers, means that which one has a legal claim to

do; legal power; authority; immunity granted by authority; the investiture with special or peculiar rights. The word is used in this sense in Rev. St. § 5508 [U. S. Comp. St. 1901, p. 3712], making it criminal for two or more persons to conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States. *United States v. Patrick* (U. S.) 54 Fed. 338, 348.

#### **As exclusive grant.**

The expression "the right," as used in Acts S. C. March 1, 1870, which gives and grants to designated persons "the right to dig, mine, and remove," for 21 years, from the beds of navigable waters within the jurisdiction of the state, the phosphate rocks and deposits contained therein, and which requires the grantee to pay the state a specified sum per ton for every ton removed, cannot be held to grant an exclusive right, so as to prevent the state from granting similar rights and powers to others. *Bradley v. South Carolina Phosphate & Phosphatic River Min. Co.* (U. S.) 3 Fed. Cas. 1165, 1166.

#### **Exemption from taxation.**

The term "all rights" embraces each right. A statute providing that all rights as to a line of railway which having been legally vested in one corporation shall pass to another corporation, upon a sale by one to the other, is sufficiently clear and certain to pass a right of exemption from taxation, as well as any other right. *Atlantic & G. R. Co. v. Allen*, 15 Fla. 637, 658.

#### **As law.**

The word "right," as used in the Constitution, providing that the right of trial by jury shall remain inviolate, is not used in the broad sense, as synonymous with "law," but is limited in its meaning, and merely gives the right to every one to have his cause tried by a jury. Therefore the act of 1874, providing that in all prosecutions the party accused, if he should so elect, might be tried by the court, instead of by the jury, and that in such cases the court should have full power to try the case and to render judgment, is valid. *State v. Worden*, 46 Conn. 349, 364, 33 Am. Rep. 27.

#### **As matured rights.**

Where a party, having a right to declare a contract to convey land forfeited for failure to comply with its terms, in consideration of certain payments extended the time for payment and agreed to waive his rights under said contract of sale of land, the words "his rights under said contract" meant his matured rights, and applied to past rights to forfeiture only, and not to rights accruing out of future delinquencies.

*Cohrt v. Kock*, 10 N. W. 230, 231, 56 Iowa, 658.

#### **Moral obligation.**

A person has a right, when the law authorizes him, to exact from another an act or forbearance. There is no right where there is no remedy. The case of a moral obligation is not to be confounded with a legal right. *People v. Ulster County Sup'ra*, 65 N. Y. 300, 308.

#### **As power.**

The word "right," in Laws 1871, p. 70, § 12, providing that the husband shall have no right to sell or incumber the common property, unless he shall be joined therein by the wife, is synonymous with "power," and a deed by the husband after the wife's death passes no title to the wife's interest as against the heirs. *Mable v. Whittaker* (Wash.) 39 Pac. 172, 173, 10 Wash. 656.

#### **As privilege.**

The word "right," as used in a deed conveying certain premises, but excepting and reserving the right and privilege of taking water from a stream, is synonymous with the word "privilege," and is limited to the use for the convenience of the grantor and his heirs and assigns. *Smith v. Cornell University*, 45 N. Y. Supp. 640, 643, 21 Misc. Rep. 220.

#### **Remedy distinguished.**

See "Remedy."

#### **As rights surviving to personal representative.**

The word "rights," as used in a bond given by an administrator with the will annexed, requiring the administrator to make and exhibit within three months an inventory of the goods, chattels, rights, and credits of the deceased, means only such rights of the deceased as survive to the personal representative; for, whenever it becomes necessary in the course of the administration to sell the real estate of the deceased, an additional bond is taken for the protection of the proceeds. *Newport Probate Court v. Hazard*, 13 R. I. 3, 9.

#### **Right to decree included.**

Gen. St. 1878, c. 81, § 15, relating to redemption from mortgage foreclosure sales, and providing that, if a lien creditor redeems, the certificate of redemption operates as an assignment to him of the rights acquired under such sale, includes the right to a final decree. *Bovey De Laittre Lumber Co. v. Tucker*, 50 N. W. 1038, 1040, 48 Minn. 223.

#### **Right to redeem included.**

In construing a statute providing that persons garnished are required to appear and answer such interrogatories as shall be



propounded touching the goods, chattels, rights, and credits of the judgment debtor, the court say that it would seem that the words here used, particularly "rights and credits," concerning which such garnishee must make disclosure, are sufficiently comprehensive to include the right of redemption in mortgaged or pledged personal property. *Burnham v. Doolittle*, 15 N. W. 606, 608, 14 Neb. 214.

#### **Stockholders' liability.**

The double liability of the stockholders of a bank is not a "right" or "credit" of the bank, which Rev. St. 1894, § 2908 (Rev. St. 1881, § 2671), authorizes the assignees for the benefit of creditors to collect, but is enforceable only by the creditors. *Runner v. Dwiggins*, 46 N. E. 580, 581, 147 Ind. 238, 86 L. R. A. 179.

#### **As title.**

"Right," as used in a deed conveying to the grantees the right to so much of certain premises as might be necessary on which to build and maintain a dam, with its wings, is equivalent to "title." "Right" is equivalent to "all right." Webster defines "right" to be "just claim; legal title; ownership." *Monmouth v. Plimpton*, 1 Atl. 693, 695, 77 Me. 556.

"Right," as used in 5 Stat. 456, § 12, providing that all assignments and transfers of the right secured by such statute prior to the issuing of the patent of lands claimed under the pre-emption laws shall be null and void, cannot be construed as meaning a fee, or even an estate less than a fee in lands; and hence deeds by pre-emptors which purported on their face to pass the absolute ownership of the lands—the fee simple—did not convey a right within the meaning of the statute. *Franklin v. Kelley*, 2 Neb. 79, 88.

"Right," as used in a will, in which testator devised all his right in certain woods to all his children, passes all the testator's estate and interest therein, and, of course, a fee, if he had one. *Newkerk v. Newkerk* (N. Y.) 2 Caines, 345, 351.

5 Stat. 456, § 12, after a declaration of the terms on which the settler will be privileged to purchase public lands, provides that all assignments and transfers of the "right hereby secured" prior to the issuing of the patent shall be null and void. Held, that by the words "right hereby secured" is meant simply the right to be preferred over all other persons in becoming a purchaser from the government at an established price. The words do not mean the possession, nor the right of possession. They do not mean the title or the land itself, for these are not yet the property of the settler. *Coleman v. Allen*, 5 Mo. App. 127, 135.

#### **Title distinguished.**

"Rights," and "titles" are, in some respects, synonymous; yet there is a distinction. The possession of land, actual or constructive is a right. "Rights," in this connection, originate in and are modified by the quality of the title. To constitute a perfect title, there must be the union of actual possession, the right of possession, and the right of property. 2 Bl. Comm. 199. These several rights may exist in several persons. In a completed title they are consolidated in one right, existing in the same party." Said in construing 1 Rev. St. p. 318, § 5, requiring that the rights and titles of the plaintiff in an action for partition should be set forth. *Stewart v. Munroe* (N. Y.) 56 How. Prac. 193, 195, 196.

#### **RIGHT AND CLAIM.**

A mortgage conveying all the "right and claim" to land which the grantor has in a certain town does not include land to which he has only a possibility of a reversion, on the nonperformance of a condition subsequent; the court remarking that at the time the grantor executed the conveyance he had no right or claim to this land, and it was not certain that he ever would have any. *Richardson v. City of Cambridge*, 84 Mass. (2 Allen) 118, 121, 79 Am. Dec. 767.

#### **RIGHT AND JUSTICE.**

"Right and justice," as used in Laws N. Y. 48th Sess. c. 325, § 9, authorizing the Supreme Court on motion to set aside a corporate election, and to make such order and give such relief as both "right and justice" may require, means the legal rights of the parties, and gives no authority to pronounce on the right and justice arbitrarily. *Ex parte Willcocks* (N. Y.) 7 Cow. 402, 408, 17 Am. Dec. 525.

#### **RIGHT AND PRIVILEGE.**

"Right and privilege," as used in a will bequeathing land to testator's son for life, with the right and privilege of disposing of the same by will or devise to his children, if he should have any, do not necessarily import a discretion. Such may be their general signification, but not when used for the purpose of creating a trust power. If the testator had said that he authorized and empowered his son to devise the property to his children, it cannot be doubted that an imperative trust power would have been created; but to hold that the power is only discretionary, because he gave him the right and privilege to so dispose of it, would be to introduce a distinction which the difference in the form of expression does not warrant. The words are not the same, it is

true; but their legal effect is. The right to do an act is the possession of the highest authority, and a privilege is a right or power specially conferred. In both cases full and unrestricted authority is given to dispose of the testator's property for the benefit of others. From the earliest times this has been deemed sufficient to impress the power with a trust which imposes upon the donee the duty of executing it. *Smith v. Floyd*, 35 N. E. 606, 607, 140 N. Y. 337.

Immunity from taxation is not a corporate franchise or "right and privilege," within the meaning of the Texas statute authorizing proceedings by quo warranto "in case any person shall usurp \* \* \* or unlawfully hold \* \* \* any office or franchise, \* \* \* or any incorporation does or omits any act which amounts to a surrender or forfeiture of its rights and privileges as a corporation"; and an appeal from a decree withdrawing such exemption, in a proceeding seeking forfeiture of charter and such withdrawal, need not be prosecuted within the time required in quo warranto proceedings. *International & G. N. Ry. Co. v. State*, 12 S. W. 685, 686, 75 Tex. 356.

A charter granting to a consolidated company all the rights and privileges of constituent companies does not pass to the consolidated company the exemption from taxation of one of the constituent companies. *Adams v. Yazoo & M. V. R. Co.*, 24 South. 200, 209, 77 Miss. 194, 60 L. R. A. 33.

The words "rights and privileges," in the charter of an insurance company, giving it all the rights and privileges of another insurance company, which was exempt from taxation, was construed not to include exemption from taxation. *City of Memphis v. Phoenix Fire & Marine Ins. Co.*, 19 S. W. 1044, 91 Tenn. 566.

#### RIGHT AND WRONG TEST.

"Right and wrong test" is that test of criminal responsibility which is whether, at the time the accused committed the act, he had the mental capacity to distinguish between right and wrong, and comprehend his relations to others, and to understand the nature and consequences of the particular act; that the act was morally wrong, or that he was conscious of doing wrong. *State v. Harrison*, 15 S. E. 982, 986, 36 W. Va. 720, 18 L. R. A. 224 (citing 1 Bish. Cr. Law, § 475).

The "right and wrong test," as to mental responsibility for crime, is stated as follows: "Where a person, at the time of the commission of an alleged crime, has sufficient mental capacity to understand the nature and quality of the particular act or acts constituting the crime, and the mental capacity to know whether they are right or wrong, he

is generally responsible if he commits such act or acts, whatever may be his capacity in other particulars; but, if he does not possess this degree of capacity, then he is not so responsible." *State v. Mowry*, 15 Pac. 282, 285, 37 Kan. 369 (citing *State v. Nixon*, 4 Pac. 159, 32 Kan. 205).

#### RIGHT AWAY.

The phrase "right away," in a proposition to sell for a certain sum of money, if accepted "right away," must be construed as meaning a reasonable time, and cannot be interpreted to mean instantaneously. *Lorimer v. Boylan*, 98 Mich. 18, 22, 56 N. W. 1043, 1045.

#### RIGHT BANK.

The term "right bank" of a stream is used to designate the bank to the right of an object passing down stream. *Borkenhagen v. Vianden*, 52 N. W. 260, 261, 82 Wis. 206.

#### RIGHT BY PRESCRIPTION.

A "right by prescription" is acquired when an open, uninterrupted, and continuous user for more than 20 years of an easement upon another's land is had under a claim of right adverse to such other's title; but, when such claim has been acquiesced in by the owner of the servient tenement after such a user for such a period, the conclusive presumption of a grant arises. The right to take ice from a creek is a property right that may be acquired by prescription. *Hinckel v. Stevens*, 54 N. Y. Supp. 457, 459, 35 App. Div. 5.

#### RIGHT, DEBT, OR DUTY.

A statute avoiding fraudulent conveyances, "made or had to avoid a right, debt, or duty," is not designed to protect creditors alone in the strict sense of the term. It embraces all persons to whom the grantor owes a duty which he attempts to avoid; and, though the rights and duties must be of the nature of debts arising ex contractu, yet they are far more extensive than "debt" in its strict sense. Therefore a liability arising by statute from acting as a director for a partially organized corporation, and also by reason of untrue representation made by such director concerning the status of said corporation, constitutes a "right or duty," to protect which the statute will invalidate a conveyance. *Corey v. Morrill*, 42 Atl. 976, 978, 71 Vt. 51.

#### RIGHT EXISTING.

A "right existing or accrued," within the saving clause of the statute relating to

actions for injuries, includes both an injury received and a claim therefor, on which a right of action has accrued by giving the requisite notice, as provided by a former or existing statute. The existing right is the injury, the cause of action, as distinguished from the notice required to be given, which pertains to the remedy. *Sehl v. City of Syracuse*, 81 N. Y. Supp. 482, 484, 81 App. Div. 543.

### RIGHT HEIR.

See "Own Right Heirs."

The "right heir" of a person deceased is he of the blood of such deceased upon whom the law casts the inheritance. A husband is not the right heir of his deceased wife, nor an administrator of a person dying intestate, in the strict and primary sense of that term. The words "right heirs," as used in a will in which the testator gave certain property to the trustee, in trust to pay the net incomes and rents to Mrs. G. for life, and after her death to convey the trust fund or estate according to the directions of her will, and on the failure of such will to convey the same to the "right heirs" of Mrs. G., their heirs and assigns, forever, are construed to be "designata persona"; that is, the property is to go to the persons who would be heirs in the strict sense of that term, or, in other words, the persons who are entitled by law to take the real estate of an intestate. *Mason v. Baily*, 14 Atl. 309, 322, 6 Del. Ch. 129.

Where a testator devised his estate in trust to pay the income to his children, providing that after the death of all his children the estate should descend to the respective right heirs of his children, the expression "right heirs" meant the children of his children. *Ballentine v. Wood*, 9 Atl. 582, 585, 42 N. J. Eq. (15 Stew.) 552.

"Right heir" is a term formerly used, in the cases of estates tail, to distinguish the preferred, to whom the estate was limited, from the heirs in general, to whom, on the failure of the preferred heir and his line, the remainder over was usually finally limited. With the abolition of estates tail, the term has fallen into disuse.—*Brown v. Wadsworth*, 61 N. E. 250, 253, 168 N. Y. 225.

A bequest to trustees, to pay the income for life to legatees named, and at their death "to my right heirs," is payable to the heirs at law living at the death of the testator; the phrase "right heirs" meaning testator's heirs at common law, and the words having been used properly as words of purchase. *McCrea's Estate*, 5 Pa. Dist. R. 448, 449.

Construing a will devising property to the guardian of an infant married woman

during her life, and thereafter to her husband for life, and after his death, in case he survived her, and after her death, whether he be living or dead, to have and hold the premises in trust for her "right heirs," the phrase is a term formerly in use in the creation of estates tail, to distinguish the preferred, to whom the estate was limited, from the heirs in general, to whom, upon the failure of the preferred heir and his line, the remainder over was usually finally limited. Estates tail having been abolished, the term does not import any preference, if none was made among the heirs. Therefore the term here means the same as the single word "heirs," so that the married woman took an equitable estate and the right heirs a legal estate by purchase. *Brown v. Wadsworth*, 61 N. E. 250, 253, 168 N. Y. 225.

### RIGHT IN A HIGHWAY.

A "right in a highway" was originally classed, and rightly so, with incorporeal hereditaments, because there was a mere grant of a right of passing over, and it came about that the streets of a city have been placed in the same category; but the rights which a municipal corporation has in the streets of a city are very different from the rights of the public in a highway of the country. The easement is not confined to a mere passing over. The street may be graded and improved; the grade may be raised or lowered; the earth excavated; it may be tunneled and water mains, gas mains, sewers, and telegraph and telephone wires laid therein; and cars propelled by steam, electrical, cable, or horse power may be authorized to be operated in such tunnel, as, likewise, upon the surface of the road, except possibly as to cars operated by steam power. So, also, great steam structures spanning the right of way of the street may be authorized to be constructed for the operation of an elevated railway. In fact, there is at this day no substantial difference between streets in which the legal title is in private individuals and those in which it is in the public, as to the rights of the public therein. *City of La Crosse v. Cameron* (U. S.) 80 Fed. 264, 276, 25 C. C. A. 399.

### RIGHT IN PERSONAM.

See "Jura in Personam."

### RIGHT IN REM.

The security as to life and limb, and indemnity against personal injuries occasioned by the negligence, fraud, or violence of others, is a right in rem, as distinguished from a right which avails against a particular individual or a determinate class of persons, which is a right in personam; for

example, the indemnity which the law affords against assaults by others is a right in rem, while the right which one may obtain by contract to secure an indemnity from another for assault by a stranger is a right in personam. The mere fact that one may have a right in personam for the same wrong which was also the breach of a right in rem does not impair the right in rem. Accordingly one injured on a passenger train, by a collision between it and another train, may have an action against the company operating the other train for its breach of the right in rem, though he may also have an action *ex contractu* against the carrier to who he bore the relation of a passenger. *Wabash, St. L. & P. Ry. Co. v. Shacklet*, 105 Ill. 364, 365, 44 Am. Rep. 791.

### RIGHT OF ACCESSION.

See "Accession."

### RIGHT OF ACTION.

As property, see "Property."

Cause of action as, see "Cause of Action."

"Right of action" has been defined in the Roman law as "*jus persequendi in judicio sibi debetur.*" *Inhabitants of Webster v. County Com'rs*, 63 Me. 27, 29.

"Right of action," as used in Gen. Laws, c. 227, § 8, providing that a debt due from plaintiff to defendant cannot be set off unless a right of action exist thereon, etc., means a right to commence and maintain an action. *Boody v. Watson*, 9 Atl. 794, 799, 64 N. H. 162 (citing *Hibbard v. Clark*, 56 N. H. 155, 22 Am. Rep. 442).

"Right of action," as used in Gen. St. c. 208, § 8, providing that any debt or demand shall be set off as aforesaid, unless a "right of action" existed, means a right to commence a suit to enforce the claim, or to collect the debt or demand referred to, and does not include the right which a collector of taxes has to collect taxes assessed in his list, and such collection is a ministerial, and not a judicial, act. *Hibbard v. Clark*, 56 N. H. 155, 158, 22 Am. Rep. 442.

"Right of action," as used in a statute providing that an attachment may issue if the person having the right of action will make complaint on oath or affirmation, includes actions for demands or claims arising *ex delicto*, as well as *ex contractu*, and includes present, but not future, demands. *Lum v. The Buckeye*, 24 Miss. 564-566.

"Right of action," as used in Gen. St. c. 227, § 8, declaring that a debt due from plaintiff to defendant cannot be set off unless a right of action existed thereon at the commencement of plaintiff's action, is construed by a majority of the court to mean a

right to commence and maintain an action existing at the time of the commencement of plaintiff's action. *Hibbard v. Clark*, 56 N. H. 155, 22 Am. Rep. 442 (cited and approved *Boody v. Watson*, 9 Atl. 794, 799, 64 N. H. 162).

### RIGHT OF ACTION BASED ON NEGLIGENCE.

To constitute a right of action based upon negligence, it must appear that there has been an invasion of the legal rights, or injury to the person or property, of the plaintiff, as the proximate result of an inadvertent or nonintentional failure on part of the defendant to use the degree of care imposed by the law upon the defendant under the circumstances and relations affecting the parties, when the injury happened of which the plaintiff complains. In other words, the right of action is the combination of negligence on the part of the defendant with a resulting injury to the person, property, or legal rights of the plaintiff. *Honey v. Chicago, B. & Q. R. Co.* (U. S.) 59 Fed. 423, 424.

### RIGHT OF ANOTHER.

How. St. § 7759, provides that where, by the wrongful act of any person, an injury is produced, either to the person, personal property, or right of another, for which an action of trespass may by law be brought, an action on the case may be brought to recover damages. Held, that the term "or right of another" was intended to include personal torts to persons or personal property, and was not sufficiently comprehensive to include or apply to trespass on lands. *Wood v. Michigan Cent. & A. L. R. Co.*, 45 N. W. 980, 981, 81 Mich. 358.

### RIGHT OF APPEAL.

"Right of appeal," as used in Act March 3, 1887, establishing the Court of Claims and giving Circuit Courts of the United States concurrent jurisdiction in certain cases, wherein it is provided that the plaintiff or the United States, in any suit brought under the provisions of the act, shall have the same rights of appeal as are now reserved in the statutes of the United States in that behalf made, means the right of appeal reserved in statutes relating to the court of claims. *Johnson v. United States*, 24 Pac. 256, 257, 6 Utah, 403.

### RIGHT OF COMMON.

See "Common."

### RIGHT OF A COMMON-LAW REMEDY.

The saving, in Judiciary Act, § 2, "to suitors in all cases of the right of a common-

law remedy, where the common law is competent to give it," does not authorize a proceeding in rem to enforce a maritime lien in a common-law court, whether state or federal. Common-law remedies are not applicable to enforce such a lien, but are suits in personam, though such suits, under special statutes, may be commenced by attachment of the property of the debtor. *The Belfast*, 74 U. S. (7 Wall.) 624, 635, 19 L. Ed. 266.

### RIGHT OF CONQUEST.

By the "right of conquest" nothing more is in fact meant than the right of discovery. It was the right of discovery as to the civilized world, and the right of conquest as to the Indians themselves. *Caldwell v. State* (Ala.) 1 Stew. & P. 327, 408

### RIGHT OF CONSCIENCE.

The "right of conscience," as understood under our organic laws, is simply "to worship the Supreme Being according to the dictates of the heart; to adopt any creed or hold any opinion whatever, or to support any religion; and to do or forbear to do any act for conscience's sake, the doing or forbearing of which is not prejudicial to the public weal." *Commonwealth v. Leshner* (Pa.) 17 Serg. & R. 155, 160. Nor is any preference given to any particular church. All are placed on a like foundation. Const. arts. 3, 6, 9, 14, providing that no person shall "be competent as a bishop, priest, deacon, minister, elder, or other clergyman of any religious persuasion, sect, or denomination, to teach or preach, or solemnize marriage," unless such person "shall have taken, subscribed, and filed" the oath specified in section 6, is not in conflict with the Constitution of the United States. Such provisions are not in the nature of *ex post facto* laws, nor a bill of attainder. *State v. Cummings*, 38 Mo. 263, 264, 273.

### RIGHT OF DOWER.

See "Dower."

### RIGHT OF DRAINAGE.

The "right of drainage" is said to be an easement which gives the owner of land the right to bring down water through or from the land of another, either from its source or from any other place. This right cannot exist independent of its connection with another tenement, and therefore cannot be aliened or conveyed, except by a conveyance as an appurtenance of the dominant estate. It can be created only by grant or prescription, and partakes in this as well as other respects of the characteristics of real estate. It can be inherited, and is therefore classified by all elementary writers as a heredita-

ment. *Nellis v. Munson*, 15 N. E. 739, 740, 108 N. Y. 453.

A right of drainage from an avenue to the sea cannot be construed to pass as parcel of a right of drainage in and through the avenue. *Fiske v. Wetmore*, 15 R. L. 354, 359, 10 Atl. 627, 629.

### RIGHT OF ELECTION.

The right of election to the estate by the eldest legal heir meant the privilege of taking the whole estate, if indivisible, and paying the others an equivalent in money according to the valuation thereof. It was not only a sentimental privilege of retaining paternal estate, but it was a valuable right, intrinsically so, and capable of alienation, so that the purchaser succeeded, though an entire stranger to the family and its sentiments, to the right of election. If the eldest male heir refused to take, the eldest female enjoyed the right, and if she was married the husband took the right of election in her right, even to her exclusion of any right in the land as such; his election giving him an absolute title. *Catlin v. Catlin*, 60 Md. 573, 577 (citing *Stevens v. Richardson* [Md.] 6 Har. & J. 156).

### RIGHT OF ENTRY.

A right of entry on land is the right of possession. *Cecil v. Clarke*, 30 S. E. 216, 219, 44 W. Va. 659.

### RIGHT OF FISHERY.

The "right of fishery" in the waters of the ocean, whether in the open sea or where the waters ebb and flow over tide lands, is a public right which may be exercised by any citizen. *Shively v. Bowlby*, 152 U. S. 1, 14 Sup. Ct. 548, 38 L. Ed. 331. In its very nature the exercise of the right of fishing in the public waters of the ocean is not and cannot be exclusive. Its exercise, no matter by whom or for what length of time, is only the exercise of a public right. *Pacific Steam Whaling Co. v. Alaska Packers' Ass'n*, 72 Pac. 161, 163, 138 Cal. 632.

### RIGHT OF FREE PASSAGE.

"The 'right of free passage' in a highway or street is a comprehensive term, which in this advanced age may embrace the transmission of thought and words as a substitute for the actual physical passage of persons over a public highway, and thereby greatly facilitate social and commercial intercourse." The construction of an underground telephone conduit in a street is a proper use of the street, and not an additional burden, for which an abutting property owner is entitled to compensation. *Castle v. Bell Telephone Co.*, 63 N. Y. Supp. 482, 484, 49 App. Div. 437.

**RIGHT OF HABITATION.**

The "right of habitation" is the right of dwelling gratuitously in a house, the property of another person. Civ. Code La. 1900, art. 627.

**RIGHT OF HOMESTEAD.**

See "Homestead."

**RIGHT OF POSSESSION.**

See "Immediate Right of Possession."

Two things are essential to perfect a present right of possession of an office—election and installation. Election determines the right to succeed the existing incumbent at the time and in the manner prescribed by law, and installation establishes a present right to exercise the functions of the office. *Ex parte Norris*, 8 S. C. (8 Rich.) 408, 483.

**RIGHT OF PRE-EMPTION.**

See "Pre-emption."

**RIGHT OF PRIVACY.**

The so-called "right of privacy" is, as the phrase suggests, founded upon the claim that a man has the right to pass through this world, if he wills, without having his picture published, his business enterprises discussed, his successful experiments written up for the benefit of others, or his eccentricities commented upon, either in handbills, circulars, catalogues, periodicals, or newspapers; and necessarily the things which may not be written and published of him must not be spoken of him by his neighbors, whether the comment be favorable or otherwise. Such right does not exist in law, and is not enforceable in equity. *Roberson v. Rochester Folding Box Co.*, 64 N. E. 442, 443, 171 N. Y. 538, 59 L. R. A. 478, 89 Am. St. Rep. 828; *Owen v. Partridge*, 82 N. Y. Supp. 248, 252, 40 Misc. Rep. 415.

"The law does not discriminate between those who are sensitive and those who are not, and the brutality of the remark which, while slanderous per se if said in the presence of a third person, is not actionable if addressed to the object in private, makes no difference. Yet the alleged right to privacy is invaded. This law of privacy seems to have obtained a foothold at one time in the history of our jurisprudence; not by that name, it is true, but in effect. It is evidenced by the old maxim, 'The greater the truth, the greater the libel,' and the result has been the emphatic expression of public disapproval, by the emancipation of the press and the establishment of freedom of speech, and the abolition in most of our states of the maxim quoted by constitutional provi-

sions. The limitation upon the exercise of these rights being the law of slander and libel, whereby the publication of an untruth, that can be presumed or shown to the satisfaction, not of the plaintiff, but of others (i. e., an impartial jury), to be injurious, not alone to the feelings, but to the reputation, is actionable. The law does not remedy all evils. We do not wish to be understood as belittling the complaint (one to restrain the use of the name and likeness of a deceased person as a label to be used in the sale of a cigar named after him). We have no reason to doubt the feeling of annoyance alleged. \* \* \* We can only say that it is one of the ills that under the law cannot be redressed." *Atkinson v. John E. Doherty & Co.*, 80 N. W. 285, 286, 121 Mich. 372, 46 L. R. A. 219, 80 Am. St. Rep. 507.

**RIGHT OF PROPERTY.**

Rights of private property consist in the free use, enjoyment, and disposal of all acquisitions, without any control or diminution, save only by the laws of the land. *Evans v. Reading Chemical Fertilizing Co.*, 28 Atl. 702, 706, 160 Pa. 209 (citing *Hutchinson v. Schimmelfeder*, 40 Pa. [4 Wright] 396, 398).

The right of property guaranteed by Const. art. 1, § 6, declaring that no one shall be deprived of property without due process of law, includes the right to acquire property and enjoy it in any way consistent with the equal rights of others and the just demands and exactions of the state. *Bertholf v. O'Reilly*, 74 N. Y. 509, 515, 30 Am. Rep. 323.

Bankr. Act 1841 provided that all property and rights of property should be vested in the bankrupt's assignee. Held, that a contingent interest, which nothing but the death of the bankrupt could prevent vesting in him, was to be regarded as a right of property. *Nash v. Nash*, 94 Mass. (12 Allen) 345, 348.

The right of property in an article involves the power to sell and dispose of such article, as well as to use and enjoy it. Any act which declares that the owner shall neither sell it, nor dispose of it, nor use and enjoy it, confiscates it, depriving him of his property without due process of law. But the prohibition of sale in any way or for any use is quite a different thing from a regulation of the sale or use, so as to protect the health and morals of the community. All property, even the most harmless in its nature, is equally subject to the power of a state in this respect with the most noxious. *Bartemeyer v. Iowa*, 85 U. S. (18 Wall.) 129, 137, 21 L. Ed. 929.

The words "property," "rights of property," and "adverse interest," as used in the bankruptcy act (Rev. St. U. S. § 5067), pro-

viding that no suit, either at law or in equity, shall be maintainable in any court between an assignee in bankruptcy and a person claiming any adverse interest touching any property or rights of property transferable to or vested in such assignees, unless brought within two years, etc., have been held to include debts owing to or by the bankrupt. *Bowen v. Delaware, L. & W. R. Co.*, 47 N. E. 907, 909, 153 N. Y. 476, 60 Am. St. Rep. 667.

A right of property consists in the free use, enjoyment, and disposition of all a person's acquisitions, without any control or diminution, save only by the law of the land. In *re Jacobs*, 2 N. Y. Cr. R. 539, 543 (1 Bl. Comm. 138); *Roderigas v. East River Sav. Inst.* (N. Y.) 48 How. Prac. 166, 174.

Chancellor Kent says: "The exclusive right of transferring property follows as a natural consequence from the exception and admission of property itself." *Roderigas v. East River Sav. Inst.* (N. Y.) 48 How. Prac. 166, 174.

#### RIGHT OF PROTECTING PROPERTY.

"Right of protecting property," as used in Bill of Rights, art. 2, declaring that all men have certain natural, essential, and inherent rights, among which is the right of acquiring and protecting property, "is the right to do whatever, under the circumstances of each case, apparently is reasonably necessary to be done in defense." *Aldrich v. Wright*, 53 N. H. 398, 399, 16 Am. Rep. 339.

#### RIGHT OF REDEMPTION.

A right to redeem from a sale of real estate is purely statutory. It does not exist at common law. Courts of equity in justifiable cases may grant in their decrees of sale something akin to the right, but the power thus exercised is apart from the one conferred by statutes. *Case v. Cherokee Lanyon Spelter Co.*, 61 Pac. 406, 408, 62 Kan. 69.

The phrase "right to redeem" in law implies more than a right to acquire. It implies a right to disincumber, or to liberate from a lien or a claim. *Millett v. Mullen*, 49 Atl. 871, 874, 95 Me. 400.

The phrase "right of redeeming mortgaged lands," as used in Gen. St. c. 103, declaring that the right of redeeming mortgaged lands may, if the creditor prefers it, be sold on execution in the manner specified in the chapter, means the debtor's equitable interest in the estate which is mortgaged. *Lafin v. Crosby*, 99 Mass. 446, 447.

"The term 'right to redeem' is familiarly used to describe the estate of the debtor

under mortgage which is to be sold at auction, in contradistinction to an absolute estate to be set off by appraisement. It would be more consonant to the legal character of this instrument to call it the debtor's estate, subject to mortgage." *White v. Whitney*, 44 Mass. (3 Metc.) 81, 84.

The words "right in equity to redeem mortgaged real estate," in an officer's return on execution that he took "all the right in equity which the debtor had to redeem the following described mortgaged real estate," was construed to have the popular meaning of the term "equity of redemption," which is used in common speech to describe the title of the mortgagor, without regard as to whether the condition has been broken. *Holmes v. Jordon*, 39 N. E. 1005, 1006, 163 Mass. 147.

The equity of redemption must not be confounded with a right of redemption. A mortgagor has an equity of redemption until the sale, and not afterwards. After sale he has a right of redemption, if the statute gives it. *Mayer v. Farmers' Bank*, 44 Iowa, 212, 216.

The "right of redemption" is an agreement or paction by which the vendor reserves to himself the power of taking back the thing sold by returning the price paid for it. Civ. Code La. 1900, art. 2567.

#### RIGHT OF REPRESENTATION.

See "By Right of Representation"; "Inheritance by Right of Representation."

#### RIGHT OF SUFFRAGE.

See "Suffrage."

#### RIGHT OF SUIT.

The term "right of suit," spoken of in Civ. Code, § 494, in reference to applications for divorce on the ground of cruelty, means a present right to resort to the courts for redress. *Jacobsen v. Jacobsen*, 5 Pac. 567, 568, 11 Or. 454.

#### RIGHT OF SUPPORT.

A wife's "right of support" is not limited to bare necessities of life, but embraces comforts suitable to her station and her husband's condition in life, and the fact that she has independent means of her own, or is able-bodied and can earn a livelihood, will not defeat a right of action against a person causing or contributing to produce the death of her husband, thus depriving her of her legal supporter. *Hackett v. Smelsley*, 77 Ill. 109, 122.

The "right of support" is one by which a proprietor stipulates that his neighbor shall

be bound to permit that his house or his timbers rest on the wall of his neighbor. Civ. Code La. 1900, art. 712.

### RIGHT OF TRIAL BY JURY.

See "Trial by Jury."

### RIGHT OF WAY.

See "Private Right of Way."

The right of travel over another's land may be denominated a right of way. It is an easement. *Clawson v. Wallace*, 52 Pac. 9, 10, 16 Utah, 300.

"The privilege which one person, or a particular description of persons, may have of passing over the land of another in some particular line is termed a 'right of way.' It is an incorporeal hereditament, an easement which does not necessarily divest the owner of the fee of the land; and for all other purposes, except the servitude or use as a way, he owns it, and may have his action for an injury to his residuary interest as fully as he would be entitled were it his own way. A right of way may be public or private. Public ways, as applied to ways by land, are usually termed highways or public roads, and are such ways as every citizen has a right to use. A private way relates to that class of easements in which a particular person, or a particular description or class of persons, have an interest or right, as distinguished from the general public. Private ways in this country are frequently termed public roads, and are so designated in our statutes. The expression has been criticised as inapt, and as tending to mislead, but it is nevertheless used to designate private ways. A right of way may arise in this state (1) by prescription—that is, by an adverse user for five years; (2) by grant; (3) from necessity; (4) by statute." *Kripp v. Ourtis*, 11 Pac. 879, 71 Cal. 62.

The term "right of way" has a twofold signification. It sometimes is used to describe a right belonging to a party—a right of passage over any tract; and it is also used to describe that strip of land which railroad companies take upon which to construct their roadbed. *Maysville & B. S. R. Co. v. Ball*, 56 S. W. 188, 191, 108 Ky. 241 (quoting *Joy v. City of St. Louis*, 138 U. S. 44, 11 Sup. Ct. 243, 34 L. Ed. 843).

The easement of "right of way" is a strictly incorporeal hereditament, though imposed upon corporeal property, and consists simply of a right which is in its nature intangible, and incapable of being the subject of livery. *Oswald v. Wolf*, 19 N. E. 28, 30, 126 Ill. 542.

A right of way across another's land, where it exists, is an incorporeal heredita-

ment, which may be appurtenant to adjoining lands or in gross. *Johnson v. Lewis*, 14 S. W. 466, 467, 47 Ark. 66.

"Right of way" is defined to be the privilege which an individual or a particular description of persons, such as the inhabitants of a particular village, or the owners or occupants of a particular farm, may have of going over another person's grounds. It is an incorporeal hereditament of a real nature, entirely different from the king's highway which leads from town to town, and also from the common way which leads from a village into the fields. *Dinehart v. Wells* (N. Y.) 2 Barb. 432, 435 (citing 3 Cruise, Dig. 100). It may be either a right in gross, which is purely a personal right, incommunicable to another, or a right annexed to a state which may pass by assignment with the estate to which it is appurtenant. *Lanier v. Booth*, 50 Miss. 410, 413.

Right of way across another's land, is an incorporeal hereditament, which may be appurtenant to adjoining lands or in gross; but such hereditament does not come within the statute of limitations applicable to land or real estate. A vested right to such way may be acquired by use for a sufficient length of time. Its use should not only be open and notorious, but continuous for the whole period. It should be occupied and used as a right, and not merely as a favor or privilege granted by the owner of the servient lands. In other words, the right of way should be definite, continuous, and adverse to the owner. *Johnson v. Lewis*, 2 S. W. 329, 330, 47 Ark. 66.

"A right of way means a right to pass over another's land more or less frequently, according to the nature of the use to be made of the easement." *Bodfish v. Bodfish*, 105 Mass. 317, 319.

A "right of way" over another's land may arise in three ways: (1) From necessity; (2) by grant; (3) by prescription. Three things are necessary to establish a right of way by prescription: (1) Continued and uninterrupted use and occupation or enjoyment; (2) the identity of the thing enjoyed; and (3) adverse from the right of some other person. Every immaterial change in a road is not a destruction of its identity, but it must depend on the situation of the road. Changing a road between any two given points merely for the purpose of straightening a fence, or for the convenience of the parties, so that the way is still kept open from one place to another, does not destroy its identity. *Lawton v. Rivers* (S. C.) 2 McCord, 445, 447, 13 Am. Dec. 741.

### Bridge.

"Right of way," as used in Comp. St. c. 77, § 39, requiring the officers of railroad corporations to return to the auditor of pub-



He accounts for assessment and taxation the number of miles of railroad in the state, including roadbed, "right of way" and superstructure thereon, cannot be construed to include a bridge across the Missouri river. The term "right of way" is defined in *Bodfish v. Bodfish*, 105 Mass. 319, as meaning the right to pass over another's land, etc. In *Stuyvesant v. Woodruff*, 21 N. J. Law (1 Zab.) 133, 136, 57 Am. Dec. 156, it is said a right of way in the legal sense of the term is a right to pass for all or for certain purposes at all or at certain times over and upon another man's land or close. *Cass County v. Chicago, B. & Q. R. Co.*, 41 N. W. 246, 247, 25 Neb. 348, 2 L. R. A. 188.

A right of way of a railroad includes a bridge across a navigable river, owned, used, and operated by the railroad company as a part of its line of road. *Chicago, B. & Q. R. Co. v. Richardson County*, 85 N. W. 532, 533, 61 Neb. 519.

#### City street.

So much of a city street as is actually used and occupied by a railroad company for railroad purposes constitutes part of its right of way, within the meaning of 2 Starr & C. Ann. St. c. 114, § 63, requiring railroad companies to keep their right of way clear of combustible material. *Lake Erie & W. R. Co. v. Middlecoff*, 37 N. E. 660, 663, 150 Ill. 27.

The words "right of way," as used in an ordinance providing that the cost of improving so much of a street as is included in the "right of way" of any steam railroad, being the space between the rails and one foot outside of such rails, mean that part of the tracks and roadbeds of railroad companies lying in the streets or parts of streets within the description. *Chicago, R. I. & P. R. Co. v. City of Moline*, 41 N. E. 877, 878, 158 Ill. 64.

#### Convenient land.

By the "right of way" of a railroad can only be understood the land used as a way for the road, and not such additional ground as may be used for the convenience of the road, but not a part of its way. *Chicago & N. W. Ry. Co. v. People*, 62 N. E. 869, 870, 195 Ill. 184 (quoting *Chicago, B. & Q. R. Co. v. Paddock*, 75 Ill. 616).

The term "right of way," as used in the statutes providing that the state board of equalization shall have exclusive power to assess and value for purposes of taxation all telegraph and telephone lines and the railroad track and rolling stock of all companies owning, operating, or constructing telegraph or telephone lines or railroads, and declaring that for the purposes of the act railroad tracks shall be deemed to include the "right of way," can only be understood as embracing

the land used as a way for the road, and not such additional ground as may be used for the convenience of the railroad, not a part of its way. *Oregon Short-Line Ry. Co. v. Gooding*, 59 Pac. 821, 822, 6 Idaho, 773.

#### As part of homestead.

A "right of way" is an easement of perpetual use, and is therefore almost equivalent to fee-simple title. It prevents the owner from the exercise of dominion. *Waples on Homestead and Exemption*, p. 945. Under Const. art. 10, § 2, declaring that a mortgage or other alienation of the homestead by a married man shall not be valid without the voluntary signature and assent of the wife, and Code, § 2508, to the same effect, a conveyance by a husband alone of a right of way over a homestead is void. *McGhee v. Wilson*, 20 South. 619, 620, 111 Ala. 615, 56 Am. St. Rep. 72.

#### As incumbrance.

See "Incumbrance (On Title)."

#### As having indefinite extent.

The term "right of way" is not limited to a strip of land of any particular and definite width at all points on the line of a railroad. As applied to a railroad company, it means a way over which the company has the right to pass in the operation of its trains. *Pfaff v. Terre Haute & I. R. Co.*, 9 N. E. 93, 94, 108 Ind. 144 (citing *Williams v. Western Union Ry. Co.*, 5 N. W. 482, 50 Wis. 71).

#### As interest in land.

A "right of way" is an incorporeal right. It is not in any legal sense an interest in the land, and hence a public corporation possessing only a "right of way" over land abutting on a street is not subject to a municipal lien for the cost of an improvement. *Warren Borough v. Pleasant Bridge Co.*, 16 Pa. Co. Ct. R. 44, 45.

#### As land itself.

See, also, "Freehold"; "Land"; "Real Property."

The phrase "right of way," as used in Code N. C. § 2010, relating to the condemnation of right of way for telegraph lines, and containing the proviso that, if the right claimed be over or upon an easement or right of way which extends into or through more counties than one, the whole right and controversy may be heard and determined in one county into or through which such easement or right of way extends, is not synonymous with "easement," but, as applied to railroads, includes in its meaning the strip of land over which the track is laid through the country, and which is used in connection therewith, whether the railroad company owns only an easement therein or the title

*In fee. Postal Telegraph Cable Co. v. Southern Ry. Co. (U. S.) 90 Fed. 30, 32.*

A road, or "right of way," is an incorporeal hereditament. The phrase does not necessarily mean the right of passage merely. Obviously, it may mean one thing in a grant to a natural person for private purposes, or another thing in a grant to a railroad for public purposes, as different as the purposes and uses and necessities respectively are. In *Keener v. Railroad Co.*, 31 Fed. 128, the words are defined as follows: "The term 'right of way' has a twofold significance. It sometimes is used to mean the mere intangible right to cross a right of way. It is often used to indicate that strip which the railroad company appropriates for its use, and on which it builds its roadbed." Under Act July 27, 1866, chartering the Atlantic & Pacific Railroad Company, which grants to such company a right of way "to the extent of one hundred feet in width on each side of said railroad where it may pass through the public domain, including all necessary grounds for station buildings, workshops, depots, machine shops, switches, side tracks, turntables, and water stations," and provides that "the right of way shall be exempt from taxation within the territories of the United States," the right of way thereby granted, and which was exempted from taxation, was not merely the right of passage, but, whether the grant is held to be of the fee or of an easement, was real estate of corporeal quality, to which all station houses and other buildings erected thereon became attached as a part thereof, and such buildings are not taxable within a territory. *Territory of New Mexico v. United States Trust Co.*, 19 Sup. Ct. 128, 132, 172 U. S. 171, 43 L. Ed. 407.

The assessment law of Colorado provides in respect to the taxation of railroads that the property shall be valued at its cash value, and assessment made on the entire railway includes the right of way, roadbed, etc. Held, that the term "right of way" does not relate to a mere intangible right to cross, but to the strip of land appropriated by the railroad company for its use, and upon which its roadbed has been built. *Keener v. Union Pac. R. Co. (U. S.) 31 Fed. 126, 128.*

#### **As mere easement.**

A mere right of way over land is always regarded as an "easement." *Brown v. Young*, 29 N. W. 941, 69 Iowa, 625; *Lidgerding v. Ziguero*, 80 N. W. 360, 361, 77 Minn. 421, 77 Am. St. Rep. 677; *Clawson v. Wallace*, 52 Pac. 9, 10, 16 Utah, 300.

Right of way is an easement or incorporeal hereditament. It is an inheritable estate, not belonging to the person of the occupant, but annexed to and forming a part of the land of the estate he possesses. It descends to the heir with the manor, and

needs no special words to convey it. A grant of the lands carries with it the right of way which is annexed thereto. A man cannot have a right of way over his own lands. A right of way, in the legal sense of the term, is a right to pass for all or for certain purposes, at all or at certain times, over and upon another man's land. *Stuyvesant v. Woodruff*, 21 N. J. Law (1 Zab.) 133, 136, 57 Am. Dec. 156; *Cass County v. Chicago, B. & Q. R. Co.*, 41 N. W. 246, 25 Neb. 348, 2 L. R. A. 188.

A right of way is an easement appurtenant to an estate owned by the person in whose favor the easement exists. *Gullick v. Fisher*, 48 Atl. 375, 376, 92 Md. 353.

The right of an owner of a lot to the use of an alley as a means of ingress to and egress from his lot is in the nature of an easement; a private right of way, which does not belong to him, but belongs to another. *Central Branch U. P. R. Co. v. Andrews*, 2 Pac. 677, 681, 30 Kan. 590.

The use of the phrase "right of way" in a devise giving land and a right of way to the land from a highway not adjoining the land "would seem to refer to an easement rather than the land itself." *Truax v. Gregory*, 63 N. E. 674, 676, 196 Ill. 83.

A "right of way," in legal meaning, is a mere easement on the lands of others. 6 Am. & Eng. Encyc. of Law, verbo "Eminent Domain," p. 531. Under Act Cong. July 24, 1866, permitting telegraph companies to maintain their lines on the railroad right of way, such companies acquire only an easement over such right of way. *Postal Tel. Cable Co. v. Louisiana Western R. Co.*, 22 South. 219, 222, 49 La. Ann. 1270.

A railroad right of way is an easement only, and the state remains the owner of the land, so the right of the railroad is only the right to use the land taken for the purpose of constructing and operating their line of road. This easement, however, is a perpetual right. *Clayton v. Chicago, I. & D. Ry. Co.*, 25 N. W. 150, 67 Iowa, 238.

A right of way for railroad purposes is a mere easement, which under the law is not subject to a lien. *Appeal of Hoffman*, 12 Atl. 57, 60, 118 Pa. 512 (citing *Western Pennsylvania R. Co. v. Johnston*, 59 Pa. 290).

A right of way over or through land is an easement, and an easement is an interest in the soil; such an interest as that, when personal property is attached to it, it becomes a part of the realty. *Northern Pac. R. Co. v. Carland*, 8 Pac. 134, 139, 5 Mont. 146.

The acquisition of a right of way over and across lands is the acquisition of an "easement" on the land. The grant of the

easement conveys all such incidental rights as are necessary to the enjoyment of the thing granted. The use to which an easement is devoted or for which it is created determines its character, and to the extent that the use is necessary to carry out the purpose of the grant the rights of the owner of the easement are paramount. *Cairo, V. & C. R. Co. v. Brevoort* (U. S.) 62 Fed. 129, 135, 25 L. R. A. 527.

A right of way over the land of another is designated in the common law as an "easement," and in the civil as a "servitude," and is defined to be a charge imposed upon one heritage for the use and advantage of another heritage belonging to another proprietor. *Kieffer v. Imhoff*, 26 Pa. 438.

In Code N. C. § 2010, relating to the condemnation of the right of way for telegraph lines, and containing the proviso that, if the right claimed be over or upon an easement or right of way which extends into or through more counties than one, it may be determined in one county, the word "easement" would have fully conveyed the idea of an incorporeal hereditament, as distinguished from the fee in the land, and the use of the words "or right of way" would not only be tautological, but confusing, and hence leads to the conclusion that by the term "right of way" is meant more than a mere easement. *Postal Telegraph Cable Co. v. Southern R. Co.* (U. S.) 90 Fed. 30, 32.

"Right of way" literally means a right to pass over another's land, but in reference to a way it signifies a mere easement in the lands of others obtained by lawful condemnation to public use or by purchase. *Williams v. Western Union Ry. Co.*, 50 Wis. 71, 76, 5 N. W. 482.

A "right of way," whether public or private, is nothing more than a special and limited right of use, and differs essentially from a fee-simple right to the land itself over which the way passes. *Bosley v. Susquehanna Canal* (Md.) 3 Bland, 63, 67.

#### As way of necessity.

"A right of way may arise by act and operation of law. If a man grant me a piece of ground in the middle of his field, he impliedly gives me a way to come to it." 2 Bl. Comm. 36. A sale of land implies a grant of a right of way over other lands of the vendor where the purchaser has no other way of ingress and egress. *Estep v. Hammons*, 46 S. W. 715, 716, 104 Ky. 144.

#### As a property right.

See, also, "Property."

A "right of way" upon a public street, whether granted by act of the Legislature, or ordinance of city council, or in any other valid mode, is an easement, and as such is a

property right capable of assignment, sale, and mortgage, and entitled to all the constitutional protection afforded other property rights and contracts. *City of Knoxville v. Africa* (U. S.) 77 Fed. 501, 507, 23 C. C. A. 252.

#### As way through public land.

The term "right of way," as used in Act July 27, 1866, exempting the Atlantic & Pacific Railroad Company from taxation on its right of way within the territory of the United States, meant the right of way granted to it through public lands, and did not embrace a right of way through private lands otherwise acquired by the company. *Territory of New Mexico v. United States Trust Co.*, 19 Sup. Ct. 784, 785, 174 U. S. 545, 43 L. Ed. 1079.

#### As right of passage.

"Right of way," as used in Const. art. 12, § 4, providing that no right of way shall be appropriated to the use of any corporation until full compensation, etc., should be construed, not as defining the quantity of interest to be transferred, but as meaning the right of passage through the grounds of others, irrespective of the interest or title to be acquired. *Challiss v. Atchison, T. & S. F. R. Co.*, 16 Kan. 117, 127.

The words "right of way" in a grant to a railroad company, taken alone, mean easement only, and do not pass the very land itself. *Uhl v. Ohio River R. Co.*, 41 S. E. 340, 341, 51 W. Va. 106.

The term "right of way," as used in a grant of a right of way to a railroad, and exempting such right of way from taxation, is not used to describe the land granted, but in their common well-known and universally accepted meaning, which is a grant of an easement as defined by law, and hence describes the tenure. *Atlantic & P. R. Co. v. Lesueur*, 19 Pac. 157, 160, 2 Ariz. 428, 1 L. R. A. 244.

#### Road distinguished.

See "Road."

A right of way is not a road in the legal sense of the term, nor can any one have a right of way over his own land. A way, in law, is the right of going over another man's ground. *Green v. Morris & E. R. Co.*, 24 N. J. Law (4 Zab.) 486, 490.

Distinguished from the three kinds of public ways in England, to wit, "iter," over which the public pass on foot; "actus," over which they pass on foot and on horseback; and "via," over which they pass on foot and on horseback and in vehicles on wheels—was the incorporeal hereditament, easement, or "right of way" which one acquired over the land of another in which the public had

no interest whatever. This right of way was acquired either by prescription, being user for a time whereof the memory of man runneth not to the contrary or by grant. If by grant, the grant itself was the proof; or, the grant being lost, 20 years' user raised a presumption that it once existed. *Boyden v. Achenbach*, 79 N. C. 539, 541.

#### Road synonymous.

In a complaint alleging that the complainant had been for a certain length of time the owner of and in the possession and actual use and enjoyment of a certain road, "road" is not synonymous with "right of way." It is never so used in common conversation, in ordinary writing, nor in legal works. "Road" means any piece of land used or appropriated for travel. It may be so appropriated by an individual, a corporation, or the public. The road is one thing; the right of way is another, and very different. It is true that the term "way" is sometimes used in the same sense as "road." Sometimes we call a road, a street, a lane, etc., a way, though this is perhaps an improper use of the term "way." "Way," in its legal, technical sense, means nearly the same thing as "right of way," or, in other words, the right of one person, of several persons, or of the community at large to pass over the land of another. Webster, among other definitions of a road, says, "it is the ground appropriated for travel, forming a communication." Bouvier defines a road as a passage through the country for the use of the people. He also says the public have the use of roads, but the owners of the lands through which they are made or which bound upon the roads have prima facie a fee in such highway, or, in plain English, the public does not usually own the soil over which roads are constructed, but only a perpetual right to use that soil for some particular purpose. *Collar-Potosi Min. Co. v. Kennedy*, 3 Nev. 361, 372, 93 Am. Dec. 409.

#### Necessary structure.

The term "right of way," as used in section 2 of the act of incorporation of the Atlantic & Pacific Railway Company, containing a grant by Congress of the right of way through the public lands for the construction of a railroad and telegraph, and further providing that such way was granted to the extent of one hundred feet in width each side of said railroad through the public domain, including all necessary grounds for station buildings, workshops, depots, machine shops, switches, side tracks, turntables, and water stations, and declaring that right of way should be exempt from taxation within the territory of the United States, includes the roadbed, ties, rails, station buildings, workshops, depots, machine shops, and other such structures necessary in the operation of a railroad. *United States Trust Co. of New*

*York v. Atlantic & P. Ry. Co.*, 47 Pac. 725, 727, 8 N. M. 673.

The phrase "right of way," as used in Act Cong. July 27, 1866, chartering the Atlantic & Pacific Railway Company, and granting to the company right of way, does not necessarily mean the right of passage merely, but includes all the station houses and other buildings erected on the right of way. *Territory of New Mexico v. United States Trust Co.*, 19 Sup. Ct. 128, 132, 172 U. S. 171, 43 L. Ed. 407.

A quitclaim deed conveying to a railroad company certain property "for all purposes 'connected with the construction,' use, and occupation of said railroad company, the right of way, etc., over the land" could not be construed to authorize the company to take sand therefrom for the construction of a roundhouse, without compensation to the owner of the land, the construction of the roundhouse not being a use of the land for a right of way. *Vermilya v. Chicago, M. & St. P. Ry. Co.*, 24 N. W. 234, 235, 66 Iowa, 606, 55 Am. Rep. 279.

#### Railroad yard.

"Right of way," as used in Act 1872, art. 5, § 1, par. 89, providing that city councils shall have power, by condemnation or otherwise, to extend any street, alley, or highway over or across any railroad track, right of way, or land of any railroad company within the corporate limits, should not be limited to such right of way, tracks, and land as are appropriated to the active operation of a company's railway, but include tracks or land devoted to the purposes of a railroad yard. *Chicago & N. W. Ry. Co. v. City of Chicago*, 37 N. E. 842, 845, 151 Ill. 348.

The terms "right of way," "tracks," and "lands" apply to tracks or lands devoted to the purpose of a railroad yard. *Chicago & A. R. Co. v. City of Pontiac*, 48 N. E. 485, 486, 169 Ill. 155.

#### Roadway synonymous.

While the term "right of way" is generally used to designate the ground on which a railroad may lay its tracks, the word "roadway" is frequently used as synonymous therewith, and hence, under section 179 of the Constitution, declaring the roadway, rails, etc., of railroads assessable for taxes, the word "roadway" is synonymous with "right of way." *Chicago, M. & St. P. Ry. Co. v. Cass County*, 76 N. W. 239, 240, 8 N. D. 18.

#### RIGHT OF WAY AS LOCATED.

The phrase "right of way as located," as used in Act March 6, 1877, authorizing railroad corporations to condemn lands adjoining their road as constructed on their right of way as located, refers to the location

by survey which these corporations are usually required to indicate upon paper filed in some public office, as preliminary to the condemnation of property, and such surveys are of the route from terminus to terminus, and not of mere appendages. *Akers v. United New Jersey R. & Canal Co.*, 43 N. J. Law (14 Vroom) 110, 111.

### RIGHT OF WAY IN GROSS.

Easement distinguished, see "Easement."

If it appears from a deed that it was intended only to reserve a personal right to pass over the land, this is what is termed a "right of way in gross," and it is neither assignable nor appurtenant to any other land. *Wagner v. Hanna*, 38 Cal. 111, 116, 99 Am. Dec. 354.

### RIGHT OR REMEDY.

The term "right or remedy" in Trenton city charter (Laws 1874, p. 373, § 83), declaring that nothing in the charter shall be construed so as to destroy, impair, or take away any right or remedy acquired or given by any act repealed by the charter, is to be construed as meaning the remedies previously provided for the enforcement of contracts with the city, as prior to the enactment of the charter it was held in *Rader v. Southeasterly Road Dist.*, 36 N. J. Law (7 Vroom) 276, that the charter of such a municipal corporation could not be altered so as to impair the obligation of existing contracts, or to deprive a party of his remedy for enforcing them; and it is a reasonable construction of the provision to hold that the Legislature had in view this limitation upon their power, and that they intended only to protect existing contracts, and to preserve the remedies theretofore provided against the city or its officers for enforcing them. *State v. Inhabitants of City of Trenton*, 38 N. J. Law (9 Vroom) 64, 67.

### RIGHT OR TITLE.

The act of 1715 relative to limitations provides that no person or persons nor their heirs which shall hereafter have any right or title to any lands shall enter or make any claim but within seven years after his right or title accrues. Held, that the claim which a widow has for dower in the lands of which her husband died seised is not, before assignment of dower, a right or title within the statute. *Spencer v. Weston's Heirs*, 18 N. C. 213, 216.

Rev. St. U. S. § 709 [U. S. Comp. St. 1901, p. 575], declares that any decision against a right or title claimed under a statute of the United States is subject to review by the United States Supreme Court. Held, that the term "right or title," as used in

such statute, included the claim of an assignee in bankruptcy to certain of the bankrupt's property, under United States Rev. St. § 5044, and where the decision of the state court was against the assignee's claim the Supreme Court of the United States had jurisdiction of a writ of error to review the same. *Williams v. Heard*, 11 Sup. Ct. 885, 140 U. S. 529, 35 L. Ed. 550.

### RIGHT, PRIVILEGE, OR IMMUNITY.

As franchise, see "Franchise."

The provision of a charter of a railroad company that it "should use and enjoy all the rights, privileges, and immunities" granted to another railroad company, included an exemption from taxes granted to the second railroad company. But a subsequent legislative enactment, providing that the company might consolidate or unite with other companies, and that such uniting company should be invested with all the rights and privileges conferred by the original charter of the company, did not pass the right of exemption where, after a deed of consolidation between two uniting companies, the stockholders of both of them met in general convention and duly organized a new company. *Atlanta & C. A. L. R. Co. v. State*, 63 Ga. 483, 484.

Where an act of a state legislature authorized the issue of bonds by way of refunding to banks such portion of a tax as had been assessed on federal securities made by the Constitution and statutes of the United States exempt from taxation, and the officers who were empowered to issue the obligations refused to sign them, because, as they alleged, a portion of the securities for the tax on which the bank claimed reimbursement was, in law, not exempt, and the highest court of the state sanctioned this refusal, this was a decision against a right, privilege, or immunity claimed under the Constitution or a statute of the United States, and gave the Supreme Court jurisdiction under the Judiciary Act, § 25. *People of New York v. Hoffman*, 74 U. S. (7 Wall.) 16, 22, 19 L. Ed. 57.

### RIGHT, TITLE, AND INTEREST.

"Right, title, and interest," as used in a deed conveying the right, title, and interest of the grantor, means only what the grantor himself could claim, and the covenants in such deed, if any, are limited to the estate described. *Allison v. Thomas*, 14 Pac. 309, 310, 72 Cal. 562, 1 Am. St. Rep. 89.

A deed of all the grantor's "right, title, and interest" in and to a ferry "and the boat which I built, and now use in carrying on the ferry, and all the estate, land, and buildings standing thereon, as the same is now occu-

pied and improved by me," with covenants of ownership, general warranty, etc., purported to convey merely such right as the grantor had in the land, and the covenants were qualified and limited by the grant. *Allen v. Holton*, 37 Mass. (20 Pick.) 458, 464.

The grantor in a deed containing covenants of seisin, title, against incumbrances, and of general warranty, having used terms purporting to convey the estate therein mentioned by metes and bounds, and added the words, "meaning and intending by this deed to convey all my right, title, and interest in and to" the premises so described, it was held that the covenants applied generally to the land mentioned in the deed, and were not restricted to the grantor's right, title, and interest therein. *Hubbard v. Apthorp*, 57 Mass. (3 Cush.) 419, 420.

A levy on "all the right, title, and interest of defendant \* \* \* in and to league No. 6, Galveston county, originally granted to B., and known as the Virginia Point League," is sufficient to identify the interest levied upon. *Smith v. Crosby*, 22 S. W. 1042, 1044, 4 Tex. Civ. App. 251.

A grant of the "right, title, and interest" of a party in certain lands, with the usual covenants of seisin and warranty, is limited as to such warranty to the estate and interest conveyed, and is restricted to such title and interest, and is not a general warranty of the whole parcel particularly described by metes and bounds. *Sweet v. Brown*, 53 Mass. (12 Metc.) 175, 177, 45 Am. Dec. 243.

A deed of "all my right, title, and interest" in certain real estate purports to convey merely such right as the grantor has in the land; and, as the grantor conveys his own title only, the general covenants of "seisin in fee of the aforementioned premises that they are free from all incumbrances, that the grantor has a good right to sell and convey the same, and that he will warrant the same against the lawful claims of all persons," are all qualified and limited by the granting clause of "all my right, title, and interest" in the premises. *Hoxie v. Finney*, 82 Mass. (16 Gray) 332, 333.

"Right, title, and interest," as used in a deed conveying the grantor's right, title, and interest, are words of release and quitclaim merely. *Gibson v. Chouteau*, 39 Mo. 536, 544.

Where one conveyed all his "right, title, and interest" in a tract of land to which he had a legal title, but which he had previously made a parol contract to convey to his father, since deceased, the words quoted imported only his interest as heir of his father. *Farrar v. Patton*, 20 Mo. 81, 84.

"Right, title, and interest," as used in an assignment by judgment creditors of their

right, title, and interest in the judgment, relate to the extent of their ownership or property. By the use of these words the assignors undertook to transfer whatever of value they owned or held in the judgment. *Scofield v. Moore*, 31 Iowa, 241, 245.

#### Contingent remainder included.

A quitclaim deed by a remainderman to the life tenant and his heirs of all "his right, title, interest, claim, and demand" operates as a release of the grantor's contingent remainder, and thereby enlarges the estate of the grantee, the life tenant, into a fee simple. *Williams v. Esten*, 53 N. E. 562, 564, 179 Ill. 267.

#### As interest under certain instrument.

"Right, title, and interest," as used in a release of an original mortgage by the mortgagee of all his right, title, and interest in and to the premises described therein, means his interest in that mortgage, and not his entire interest, where he has derived an independent title to the mortgaged premises by an assignment to himself of a subsequent mortgage thereon. *Barnstable Sav. Bank v. Barrett*, 122 Mass. 172.

#### As land itself.

An attachment of all of a debtor's "right, title, and interest" in land, under Rev. St. c. 76, § 42, authorizing such levy and sale, is equivalent to an attachment and sale of the land itself. *Millett v. Blake*, 18 Atl. 293, 295, 81 Me. 531, 10 Am. St. Rep. 275.

#### As vested interest only.

Where a deed conveyed all the right, title, and interest in and to undivided real estate devised to the grantor, only the vested interest was conveyed, and the grantor was not thereafter estopped to claim a contingent interest, which became vested in him by the happening of the contingency. *Blanchard v. Brooks*, 29 Mass. (12 Pick.) 47, 60.

A grant of right, title, and interest in the grantor's land, coupled with a covenant of general warranty, does not operate as an estoppel to pass a subsequently acquired title. *Hanrick v. Patrick*, 7 Sup. Ct. 147, 157, 119 U. S. 156, 30 L. Ed. 396.

"Right, title, and interest," as used in a conveyance by an heir of all his "right, title, and interest" in the estate of his ancestor, will convey not only the property which the heir knew had belonged to his ancestor, but also his undivided interest in lands which were, subsequent to the conveyance, decreed to belong to his ancestor; the heir believing at the time of the conveyance that he did not have any title or interest in such lands. *Watson v. Priest*, 9 Mo. App. 263, 266.

**RIGHT TO ALLUVION.**

See "Alluvion."

**RIGHT TO AN OFFICE.**

Right to an office is not the right of the incumbent to the place, but of the people to the officer. An office, therefore, not constitutional, exists by the will of the Legislature only, and may be abolished at any time, and the incumbent has no standing to complain. *Lloyd v. Smith*, 35 Atl. 199, 201, 176 Pa. 213.

**RIGHT TO APPEAR.**

"Right to appear," as used in a statute authorizing persons interested in a tax assessment to appear before the board of equalization, "implies the right to be heard in reference to the assessment." *Dundee Mortg. & Trust Inv. Co. v. Charlton* (U. S.) 32 Fed. 192, 194.

**RIGHT TO BEAR ARMS.**

See "Bear."

**RIGHT TO BE HEARD BY COUNSEL.**

"Right to be heard by counsel," as used in Const. art. 1, § 9, providing that in all criminal prosecutions the accused shall have a "right to be heard by himself and by counsel," does not mean a right to a hearing unlimited with regard to time, but the court may prescribe any reasonable limit for the argument; and such a rule does not infringe upon the defendant's constitutional right, unless the time allowed be so short as to be unreasonable, in which case it is a cause for reversal. *State v. Hoyt*, 47 Conn. 518, 519, 36 Am. Rep. 89.

The "right to be heard by himself and counsel," or either, guaranteed by Const. art. 1, § 7, is the right of the accused to be heard by counsel before the court and jury on any and every point involved in the issues on which the jury are to render verdict. The whole case is open for every discussion, and the counsel may suggest for the consideration of the jury any and every fact and circumstance which may be in evidence, and draw from them such deductions and inferences as may seem to him fair and reasonable, leaving to the jury to pass on the force of the suggestions he may submit. *Mitchell v. State*, 22 South. 71, 72, 114 Ala. 1.

By Const. art. 13, § 9, it is declared that "in all criminal prosecutions the accused has a right to be heard by himself and his counsel." Now, in the nature of things, there must be some discretion left with the courts who have criminal jurisdiction in these matters. How long has the accused or his coun-

sel the right to consume the time of the court in their exercise of this right? There must be a limit to it as to duration. The right to be heard exists. It cannot be taken away. But there is also an inherent right in courts of justice to control and restrain the acts of parties and counsel and officers while engaged in the administration of justice before them. In an action for trespass, a limitation by the court of defendant's counsel to 15 minutes in his address to the jury was not an unreasonable restriction of or denial of this constitutional right. *State v. Page*, 21 Mo. 257, 258, 259, 64 Am. Dec. 229.

"Right to be heard by himself and his counsel," as used in Const. art. 13, § 9, declaring that in all criminal prosecutions the accused has the "right to be heard by himself and by his counsel," does not mean an unlimited hearing, but one limited with regard to time at the discretion of the court; so that an order limiting the time during which counsel may address the jury is not an interference with this constitutional right. *State v. Page*, 21 Mo. 257, 259, 64 Am. Dec. 229.

**RIGHT TO CONVEY.**

See "Covenant of Right to Convey."

**RIGHT TO DOWER.**

See "Dower."

**RIGHT TO FLOWING OR RUNNING WATER.**

The "right to flowing water" is a right incident to property in the land. *Elliott v. Fitchburg R. Co.*, 64 Mass. (10 Cush.) 191, 193, 57 Am. Dec. 85; *Lux v. Haggin* (Cal.) 4 Pac. 919, 920.

The "right to running water" is defined to be a corporeal right or hereditament which follows or is embraced by the owner of the soil over which it naturally passes. *Lux v. Haggin*, 10 Pac. 674, 754, 69 Cal. 255 (citing *Sackett v. Wheaton*, 34 Mass. [17 Pick.] 103, 105; *Hill v. Newman*, 5 Cal. 445, 63 Am. Dec. 140).

The "right to the use of flowing water" is publici juris, and common to all riparian proprietors. It is a right to the flow and enjoyment of the water, subject to a similar right in all the proprietors. *Partridge v. Eaton* (N. Y.) 3 Hun, 533, 534.

A right to a stream of water is as sacred as a right to the soil over which it flows. It is a part of the freehold of which no man can be disseised but by lawful judgment of his peers, or by due process of law. *Irving's Ex'rs v. Borough of Media*, 10 Pa.

Super. Ct. 132, 145 (citing *Gardner v. Newburgh* [N. Y.] 2 Johns. Ch. 162, 7 Am. Dec. 526).

### RIGHT TO LIBERTY.

"Right to liberty," as guaranteed in Const. art. 1, § 6, providing that no one shall be deprived of liberty without due process of law, includes the right of the individual to exercise his faculties and to follow a lawful vocation for the support of life. *Bertholf v. O'Reilly*, 74 N. Y. 509, 515, 30 Am. Rep. 323.

### RIGHT TO LIFE.

The "right to life," as guaranteed in Const. art. 1, § 6, providing that no one shall be deprived of life without due process of law, means not only the right to live, but the right of the individual to his body in its completeness and without dismemberment. *Bertholf v. O'Reilly*, 74 N. Y. 509, 515, 30 Am. Rep. 323.

### RIGHT TO PURSUE HAPPINESS.

See "Pursuit of Happiness."

### RIGHT TO REDEEM.

See "Right of Redemption."

### RIGHT TO VOTE BY PROXY.

A "right to vote by proxy" is not a common-law right, and hence not necessarily incident to the shareholders in a corporation. Such a right is not a general right, and the party claiming it must show special authority for that purpose. *Commonwealth v. Bringhurst*, 103 Pa. 134, 138, 49 Am. Rep. 119.

### RIGHTFUL.

"Rightful," as used in the organic law of the territory of Oregon, is equivalent to the word "lawful." *Maynard v. Hill*, 5 Pac. 717, 718, 2 Wash. T. 321.

Rev. St. U. S. § 1851, provides that the legislative power of every territory shall extend to all rightful subjects of legislation not inconsistent with the Constitution and laws of the United States. This grant of power is a broad one. All rightful subjects of legislation is an extensive grant of legislative power, and not only gives to the Legislature the right to legislate upon all rightful subjects of legislation, but it gives to the Legislature in the first instance power of determining what are rightful subjects of legislation. The question whether legislation is rightful or not is not to be determined by the expediency or propriety of such legislation, for no two legislators might agree

whether such law was or was not suited and adapted to the needs, habits, or education of the people. The term "rightful" has more the significance of "lawful," and the clause must be interpreted to mean that Congress grants to the territorial legislative assembly all the powers necessary to be exercised by it in the establishment of a temporary sovereign government. *Territory v. O'Connor*, 41 N. W. 746, 749, 5 Dak. 397, 3 L. R. A. 355.

Rev. St. U. S. § 1851, declares that the legislative power of every territory shall extend to all rightful subjects of legislation. Held, that the word "rightful" is a synonym for "legitimate," and does not signify just legislation, or legislation consonant to justice. A subject may be rightful, but the legislation on it may be wrongful, in that it may be in excess of power, in that it may transcend the limitations of the Constitution and laws. *Baca v. Perez*, 42 Pac. 162, 166, 8 N. M. 187.

"Rightful subjects of legislation," as used in 9 Stat. 325, § 16, granting to Washington Territory legislative power over all "rightful subjects of legislation" not inconsistent with the Constitution and laws of the United States, means "subjects already sufficiently defined by the general consent and practice of the people who, in Congress, have mentioned them. That which the words 'rightful subjects of legislation' stood for in the mind of the people at the time they were speaking them is the meaning that belongs to them in this statute, and is the meaning we must regard. To find it out, we have recourse to the most solemn and authoritative utterances current among the people, namely, their written constitutions, statutes, and adjudications." The statute authorized the granting of a legislative divorce. *Maynard v. Valentine*, 3 Pac. 195, 200, 2 Wash. T. 3.

### RIGHTS AND APPURTENANCES.

Where one conveyed by deed to a grantee the ground on which the abutment of a dam stood, with all and singular the rights and appurtenances thereto belonging, the deed conveyed, not only the ground on which the abutment stood, but also the entire and exclusive use of the water power created by the dam; it being necessary to the enjoyment of the property purchased and appurtenant thereto. *Wall v. Cloud*, 22 Tenn. (3 Humph.) 181, 183.

### RIGHTS, EASEMENTS, AND APPURTENANCES.

A mortgage granting all the rights, easements, and appurtenances of and to the property refers to the free use, enjoyment, and disposal of it. *Ammidown v. Granite Bank*, 90 Mass. (8 Allen) 285, 290.



**RIGHTS IN PORTS AND SHORES.**

According to Hale there are three sorts of "rights in ports and shores": First, the *jus privatum*, or right of property or franchise; second, *jus publicum*, or public right of passage and navigation; and, third, the *jus regium*, or governmental right. *Wilson v. Welch*, 7 Pac. 341, 345, 12 Or. 353.

**RIGHTS OR CREDITS.**

The term "rights or credits" in a statute authorizing the charging of a person as trustee who has in his hands rights or credits of the principal debtor, means cash in the hands of the trustee, or debts due from him belonging to the principal debtor. *Sargeant v. Leland*, 2 Vt. 277, 280.

**RIGHTS OR LIABILITIES.**

Act Nov. 5, 1849, declared the time of limitation in an action on a promissory note to be 16 years. Act April 4, 1872, repealed the former act, and provided that the latter act will not be construed so as to affect any "rights or liabilities," or any causes of action that may have accrued before such act should take effect. Held, that the words "rights or liabilities" should be construed to include a note not yet due when the latter act went into effect. "We must think that the Legislature meant more than causes of action which had accrued when they say 'any rights or liabilities, or any causes of action, that may have accrued.' Some additional meaning should be allowed to the words 'rights or liabilities.'" The statute is wholly prospective in its operation. *Means v. Harrison*, 2 N. E. 64, 65, 114 Ill. 248.

The words "rights, liabilities, or causes of action," as used in the saving clause of the statute of limitations (Laws 1871-72, p. 559, § 24), declaring that the act shall not be construed to affect any "rights, liabilities, or causes of action" that may have accrued before the act shall take effect, are not synonymous, and it was the plain purpose of the Legislature to leave wholly unaffected all contracts that had been executed prior to the time the act became a law. When a note was made, the statute of limitations provided that suits should be brought on such cause of action within 16 years after the same had accrued, and before the note became due the statute of 1871-72 took effect, which provided that such actions should be brought within 10 years after the cause of action accrued. When the note was made, the payee, therefore, had the right to receive the money when due, and to bring suit within 16 years thereafter, and the liability of the maker was correlative, and the law of 1871-72 did not affect this right. *Smart v. Morrison*, 15 Ill. App. (15 Bradw.) 226, 229.

**RIGHTS OR PRIVILEGES.**

The words "rights or privileges" do not include the offices and compensation of public officers, within the meaning of Const. art. 1, § 2, providing that "no member of this state shall be disfranchised or deprived of any of the rights or privileges secured to any citizen thereof, unless by the law of the land or the judgment of his peers." *Hennepin County Com'rs v. Jones*, 18 Minn. 199, 203 (Gil. 182, 185).

Rev. St. U. S. § 5508 [U. S. Comp. St. 1901, p. 3712], provides that, if two or more persons come in disguise on the premises of another, with the intent to prevent or hinder his free enjoyment of any right secured by the Constitution and laws of the United States, they shall be fined, etc. Held, that the phrase "rights or privileges" extends to no other right than one arising under the Constitution and laws of the federal government, and includes no right or privilege dependent on any state law. *United States v. Ringeling*, 20 Pac. 643, 644, 8 Mont. 353.

**RING.**

In a publication charging members of city council with being members of a "ring," the word "ring" must be understood according to the most obvious and familiar sense of the term as a combination for illegal or otherwise improper purposes. *Schomberg v. Walker*, 64 Pac. 290, 291, 132 Cal. 224 (citing *Edwards v. San Jose Printing & Publishing Soc.*, 99 Cal. 431, 435, 436, 34 Pac. 128, 37 Am. St. Rep. 70).

**RING FIGHT.**

See "Prize Fight."

**RING UP.**

"Ring up the fares" means the pulling on a rope at the side of a railway car on receipt of each fare to move the index one point on the circular scale of the register, the registry of the fare being announced by the stroke of a bell. *Pittsburgh, A. & M. Pass. Ry. Co. v. McCurdy*, 8 Atl. 230, 232, 114 Pa. 554, 60 Am. Rep. 363.

**RING WASTE.**

"Ring waste" is a highly purified article of scoured wool, and is made from wool tops or combed wool. *Standard Varnish Works v. United States* (U. S.) 59 Fed. 456, 457, 8 C. C. A. 178.

**RINGING UP—RINGING OUT.**

The term "ringing up" is used in exchanges to designate the setting off of any trade against another in making settlements.

It occurs in great cities in mercantile transactions as to 95 per cent. of the entire volume of business; that is to say, in great cities, on purchases and sales of merchandise to the extent of \$100,000, in the settlement of the same, upon the average less than \$10,000 in money is actually paid, payments being made through checks upon bank, credit balances being set off against each other. The closing up of transactions on the board of trade for the purchase and sale of grain by setting off one trade against another—in the parlance of the exchange "ringing up"—is necessarily no more illegal or improper than is the setting off of credit balances by merchants through checks on banks. *Pardridge v. Cutler*, 68 Ill. App. 569, 573.

What is known as the "ringing up" process is described by Judge Gresham in *Williar v. Irwin*, 30 Fed. Cas. 38, as follows: "When one commission merchant, upon the order of a customer, sells to another commission merchant a quantity of grain for future delivery, and it occurs that at some other time before the maturity of the contract the same commission merchant receives an order from another customer to purchase the same or a larger quantity of the same kind of grain, for the same future delivery, and he executes this second order by making the purchase from the same commission merchant to whom he had made the sale in the other case, then the two commission merchants meet together and exchange or cancel the contracts as between themselves, adjusting the difference in the prices between the two contracts, and restoring any margins that may have been put up; and from that time forth the first commission merchant holds for the benefit of the customer for whom he sold the order or contract of the purchaser for whom he bought, so that the grain of the selling customer may, when delivered, be turned in on the order or contract of the purchasing customer, and that the commission merchant is held responsible as a guarantor to his customer. Though the second transaction may have been had with a different commission merchant from the one with which the first transaction was had, yet where it can be found that a series of contracts are in existence for the sale of like grain for like delivery, so that the seller owes the wheat to the buyer to whom he sold, and he to another who owes like wheat for like delivery to the first commission merchant, in such case they settle by what they call a 'ring'—that is, they all reciprocally surrender or cancel their contracts, adjust differences in price between themselves, and surrender all margins that have been put up; that in all such cases the commission merchant substitutes the contract of another customer in place of that with the commission merchant whose contract has been canceled or surrendered; and that he guaranties

to his customer the performance of the contract originally made in his behalf." *Ward v. Vosburgh* (U. S.) 81 Fed. 12, 16.

"Ringing out" is a term used by dealers in options on the board of trade to indicate the formation of rings or temporary clearing houses through which, by means of a system of mutual offsets or cancellations, various contracts for future delivery of grain were settled by an adjustment of differences, saving an actual delivery and change of possession. *Clarke v. Foss* (U. S.) 5 Fed. Cas. 955, 958.

The term "ringing out" is used in boards of exchange to designate the settling and adjusting of differences in prices by which the profits and loss of contracts for the sale and purchase of grain, etc., for future delivery, is determined. *Samuels v. Oliver*, 22 N. E. 499, 500, 130 Ill. 73.

## RIOT.

See "Squatter Riots."

Riot is a tumultuous disturbance of the peace by three persons or more, assembling together at their own authority, with the intent mutually to assist one another against all who shall oppose them, and afterwards putting the design into execution in a turbulent and violent manner, whether the object in question be lawful or otherwise. *State v. Stalcup*, 23 N. C. 30, 31, 35 Am. Dec. 732; *State v. Connolly* (S. C.) 3 Rich. Law, 337, 338; *State v. Cole* (S. C.) 2 McCord, 117, 119; *State v. Johnson*, 20 S. E. 983, 43 S. C. 123; *State v. Brooks* (S. C.) 1 Hill, 361, 362; *Roberts v. State*, 21 Ark. 183, 185; *State v. Hughes*, 72 N. C. 25, 26; *Marshall v. City of Buffalo*, 64 N. Y. Supp. 411, 413, 50 App. Div. 149; *People v. Judson* (N. Y.) 11 Daly, 1, 83; and it is no less an offense because no proclamation under the riot act has been made, *State v. Russell*, 45 N. H. 83, 84. At common law a riot cannot be committed without the joint action of at least three persons. In Georgia, however, the number of persons necessary to commit the offense has been changed by statute to two. *Dixon v. State*, 31 S. E. 750, 753, 105 Ga. 787. "This partakes of the imperfections of all definitions, and a correct idea of the offense is only to be obtained by analyzing the cases which have been decided. All the authorities agree that if the act committed be a trespass, it is unlawful and riotous, as if the object be to beat another, or to pull down his house, or such like acts. But a man may lawfully pull down his own house in a tumultuous manner and with a great concourse of people, yet, if it be accompanied by no circumstances calculated to excite terror or alarm in others, it would not amount to a riot. So, also, if a dozen men assemble together in a forest, and blow

horns, or shoot guns, or such acts, it would not be a riot. But if the same party were to assemble at the hour of midnight in the streets of Charleston or Columbin, and were to march through the streets crying 'Fire!' blowing horns, and shooting guns, few, I apprehend, would hesitate in pronouncing it a riot." *State v. Brazil* (S. C.) Rice, 257, 260.

In 4 Bl. Comm. p. 140, a riot is defined as follows: A riot is where three or more persons actually do an unlawful act of violence, either with or without common cause or quarrel; as, if they beat a man; or hunt or kill game in another's park, chase, warren, or liberty; or do any other unlawful act with force and violence; or even do a lawful act, as removing a nuisance, in a violent and tumultuous manner. A riot, says Bishop (2 Cr. Law, § 1143), is such disorderly conduct in three or more assembled persons, mutually accomplishing an object, as is calculated to terrify others. According to Stroud and to Burrill, an unlawful act, committed with force and violence by three or more, constitutes a riot. As used in General Municipal Law, c. 17, § 21, making a city liable for property destroyed by "riot," which act was passed before a riot was made a statutory crime, the word is to be construed as having its common-law meaning. *Marshall v. City of Buffalo*, 64 N. Y. Supp. 411, 413, 50 App. Div. 149.

An indictment for riot always avers that defendants unlawfully assembled, and this averment must be proved on the trial, as well as the subsequent riotous acts of defendants. Where the verdict of the jury finds facts from which the court can see that the assembly of defendants was not unlawful, defendants cannot be convicted of a riot. *State v. Hughes*, 72 N. C. 25, 26.

Hawkins (Pleas of the Crown, c. 65, § 9) says "that unlawful assemblies, routs, and riots are three allied disturbances of the public peace. If an assembly moves forward towards the execution of its unlawful design, it is a rout. An actual execution of the design is a riot." *Follis v. State*, 40 S. W. 277, 37 Tex. Cr. R. 535.

A riot is a tumultuous disturbance of the public peace by an unlawful assembly of three or more persons in the execution of some private object. If it be to resist a statute, but not to overthrow the government, then, in the United States, the offense is not treason. *Aron v. City of Wausau*, 74 N. W. 354, 355, 98 Wis. 592, 40 L. R. A. 733.

"Riot" is defined in St. 1893, c. 25, art. 37, § 2, as any use of force or violence, or any threat to use force or violence, if accompanied by immediate power of execution by three or more persons acting together and without authority of law. By the terms of this statute three or more persons must act conjointly in order to constitute a riot.

Less than three cannot commit an offense. Where three persons are charged with riot, it therefore follows that if one is guilty all are guilty; and the fact that one of the three is acquitted by a different jury does not work an acquittal of one found guilty. *Simmons v. Territory*, 69 Pac. 787, 788, 11 Okl. 574.

"Riot, insurrection, and civil commotion" were held to import occasional local or temporary outbreaks of unlawful violence, which, though temporarily destructive in their effects, did not rise to the proportions of organized rebellion against the government. *Boon v. Ætna Ins. Co.*, 40 Conn. 575, 584.

The essence of a "riot" may be the *terrorem populi* or it may be the committing of some unlawful act with violence, or in a violent and tumultuous manner. *State v. Sims*, 16 S. C. 486, 490.

Where three or more persons assemble together, armed, with an intent mutually to assist one another in cutting a dam unlawfully erected on the land of one of such persons by another, and execute their intent in a threatening manner, it is a riot, whether the act done be lawful or not. *State v. Brooks* (S. C.) 1 Hill, 361, 362.

Where there was an unlawful assemblage of three or more persons, combined together to perpetrate an outrageous and violent crime, as that of arson, and the commission thereof was immediately preceded by numerous discharges of firearms, and possibly citizens engaged in watching and protecting the premises, and placed there for that purpose, were compelled to flee therefrom in terror of their lives, there was every element of riot. *Lycoming Fire Ins. Co. v. Schwenk*, 95 Pa. 89, 96, 40 Am. Rep. 629.

Pen. Code, § 295, provides: "If the persons unlawfully assembled together do or attempt to do any illegal act, all those engaged in such illegal act are guilty of riot." Pen. Code, art. 309, provides that where the assembly was at first lawful, and the persons so assembled afterwards agreed to join in the commission of an act which would amount to riot if it had been the original purpose of the meeting, all those who do not return when the change of purpose is known are guilty of riot. *Blackwell v. State*, 30 Tex. App. 672, 673, 18 S. W. 676.

Our statute, in defining riot, says: "Any use of force or violence, disturbing the public peace, or any threat to use such force or violence, if accompanied by immediate power of execution," is riot. The words do not imply that such use of, or that to use, force or violence should be noisy, boisterous, or tumultuous, or be accompanied with threatening speeches, or turbulent, or that the men using force or threatening to use it need be

armed. Testimony of a general feeling of alarm and disquiet is properly received to show that persons acting together without authority of law used or threatened either force or violence, accompanied by immediate power of execution, disturbing the public peace. *People v. O'Loughlin*, 3 Utah, 133, 146, 1 Pac. 653, 661.

Any use of force or violence disturbing the public peace, or any threat to use such force or violence, if accompanied by immediate power of execution, by two or more persons acting together, and without authority of law, is a riot. Pen. Code Cal. 1903, § 404.

#### **Affray distinguished.**

See "Affray."

#### **Disturbance of election.**

An unlawful assembly, riotously and tumultuously disturbing the selectmen of a town in the exercise of their duty on a public day and in a public place and obstructing the inhabitants of the town in the use of their constitutional privilege of election, is a riot, and not an affray. To disturb another in the enjoyment of his lawful right is trespass, and, if it is done by numbers unlawfully combined, the same act is a riot. *Commonwealth v. Runnels*, 10 Mass. 518, 520, 6 Am. Dec. 148.

#### **Mob synonymous.**

The term "riot" is practically synonymous with "mob." *Marshall v. City of Buffalo*, 50 N. Y. App. Div. 149, 153, 6 N. Y. Supp. 411.

#### **Act by two persons.**

Pen. Code, § 354, defines a "riot" as follows: If two or more persons do an unlawful act of violence, or any other act in a violent and tumultuous manner, they shall be guilty of a riot, and be punished as for a misdemeanor. *Green v. State*, 35 S. E. 97, 98, 109 Ga. 536.

If two persons, while endeavoring to separate two others, and prevent their quarreling and fighting, are struck, the one by one of the combatants, and the other by another of the combatants, they both acting together, this is prima facie a riot on the part of the persons so striking, and, if there are circumstances of defense, it devolves upon them to show what they are. *Logg v. People*, 92 Ill. 598, 604.

"Riot" is defined in Comp. Laws, § 5054, to be "any use of force or violence disturbing the public peace, or any threat to use such force and violence, if accompanied by immediate power of execution by two or more persons acting together and without authority of law." *People v. O'Loughlin*, 1 Pac. 653, 659, 3 Utah, 133.

A "riot," according to the Georgia Code, is where any two or more persons, either with or without a good cause or quarrel, do an unlawful act of violence, or any other act, in a violent and tumultuous manner, and a riot cannot be committed without as many as two persons acting in the execution of a common design. *Prince v. State*, 30 Ga. 27, 29.

#### **As requiring unlawful act.**

"Riot" does not involve the idea of an unlawful act done. If three or more persons do any act in a violent and tumultuous manner, there is a riot. *Kiphart v. State*, 42 Ind. 273.

#### **Any unlawful act by three or more.**

"Riot," as used in a life policy, wherein it is provided that the policy shall be void if the insured die by means of any riot, means where three or more persons actually do some unlawful act, either with or without a common cause. *Spruill v. North Carolina Mut. Ins. Co.*, 46 N. C. 126, 127.

Where an injury was done by four persons to the person or property of another, accompanied with force, it was not necessary to prove that the four persons should have met with an intention to commit such acts in order to constitute a riot, but that, without having met with such previous intention, if such acts were committed arising from an intention or agreement formed after their meeting, the act constituted or amounted to a riot. *United States v. McFarland* (U. S.) 26 Fed. Cas. 1087.

Five masked men, forcibly breaking at night into a dwelling house, and compelling the occupant to vacate, under threats of personal violence, and then burning the building, constitutes a riot, within the meaning of a fire insurance policy stipulating against loss or damage by fire caused by riot, etc. *Germania Fire Ins. Co. v. Deckard*, 28 N. E. 868, 871, 3 Ind. App. 361.

#### **RIOTER.**

A "rioter" is one who inflames people's minds, and induces them by violent means to accomplish an illegal object, and it is not necessary that he should take any part in the riot, but it is sufficient if he sets in motion the physical power of another which results in a riot. *Spies v. People*, 12 N. E. 865, 961, 122 Ill. 1, 3 Am. St. Rep. 320.

#### **RIOTOUS.**

"Riotous," as used in a city ordinance providing that every person who shall act in a noisy, riotous, or disorderly manner shall be deemed guilty of a misdemeanor, is employed in its popular meaning as "wanton" and "boisterous," and has no allusion to the

technical crime of riot. *State v. Kennan*, 66 Pac. 62, 63, 64, 25 Wash. 621.

The term "riotous," as used in an affidavit charging the offense of riot, is synonymous with "violent." *State v. Kutter*, 59 Ind. 572, 574.

### RIOTOUS ASSEMBLY.

Ky. St. § 8, makes any city liable for injury to property caused by a riotous or tumultuous assemblage of people. An action was brought under this statute to recover for damages inflicted by a crowd which had assembled to celebrate a holiday, but probably without any intention of violating the law. For the city it was contended that the term "riotous assemblage" of people referred only to an unlawful assemblage bent on evil, such as a mob, and that it was not contemplated that it should apply to a crowd of merry-makers celebrating the advent of Christmas. It was, however, held that the purpose of the assembly, or the aim that it had primarily in view, was not material if it was in fact riotous, and that an assemblage of 1,000 people in the main street of a city, obstructing the use of the street, and discharging bombs, skyrocketing, Roman candles, and other missiles at private property, endangering life, and preventing the use of the street for business purposes, was in fact a riotous assembly. *City of Madisonville v. Bishop*, 67 S. W. 269, 270, 113 Ky. 106, 57 L. R. A. 130.

### RIP.

The word "rip," as used in Rev. St. p. 250, § 132 (Nix. Dig. p. 188, § 66), providing that if any person shall steal, rip, cut, or break, with intent to steal, any lead or iron bar, iron rail, gate, or palisade, or any lock fixed to any building of another, he shall be deemed guilty of a misdemeanor, properly applies to lead in sheets of roofing, or any other shape than bars. Bars of lead or iron may be broken or cut, but with respect to lead or iron in that shape the Legislature would hardly apply the term "rip." *State v. Stone*, 30 N. J. Law (1 Vroom) 299, 300.

### RIPA.

The Latin word "ripa" means "shore of a river." *Bathgate v. Irvine*, 126 Cal. 135, 143, 58 Pac. 442, 445, 77 Am. St. Rep. 158 (citing *And. Law Dict.*).

### RIPARIAN.

The word "riparian" is defined as relating to the banks of a stream or other water, river, lake, or sea, as riparian properties, rights, states. *And. Dict.* Land whose watershed does not drain into a stream is not

riparian to such stream. *Bathgate v. Irvine*, 126 Cal. 135, 143, 58 Pac. 442, 445, 77 Am. St. Rep. 158.

"Riparian" means, in its common-law sense, the owner of the ripa or bank of streams not navigable. *Gough v. Bell*, 22 N. J. Law (2 Zab.) 441, 464.

The *Century Dictionary* defines "riparian" as pertaining to or situate on the bank of a river. *Mobile Transp. Co. v. City of Mobile*, 30 South. 645, 646, 128 Ala. 335, 64 L. R. A. 333, 86 Am. St. Rep. 143.

### Land extending to levee.

Those lands are riparian which actually extend to the river—that is, which come down to the banks of the river; and under Civ. Code, art. 457, providing that "the banks of a river or stream are understood to be that which contains it in its ordinary state of high water, for the nature of the banks does not change, although for some cause they may be overflowed for a time. Nevertheless, on the borders of the Mississippi, and other navigable streams, where there are levees established according to law, the levees shall form the banks"—the lands extending to the levee, although not actually washed by the river, are riparian. *Hart v. Board of Levee Com'rs* (U. S.) 54 Fed. 559, 561.

### As littoral.

The word "riparian" is sometimes used in the books to indicate the owner of the land adjoining the shore of tide waters above the ordinary view of the tide. *Gough v. Bell*, 22 N. J. Law (2 Zab.) 441, 464.

### Land beyond watershed.

The word "riparian" is defined as relating to the bank of a stream or other water. Land lying beyond the watershed of a stream is not riparian. *Bathgate v. Irvine*, 58 Pac. 442, 445, 126 Cal. 135, 77 Am. St. Rep. 158.

Any person owning land which abuts upon or through which a natural stream of water flows is a "riparian proprietor," entitled to the rights of such, without regard to the extent of his land, or from whom or when he acquired his title. The fact that he may have procured the particular tract washed by the stream at one time, and subsequently purchased land adjoining it, will not make him any the less a riparian proprietor, nor should it alone be a valid objection to his using the water on the land last acquired. The only thing necessary to entitle him to the right of a riparian proprietor is to show that the body of the land owned by him borders upon a stream. Where an owner's lands bordered on a stream, the fact that a part of it extended beyond the natural watershed of the stream did not prevent that part from being riparian land. *Jones v. Conn*, 64

Pac. 855, 858, 39 Or. 30, 54 L. R. A. 630, 87 Am. St. Rep. 634.

### RIPARIAN PROPRIETOR.

"An owner of land bounded generally on a stream of water, and as such having the qualified property in the soil to the thread of the stream," is a riparian proprietor. *Bardwell v. Ames*, 39 Mass. (22 Pick.) 333, 355.

A "riparian proprietor" is one whose land is bounded by a navigable stream, and among the rights he is entitled to as such are access to the navigable part of the river from the front of his lot, the right to make a landing, wharf, or pier for his own use or for the use of the public, subject to such general rules and regulations as the Legislature may impose. *Potomac Steamboat Co. v. Upper Potomac Steamboat Co.*, 3 Sup. Ct. 445, 451, 109 U. S. 672, 27 L. Ed. 1070.

A "riparian proprietor" is one who owns land bounded upon a water course or lake. *French-Glenn Live Stock Co. v. Springer*, 58 Pac. 102, 104, 35 Or. 312.

A riparian proprietor is one who owns land bounded on a water course or lake; and where it appears that the government intended to sell all the land to the river or body of water, the riparian owner is entitled to all the land adjacent to the water's edge. *Grant v. Hemphill*, 59 N. W. 263, 265, 92 Iowa, 218.

The term "riparian proprietors" may be used to indicate the owner of the ripa or bank of a stream not navigable as well as the owner of land adjoining the shore of tide-waters above the ordinary flow of the tide. *Gough v. Bell*, 22 N. J. Law (2 Zab.) 441, 464.

#### As littoral owner.

The words "owner of lands situated along or upon tide waters," in the wharf act of 1851 (Revision, p. 1240), giving to the board of chosen freeholders of the several counties power to license such owners who build docks or wharves in front of their lands, etc., are identical in meaning with the words "riparian owner" in the act of 1871, providing that any riparian owner of lands on tide waters in the state may apply to the riparian commissioners for release, etc. *Fitzgerald v. Faunce*, 46 N. J. Law (17 Vroom) 536, 594.

The words "riparian proprietor" have been heedlessly extended from rivers and streams to the shores of the sea. If it is necessary to express it by a single adjective, the term "littoral proprietor," as used by counsel in *Commonwealth v. City of Roxbury*, 75 Mass. (9 Gray) 472, and by the Supreme Court of the United States in *City of Boston v. Lecraw*, 58 U. S. (17 How.) 426, 432, 15 L. Ed. 118, is more accurate. Com-

monwealth v. City of Roxbury, 75 Mass. (9 Gray) 451, 521, note.

### RIPARIAN RIGHT.

A "riparian right" is the result of that full dominion which every one has over his own land, by which he is authorized to keep all others from coming upon it except upon his own terms. It is defined as the right of the owner of lands upon tide waters to maintain his adjacency to it, and to profit by this advantage, and otherwise as a right in the riparian owner to preserve and improve the connection of his property with the navigable water. The rights which a riparian proprietor has with respect to the water are entirely derived from his possession of the land abutting thereon. *Potomac Steamboat Co. v. Upper Potomac Steamboat Co.*, 3 Sup. Ct. 445, 451, 109 U. S. 672, 27 L. Ed. 1070.

The riparian rights of persons owning land fronting on navigable waters are defined to be "access to the navigable river in front of his lot, the right to make a landing, wharf, or pier for his own use or the use of the public, subject to the general rules imposed by the Legislature for the rights of the public." *Yates v. Milwaukee*, 77 U. S. (10 Wall.) 497, 19 L. Ed. 984. The term does not include the right to appropriate the water front with old vessels to be dismantled or broken up, as it is the exclusive appropriation of the fee itself, and not merely an exercise of an easement. It is not necessary that the act should interfere with navigation." *Town of North Hempstead v. Gregory*, 66 N. Y. Supp. 28, 29.

Const. 1865, art. 4, § 2, requires that each law shall embrace but one subject, which shall be described in the title. Act Jan. 31, 1867 (Acts 1866-67, p. 307), was entitled "An act granting to the city of M. the riparian rights in the river front," while the body granted the fee. Held, that the act was not unconstitutional, since the phrase "riparian rights" comprehended the view of the shore below high-water mark, and was not limited to easements therein. The word "rights" comprehends absolute rights, and "riparian" is a mere localizing term. *Mobile Transp. Co. v. City of Mobile*, 30 South. 645, 646, 128 Ala. 335, 64 L. R. A. 333, 86 Am. St. Rep. 143.

"Riparian rights" are not common to the citizens at large, but exist as incidents to the right of the soil itself adjacent to the water. In such ownership they have their origin. They may and do exist although the fee in the bed of the river or lake be in the state. *McCarthy v. Murphy*, 96 N. W. 531, 532, 119 Wis. 159.

#### As property.

See "Property."

## RIPE.

The term "ripe," in a silo contract providing for the delivery of beets mentioned therein when ripe, construed to mean when they should contain 12 per cent. of sugar, with a purity coefficient of 80. *Norfolk Beet Sugar Co. v. Berger*, 95 N. W. 336, 338, 1 Neb. (Unof.) 151.

## RIPE FOR JUDGMENT.

Where a suggestion of insolvency of defendant and motion for continuance based thereon are on file and undetermined through mistake or nonappearance of defendant when the case is reached for trial, it is not "ripe for judgment," within the general order that in such cases judgment shall be entered on the first Monday of each month. *Hosmer v. Hoitt*, 36 N. E. 835, 161 Mass. 173.

## RIPRAP.

The term "riprap" applies to stone when laid into a kind of shingling upon the slope of a dirt embankment at such points as it is likely to be washed by water. In other words, "riprap" is a kind of wall, so as to imply that "cubic yard," when applied to it, would have the same signification as when applied to a wall. *Wood v. Vermont Cent. R. Co.*, 24 Vt. 608, 610.

## RIISING OF COURT.

"Rising of court," as used in a statute requiring a party to reduce his exceptions to writing within such time as the court may direct, not exceeding forty days from the "rising of the court," was equivalent to final adjournment or "last day of the term." *State v. Weaver*, 8 N. W. 385, 386, 11 Neb. 163.

## RISK.

See "Assumption of Risk"; "At Owner's Risk"; "Buyer's Risk"; "Carpenter's Risk"; "Marine Risk"; "Obvious Risks"; "Ordinary Risks"; "Port Risk"; "Shifting Risk"; "Visible Risk"; "War Risk"; "Writing the Risk."

All risks, see "All."

"Risks," as used in a contract between two insurance companies, whereby one agreed "to pay all losses on all policies issued by the other company upon risks in the state of New York only," means the hazards at the places where the property insured is located. *London & L. Fire Ins. Co. v. Lycoming Ins. Co.*, 105 Pa. 424, 430.

### As agreed value.

"Risk," as used in an indorsement on a policy of reinsurance, providing that the re-

insurance should be "to the extent of one-half of the amount of each and every risk which calls or exceeds in value the sum of \$15,000" on cargoes insured by the reassured under certain open policies, referred to the value of the property as indorsed on the open policies, rather than the value of the property as adjusted after a loss. *Continental Ins. Co. v. Aetna Ins. Co.*, 33 N. E. 724, 138 N. Y. 16.

### As actual liability.

An indorsement on a policy of reinsurance provided that the reinsurance should cover "one-half of the value of all cargoes shipped" by one T. A later indorsement provided that the reinsurance should be "to the extent of one-half of the amount of each and every risk which equals or exceeds in value the sum of \$15,000" on cargoes insured by the reassured under open policies to T. and certain other persons, and "on cargoes of the value of \$50,000 and upwards this policy is to cover the excess of \$25,000, not exceeding the sum of \$50,000 on one cargo." The policy to the assured provided that he should "enter for insurance all goods at the full value thereof." Held that, construing the indorsements together as in *pari materia* with the terms of the policy of insurance, the word "risk" did not mean "loss," nor did it mean the arbitrary value of the cargoes as fixed in the policies, but rather the actual liability assumed, which was the real, and not the estimated, value of the cargoes insured. *Continental Ins. Co. v. Aetna Ins. Co.*, 17 N. Y. Supp. 106, 108, 62 Hun, 554.

### Negligence.

"Risk of the master and owners," as used in a contract by the owners of a steamboat used for towing boats on the Hudson river to tow a boat from New York to Albany for hire at the risk of the master and owners, refers to the perils of the navigation not arising from the gross negligence of the contractor or his servants navigating the boat. *Wells v. Steam Nav. Co.*, 8 N. Y. (4 Seld.) 375, 379.

"Risk," as used in a contract for the shipment of goods, did not exempt the carriers from proper care over the property while on the cars and while remaining in their custody. *Wallace v. Sanders*, 42 Ga. 486, 490.

### Stock subscriptions.

"Risks," as used in Gen. St. 1868, c. 23, § 103, providing that no insurance company created by or under the laws of any other state or territory shall directly or indirectly take "risks or transact any business of insurance" without first obtaining a certificate of authority from the auditor of the state, does not invalidate subscriptions to the stock of such company, or notes given in payment thereof before the obtaining of such cer-

tificate; stock subscriptions being deemed neither risks nor business of insurance. *Bartlett v. Chouteau Ins. Co.*, 18 Kan. 369, 370.

#### As subject-matter of insurance.

"Risk," as used in an application for a policy of fire insurance which formed part of the contract, and which should avoid the policy if it did not contain a full, fair, and substantially true representation of all the facts and circumstances respecting the property, so far as they were within the knowledge of the assured and material to "the risk," does not mean the liability of the property insured to loss or injury by fire only, but means the whole subject-matter of the contract of insurance, and hence false representations as to the incumbrances upon the property insured, made in the application, are material to the risk, and avoid the policy. *Towne v. Fitchburg Mut. Fire Ins. Co.*, 89 Mass. (7 Allen) 51, 52.

#### RISK INCIDENT TO IMPORTATION.

See "Incident."

#### RISK OF COLLISION.

The phrase "risk of collision" in admiralty rules is not merely certainty, but that there is danger from risk of collision whenever it is not clearly safe to go on. *The Aurania and The Republic* (U. S.) 29 Fed. 98, 123.

Act Cong. April 29, 1864 (13 Stat. 60) art. 16, declares that every steam vessel, when approaching another so as to involve "risk of collision," shall slacken her speed, or, if necessary, stop and reverse. Held, that the phrase "risk of collision" does not mean merely danger, but means chance, peril, hazard, or danger of collision merely, and not immediate danger. *The D. S. Gregory and the George Washington* (U. S.) 7 Fed. Cas. 1122, 1124.

#### RISK OF CRAFT, HULK, OR TRANSSHIPMENT.

"Risk of craft, or hulk, or transshipment," as used in a bill of lading for a sea carriage exempting the carrier from risk of craft, or hulk, or transshipment, does not include risks arising from the unworthiness of the vessel in which the goods are shipped, but only applies to small boats, lighters, or other craft which may be necessarily used in taking goods from the vessel to the shore, in which the goods are liable to be wrecked or damaged in the passage. *The Hadji* (U. S.) 16 Fed. 861, 863.

#### RISK OF CRAFT TO AND FROM SHIP.

A policy of insurance on goods loaded on a ship included "risk of craft to and

from ship." The assured expressly warranted the goods "to be free of particular average, unless the ship be stranded." Held, that on account of this warranty the expression "risk of craft to and from ship" did not cover a particular average loss incurred by the stranding of a lighter conveying goods from ship to shore. *Hoffman v. Marshall*, 2 Bing. N. C. 383, 389.

#### RISK OF DELAY, ETC.

A bill of lading exempting a carrier from "risk or any loss or damage which may be sustained by reason of any delay or from any other cause or thing in or incident to or from or in the loading or unloading the stock" is to be construed as exempting the carrier from loss or damage "by reason of injuries to the stock caused by delay, etc., upon the car, and to loss or damages by reason of delay in loading or unloading, and has no reference to other losses which the delays of the carriers may cause to the shipper." *Sission v. Cleveland & T. R. Co.*, 14 Mich. 489, 500, 90 Am. Dec. 252.

#### RISK OF LIGHTERAGE.

See "Usual Risk of Lighterage."

#### RISK OF NAVIGATION.

"Risk of navigation," as used in an agreement by which plaintiff became the owner of a boat, and defendant agreed to take on a cargo and run the boat for the plaintiff, which he agreed to do absolutely unless prevented by some "risk of navigation," has a broader signification than the term "perils of navigation," and plaintiff assumed all the risks attendant upon the navigation through the canal which were beyond the control of the defendant, including the risk that the boat was too large to pass the locks on the canal. Defendant assumed only the risks occasioned by the negligence and misconduct of himself and his servants, and plaintiff assumed all the risks attending upon the navigation through the canal which were beyond the control of the defendant. Such is the plain, ordinary meaning of the language used. *Pitcher v. Hennessy*, 48 N. Y. 415, 419.

#### RISK VOLUNTARILY ASSUMED.

The death of a person who is shot by one whom he is trying to eject by force from a hotel office is a death by "accident," and not a risk voluntarily assumed, when he makes the attempt without knowing that the other person is armed. *Lovelace v. Travelers' Protective Ass'n*, 28 S. W. 877, 879. 126 Mo. 104, 30 L. R. A. 209, 47 Am. St. Rep. 638.



**RISKS INCIDENT TO BUSINESS.**

In an action for an injury to a servant while operating a machine, in which defendant contended the plaintiff had assumed the risk, it was said that risks which are incident to the business must not be confounded with such as are denominated "obvious." "The former sort comprises those which accompany or arise from the natural or usual method of conducting the particular business, and has more special relation to perils which attend the business generally; while the latter includes such as are manifest to the sense of observation, open, and readily discernible, whether they arise from the nature of the business, the particular manner in which it is conducted, or the use of defective or unsafe appliances." *Stager v. Troy Laundry Co.*, 63 Pac. 645, 647, 38 Or. 480, 53 L. R. A. 459.

**RIVER.**

See "Inland River"; "Private River or Stream"; "Royal River."  
See, also, "Water Course."

A river is the water flowing in its channel. *People v. Gold Run Ditch & Mining Co.*, 4 Pac. 1152, 1155, 66 Cal. 138, 56 Am. Rep. 80.

A "river" consists of water, bed and banks. *Gavit's Adm'rs v. Chambers*, 3 Ohio, 495, 496, 498; *Starr v. Child* (N. Y.) 20 Wend. 149, 153.

The word "river" is defined to be a large stream of water flowing in a channel on land toward the ocean, lake, or other river. Every river, whether public or private, has a bed, shore, and a bank. *Harlan & Hollingsworth Co. v. Paschall*, 5 Del. Ch. 435, 463.

Richardson, the most learned and satisfactory of modern English lexicographers, defines a river to be a flood or flowing course, a current, a stream of water; and this definition expresses what we mean ordinarily when we speak of a river. *State v. Town of Gilmanton*, 14 N. H. 467, 477.

A river is defined to be a body of flowing water of no specific dimensions, larger than a brook or rivulet, a running stream pent in on each side by walls or banks. *Howard v. Ingersoll*, 54 U. S. (13 How.) 381, 391, 14 L. Ed. 189; *State of Alabama v. State of Georgia*, 64 U. S. (23 How.) 505, 513, 16 L. Ed. 556; *Shelby County Com'rs v. Castetter*, 33 N. E. 986, 987, 7 Ind. App. 309.

A river means a considerable stream of water that has a current of its own, flowing from a higher level, that constitutes its source, to its mouth, where it debouches. *The Garden City* (U. S.) 26 Fed. 766, 772.

A river is a natural stream of water flowing betwixt banks or walls in a bed, and  
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is so called whether its current sets one way or flows in different directions with the tide. *Berlin Mills Co. v. Wentworth's Location*, 60 N. H. 156.

Water flowing from springs may be appropriated under Civ. Code, § 1410, providing for appropriation of water flowing in a river or stream. *Ely v. Ferguson*, 27 Pac. 587, 588, 91 Cal. 187.

A sluiceway formed on river flats between the piers of a bridge and sections of the causeway erected across such flats and river by the filling in of such causeway and of other portions of the flats, and into which water flows only during high tide, is not a river. The word "river" is derived from the Latin "rivus," and it is constantly used by the Latin authorities in a sense that implies a current from a source to the mouth. It is a river from the point where the water comes to the surface and begins to flow in a channel until it mixes with the sea, arm of the sea, lake, or other water. It may sometimes be dry, but, in order to be within the above definition, it must appear that the water usually flows in a particular direction, and has a particular channel with beds, banks, or sides. *Dudden v. Guardians of Clutton Union*, 1 Hurl. & N. 627; *Gould, Waters*, 41; *Gallup v. Tracy*, 25 Conn. 10, 17; *Stanchfield v. City of Newton*, 142 Mass. 110, 116, 7 N. E. 703. Webster defines a river as a large stream of water flowing in a channel on land towards the ocean, a lake, or another river; a stream larger than a rivulet or brook. Worcester defines it as a large inland stream of water flowing into the sea, a lake, or another river; a stream larger than a brook. In *Stor. Dict.* it is said to be a stream flowing in a channel into another river, into the ocean, or into a lake or sea. In *Imp. Dict.* it is defined as a large stream of water flowing through a certain portion of the earth's surface, and discharging itself into the sea, a lake, a marsh, or another river. *Cent. Dict.* says that a river is a considerable body of water, flowing with a perceptible current in a certain course or channel, and usually without cessation during the entire year. *Chamberlain v. Hemmingway*, 27 Atl. 239, 240, 63 Conn. 1, 22 L. R. A. 45, 38 Am. St. Rep. 330.

**Bay or inlet of sea.**

"Rivers," as used in Code, § 4212, providing for the punishment of a captain or commanding officer of a steamboat who knowingly suffers a game of cards on such boat while navigating any of the rivers of the state, means an inland stream, and cannot include a bay which is an inlet of the sea, though the river empties into the bay. "Where the one begins and the other ends may often be a question of difficulty, yet the two are legally and essentially distinct." *Johnson v. State*, 74 Ala. 537, 538.

**Great Lakes and straits.**

The terms "rivers, haven, creek, basin, bay, or arm of the sea," in Rev. St. U. S. § 5346 [U. S. Comp. St. 1901, p. 3630], providing that an assault committed with a dangerous weapon or with intent to perpetrate any felony on board of any vessel belonging in whole or in part to the United States while in any arm of the sea, or in any river, haven, creek, basin, or bay within the admiralty jurisdiction of the United States, and out of the jurisdiction of any particular state, are limited to the high seas and other waters connected immediately with them, and do not include the rivers connecting the Great Lakes. *Ex parte Byers* (U. S.) 32 Fed. 404, 406.

**Lake distinguished.**

A "river" is characterized by its being confined in channel banks, which give it a substantially single course throughout, as distinguished from a "lake," which occupies a basin of greater or less depth, and may or may not have a single prevailing direction. *Jones v. Lee*, 43 N. W. 855, 856, 77 Mich. 35.

**As low-water mark.**

The phrase "river or any part of said river" in a patent to a village to land described as extending to the river or any part of said river was construed to extend to the low-water mark, the river in question being navigable, and affected by the ebb and flow of the tide. The court, in passing on the question, said that retaining the land between the high and low water lines would be of no practical advantage to the granting authority, while its right and enjoyment would be indispensable to the prosperity of the village, but that a grant from the public authorities to individuals would undoubtedly require a different construction. *City of New York v. Hart* (N. Y.) 16 Hun, 380, 382.

**As main channel.**

By the charter of the Hudson River Railroad Company the corporation was relieved from any obligation to maintain fences where the railroad was constructed in the river. Held, that "the river" was not limited to the main channel, but included the different channels or creeks separating or flowing around intervening islands in the stream, though by local usage such channels or creeks received different names. *Schermerhorn v. Hudson River R. Co.*, 38 N. Y. 103.

**Overflowed lands.**

"A river consists of the bed, the water, and the bank, but it does not include lands beyond the banks which are covered in times of freshet or extreme floods, or swamp or low grounds which are liable to overflow, but are reclaimable for meadows or agriculture,

or which, being too low for reclamation, though not always covered with water, may be used for cattle to range upon as natural or uninclosed pasture." *Paine Lumber Co. v. United States* (U. S.) 55 Fed. 854, 864; *State ex rel. Citizens' Electric Lighting & Power Co. v. Longfellow*, 69 S. W. 374, 377, 169 Mo. 109.

**As thread of river.**

"River," as used in a grant of land described as bounded by a river, will be construed to mean bounded by the thread of the river, unless the tide ebbs and flows therein. *Paine v. Woods*, 108 Mass. 160, 169.

It is well settled that a grant of land in a state bounded by a highway or river carries the fee by implication to the center of the highway or river, subject to the right of passage of the public. *Mariner v. Schulte*, 13 Wis. 692, 706.

Where a road or a river is used in a deed to describe a boundary of land conveyed, it is a familiar principle of law that the deed carries the title to the center of the river or road, unless the terms or circumstances of the grant indicate a limitation of its extent by the exterior lines. *Banks v. Ogden*, 69 U. S. (2 Wall.) 57, 68, 17 L. Ed. 818.

The use of the word "river" in a grant which provides that the land extends to a river, and is bounded upon it, will be presumed to mean the center of the stream if there is no limitation in the terms of the grant itself. *State v. Town of Gilmanton*, 9 N. H. 461, 463.

The word "river" in a deed describing a boundary of land described as being on a river passes the title to the center of the stream, if the grantor owns so far, unless expressly restricted to the shore or bank. *City of Boston v. Richardson*, 95 Mass. (13 Allen) 146, 155.

The term "river," when used to describe the boundary of land on a nonnavigable stream, is to be construed as meaning the center of the river. *Clement v. Burns*, 43 N. H. 609, 616.

The term "river," when used to designate a boundary of land on a nonnavigable river, will be construed to mean thread of the river. *State of Indiana v. Milk* (U. S.) 11 Fed. 389, 395.

**RIVER BED.**

A "river bed" is that soil so usually covered by water as to be distinguishable from the banks by the character of the vegetation produced by the common presence and action of flowing water. *Howard v. Ingersoll*, 54 U. S. (13 How.) 381, 427, 14 L. Ed. 189.

The "bed" of a river is a definite, and commonly a permanent, channel, and is the characteristic which distinguishes the water of a river from mere surface drainage flowing without definite course or certain limits and from water percolating through the strata of the earth, both of which are not subject to riparian rights, but form part of the realty, and belong exclusively to the owner of the realty. The bank of a river is that elevation of land which confines the waters of the river in their natural channel when they rise the highest, and do not overflow the banks, and in that condition of the water the banks and the soil which is permanently submerged form the bed of the river. The banks are a part of the river bed. *Paine Lumber Co. v. United States (U. S.)* 55 Fed. 854, 864.

"The bed of the river" is that portion of its soil which is alternately covered and left bare as there may be an increase or diminution in the supply of water, and which is adequate to contain it at its average and mean stage during the entire year, without reference to the freshets of the winter or spring or the extreme droughts of summer or autumn. *State of Alabama v. State of Georgia*, 64 U. S. (23 How.) 505, 515, 16 L. Ed. 556.

If we divide a river into its parts, which consists of banks, bed, and water, the bed includes the shores; for to constitute a part of the bed it is not necessary that it should always be covered by water, yet, in order to obtain intelligible terms for different parts, it is often divided into banks, shores, bed, and water; still the shore is a part of the bed or bottom of the river. It is probable that confusion and misunderstanding of cases has arisen from the use of the word "bed" in different senses; sometimes in its broad and true sense, and sometimes in a limited one, meaning only that part which is always covered by water. *Haight v. City of Keokuk*, 4 Iowa, 199, 212.

The bed of a river is the space contained between its banks. *Pulley v. Municipality No. 2*, 18 La. 278, 282.

The "bed of a river" is a natural object, and is to be sought for not merely by the application of any abstract rules, but as other natural objects are sought for and found by the distinctive appearances they present; the banks being fast land, on which vegetation appropriate to such land in the particular locality grows wherever the bank is not too steep to permit such growth, and the bed being soil of a different character, and having no vegetation, or only such as exists when commonly submerged in water. *Howard v. Ingersoll*, 54 U. S. (13 How.) 381, 428, 14 L. Ed. 189.

A depression along which grass grew as elsewhere, a little coarser and thicker per-

haps, but with that as the only difference, on which mowing machines were run, and the turf of which was not cut through, nor was a distinct channel worn in the soil by the running water, is not the bed of a river. *Gibbs v. Williams*, 25 Kan. 214, 221, 37 Am. Rep. 241.

The "bed of a river" is covered by the river, and is the space subjacent to the river through which it flows. Every river, be it public or private, has a bed, a shore, and a bank. *Harlan & Hollingsworth Co. v. Paschall*, 5 Del. Ch. 435, 463.

Where the call in a deed is "in and to the grant constituting the bed of said river" (the same being an unnavigable stream), the bed of said river is the hollow basin through which the water of the river flows at low-water mark. *Dayton v. Cooper Hydraulic Co.*, 10 Ohio S. & C. P. Dec. 192, 205.

An examination of all the statutes of Virginia will show that the state has always asserted the right, in its exercise of sovereignty, to control the "bed," shores, and banks of all the navigable waters within the commonwealth. The "beds," of course, include the shores and the whole space through which the stream flows. *Town of Ravenswood v. Fleming*, 22 W. Va. 52, 66, 46 Am. Rep. 485.

#### RIVER CRAFT.

A statute authorizing "bay or river crafts or other boats" to make fast to private wharves without paying harbor master's fees, will be construed to include all vessels propelled by either sail or steam, which are constructed and used in the bays and rivers, and not on the open seas, and does not embrace steamboats of 500 tons. *Owners of The Wenonah v. Bragdon (Va.)* 21 Grat. 685, 697.

#### RIVER FRONT.

"River front," as used in a deed conveying "the entire river front, land under water, easements, and privileges in the Mississippi river," means the shore upon low-water mark. *Eastman v. St. Anthony Falls Water-Power Co.*, 44 N. W. 882, 883, 43 Minn. 60.

#### RIVER-WORTHINESS.

The term "river-worthiness" was used by counsel in speaking of the seaworthiness of a raft on a river, and such term was said by the court to be more accurate, perhaps, than "seaworthiness," but the court further stated that it did not much relish the term. *Moore v. Louisville Underwriters (U. S.)* 14 Fed. 226, 229, 233.

**ROAD.**

See "Artificial Roads"; "Bridle Road"; "Byroad"; "County Road"; "De Facto Road"; "Great Roads"; "Necessary Road"; "Pent Road"; "Plank Roads"; "Post Road"; "Private Road"; "Public Roads"; "Toll Road"; "Traveled Public Road"; "Turn-out Road." Any road, see "Any."

The word "road," according to Webster, applies generally to highways, and as a generic term includes highways, streets, and lanes. The word "road" is defined in the Code to include public bridges, and is equivalent to the words "county way," "county road," "common road," and "state road." *Stokes v. Scott County*, 10 Iowa, 166, 175..

"Road," as used in Rev. St. c. 51, § 1, providing that persons traveling on a road, on meeting, shall drive to the right of the center of the traveled part of the road, is not necessarily limited to a public highway. The term "road," used without qualification, applies in its ordinary acceptation to a place set apart and appropriated either de jure or de facto for the purpose of passing with carriages, whether by public authority or by the general license and permission of the owners. *Commonwealth v. Gammons*, 40 Mass. (23 Pick.) 201, 202.

"Road," as used in St. 1820, c. 65, § 1, providing that in all cases of persons meeting each other on any turnpike or other road traveling with vehicles, persons so meeting shall drive to the right of the center of the traveled part of such road, does not mean only highways or town ways, but means any way, whether public or private. *Jaquith v. Richardson*, 49 Mass. (8 Metc.) 213, 215.

In Public Health Act 1848, § 117 (11 & 12 Vict. c. 63), providing that the inhabitants of any district shall not, in respect of any property situate therein, be liable to the payment of highway rate or other payment, not being a toll in respect of making or repairing roads or highways within any parish or place situate beyond the limits of such district, the word "roads" being employed instead of the word "streets," as in previous sections, expressly extends to all roads, and is not confined to highways nor turnpikes the management of which is vested in a local board. *Reg. v. Trustees of Worthing & Lancing Turnpike Road*, 3 El. & Bl. 989, 1006.

Webster defines a "road" as synonymous with "way," "highway," "passageway," but, strictly speaking, it is a way for horses and carriages, and the word "road" in Rev. St. § 4231, requiring railroad companies to erect at all points where there roads cross any public road a sign with distinct letters thereon, does not mean a public road, but applies to all roads that are traveled. *International*

& G. N. Ry. Co. v. Jordan (Tex.) 1 White & W. Civ. Cas. Ct. App. § 859.

"Road" is generally applied to highways, and as a generic term includes highways, streets, and lanes. *People v. Buffalo County Com'rs*, 4 Neb. 150, 158.

In common parlance the word "road" is a generic term, comprehending county roads, town roads, turnpikes, private ways, and perhaps others. *Inhabitants of Windham v. Cumberland County Com'rs*, 26 Me. (13 Shep.) 406, 409.

The words "highway" and "road" include public bridges, and may be held equivalent to the words "county way," "county road," "common road," and "state road." Rev. St. Utah 1898, § 2498; Gen. St. Kan. 1901, § 7342, subd. 5; Code Iowa 1897, § 48, subd. 5; Shannon's Code Tenn. 1896, § 70.

The term "road," as used in the chapter relating to road superintendents, includes roadbed, ditches, drains, culverts, and every part of such road. Rev. St. Tex. 1895, art. 4784.

In the construction of statutes the word "highway," "road," or "street" may include any road laid out by the authority of the United States or of this state, or of any town or county of this state, and all bridges upon the same. *Hurd's Rev. St. Ill. 1901*, p. 1720, c. 131, § 1, subd. 16.

The word "road," as used in certain provisions of the chapter relating to roads, bridges, landings, wharves, etc., defining and punishing offenses relating to roads, bridges, etc., includes any state or county road, turnpike or road owned by a company or person, and the Cumberland road; and the word "bridge" any state or county bridge owned by a company or person. Code W. Va. 1899, p. 355, c. 43, § 44.

The word "road," as used in the chapter relating to highways, etc., shall be construed to mean any turnpike, state road, or county road. Code Va. 1887, § 3878.

**Bridges and culverts.**

The word "road," as a generic term, includes the highway, street, and lane. As used in Gen. St. 954, § 16, providing that the county commissioners may let contracts to the lowest competent bidders for the improvement of such roads as may be of general necessity, "roads" should be construed to include permanent bridges and culverts. Public roads and streets are for the use of the public at large, although ordinarily the public acquire only the use, the fee remaining in the original proprietor or abutter. Public bridges are portions of public roads. *Follmer v. Nuckolls County Com'rs*, 6 Neb. 204, 209.

"Road," as used in a collector's advertisement that the object for which the tax was granted was for the purpose of making "roads," *ex vi termini* implies bridges, as bridges are a portion of the road, and also as the term "road" is generic and "bridge" specific. *Isaacs v. Wiley*, 12 Vt. 674, 679.

The word "road," as defined by Webster's Dictionary, is a generic term, usually applied to highways, and includes a highway, street, or lane. A public bridge along the road is a part of the road, and this without regard to its length or cost. *People v. Buffalo County Com'rs*, 4 Neb. 150, 158.

"Road," as used in P. L. 1891, p. 1389, § 47, providing that the board of township committee should have power to take any lands that might be necessary for opening, widening, or altering any "street or road" in the township, cannot be construed to include the approaches to a bridge, for it is in the ordinary sense that the terms are employed in the statute, about which there is no confusion. *Ballantine v. Township Committee of Kearny*, 19 Atl. 792, 52 N. J. Law (23 Vroom) 338.

The word "highway" or "road" in statutes shall include all bridges thereon. Pub. St. N. H. 1901, p. 64, c. 2, § 26; Pen. Code Ga. 1895, § 2; V. S. 1894, 24.

#### **As included in term bridge.**

"Road" is not included within the term "bridge," and an advertisement of a tax sale for the purpose of making and repairing the roads and public bridges, which omitted the word "roads," is not sufficient. *Langdon v. Poor*, 20 Vt. 13, 14, 16.

#### **As center of road.**

Where a "road" or a river is used in a deed to describe a boundary of land conveyed, it is a familiar principle of law that the deed carries the title to the center of the river or road, unless the terms or circumstances of the grant indicate a limitation of its extent by the exterior lines. *Banks v. Ogden*, 69 U. S. (2 Wall.) 57, 68, 17 L. Ed. 818.

When the word "road" is used in a deed as describing the boundary of land, it will pass the land to the center of the highway, although the distance specified by actual measurement carries the line only to the side of the highway. *Newhall v. Ireson*, 62 Mass. (8 Cush.) 595, 598, 54 Am. Dec. 790.

Where the word "road" is used in deeds by the original owner of land who lays out a road through the lands to describe the boundaries of the tracks on both sides of the road, the boundary between the two roads will be construed to be in the center of the road. *Witter v. Harvey* (S. C.) 1 McCord, 67, 71, 10 Am. Dec. 650.

#### **As easement only.**

"Road," as used in a deed in which the grantor reserved a road ten feet wide along the line of a certain person, to be shut at each end with a bar or gate, is a mere way, the owner of the way having no interest in the land. The word "road" has never been defined to mean land. It is difficult to find a definition which does not include the sense of way, though the latter word is more generic, referring to many things besides roads. It is generally applied to highway, street, or lane; often to a pathway, or private way; yet strictly it means only one particular kind of way. It means the reservation of a way. *Klister v. Reeser*, 98 Pa. 1, 4, 42 Am. Rep. 608.

A "road" is a right of passage in the public, but for every other purpose the soil belongs to the original owner; so an exception of a road in a conveyance of land embraces only the easement or right of the public in the road, and not the soil. *Leavitt v. Towle*, 8 N. H. 96, 97.

#### **Highway synonymous.**

A "highway" or "road" is an open way or public passage; it is ground appropriated for forming a communication between one city or town and another. *Hutson v. City of New York*, 7 N. Y. Super. Ct. (5 Sandf.) 289, 312.

The word "road" is uniformly taken to mean a public highway in both legal and common acceptation. It is synonymous with "highway." *Heiple v. City of East Portland*, 8 Pac. 907, 909, 13 Or. 97.

"Road," as used in a complaint in an action against a town for damages for an injury caused by a defect in a road, alleging the existence in the town of a certain town-way or road, which it was the duty of the town to keep in repair, but that on said road, etc., is synonymous with highway; such being its use in common parlance. The term "road" is generic, and includes all highways and every species of public way. *Stedman v. Inhabitants of Southbridge*, 34 Mass. (17 Pick.) 162, 164.

"Road," as generally used in laws, applies to public roads, unless the word "private" is prefixed, and is synonymous with the term "highway." *Respublica v. Arnold* (Pa.) 3 Yeates, 417, 421.

The word "road" includes highways, streets, and lanes. *Dubuque County v. Dubuque & P. R. Co.* (Iowa) 4 G. Greene, 1, 14, 15.

#### **Location of route.**

A "road" is a way actually used in passing from one place to another. A mere survey or location of a route for a road is not

a road. A mere location for a road falls short of a road as much as a house lot falls short of a house. *Brooks v. Morrill*, 42 Atl. 357, 358, 92 Me. 172.

#### **As marine roads.**

"Roads," as used in a bill of lading exempting the carrier from the dangers of the seas, roads, and rivers, means marine roads. *De Rothschild v. Royal Mail Steam Packet Co.*, 7 Exch. 734, 742.

#### **As public highway.**

In Pennsylvania there are and have been for a great length of time three different kinds of lawful roads: First. The great provincial roads, called in the act of 1700 the "king's highways," or "public roads," which were laid out by order of the Governor and council. Second. The roads or cartways leading to such provincial roads, laid out by order of the justices of the county courts, after a return of certain viewers that the same were necessary for the convenience of the public. Such parts of these roads as run through any man's improved grounds were to be paid out of the county stock. The third kind were called "private roads," likewise laid out by order of the county court, on the application of any persons for a road to be laid out from or to their plantations or dwelling places to or from the highway. *McClenachan v. Curwin*, 3 Yeates (Pa.) 362, 371.

An indictment against a person for maintaining a nuisance near unto divers "roads and streets" cannot be construed as meaning private roads and streets, but should be taken as descriptive of public roads and streets. The noun "road," according to the legal definition, means a passage through the country for the use of the people. The ordinary and accepted meaning of the term is a way for public travel, unless qualified by the adjective "private," or some other qualifying expression; and so, as to the noun "street," that term is defined to mean a public thoroughfare or highway in a city or village; and hence the words "roads and streets" mean public ways or thoroughfares, and are sufficient to charge the offense as having been committed against the public. *Horner v. State*, 49 Md. 277, 283.

"Road" is a public way for passage or travel; a strip of ground appropriated for travel, forming a line of communication between different places; a highway; and is so used in Gen. Laws 1894, § 2641, authorizing telegraph and telephone companies to erect poles and wires along the public roads and highways. *Northwestern Telephone Exch. Co. v. City of Minneapolis*, 86 N. W. 69, 71, 81 Minn. 140, 53 L. R. A. 175.

"Road," as used in a reservation in a grant of the range way if ever wanted for a road, means a public highway, and not a

private way. *Morgan v. Palmer*, 48 N. H. 336, 337.

The court directed the jury to answer affirmatively a question as to whether the plaintiff had been injured while traveling on a road in the defendant town, and submitted a question as to whether such road had become a public highway by usury. Held, that the term "road" should not be construed to have been used in the sense of highway, and in directing the answer to the first question the court did not adjudge the road to be a highway. The term "road," as used, denoted a traveled place or track, without regard to the nature of the user or the question of any right thereto in the public. *Hart v. Town of Red Cedar*, 24 N. W. 410, 411, 63 Wis. 634.

"Road," as used in a statute providing that the trustees apply money raised by the tolls in erecting gates and tollhouses and widening and repairing roads within their respective districts, meant a surface over which the subject had a right to pass. *King v. Commissioners of Llandilo District of Roads*, 2 Term R. 232, 234.

Act Regulating Highways, § 18 (Laws 1801, p. 534, c. 186), declares that if any person shall thereafter obstruct any highway or road, such person shall forfeit a certain sum of money for every offense, etc. "Road," as there used, relates only to highways or public roads, and does not include private roads. *Fowler v. Lansey* (N. Y.) 9 Johns. 349, 350.

It is held that where "road" is used in a city charter it must be taken in its general sense as synonymous with "highway," or "public thoroughfare," and not as a private enterprise gotten up for private purposes. *City of Aurora v. West*, 9 Ind. 74, 76.

#### **Railroad.**

"Road," as used in a statute authorizing a county to submit the question whether the county will aid or construct any road or bridge to the voters of such county, should be construed to include a railroad. Courts themselves have differed as to whether the word "road" in its generic sense is sufficient to include a railroad. The Supreme Court of the state of Indiana in two cases—*Evansville, I. & C. Straight Line R. Co. v. City of Evansville*, 15 Ind. 395, and *City of Aurora v. West*, 9 Ind. 74—held that it did. To the same effect is the holding of the Supreme Court of the United States in *Von Hostrup v. City of Madison*, 68 U. S. (1 Wall.) 291, 17 L. Ed. 538. *Washington County v. David*, 89 N. W. 737, 738, 2 Neb. (Unof.) 649.

The term "road" in a statute authorizing the submission of a question whether money shall be borrowed to aid in the construction of any road which may call for the extra

expenditure construed in connection with the section of the Code defining the word "road" to mean county road, country road, or state road, does not include a railroad. *State v. Wapello County*, 13 Iowa, 388, 397; *Stokes v. Scott County*, 10 Iowa, 166, 175.

According to *City of Aurora v. West*, 9 Ind. 74, "roads," within the meaning of a municipal charter authorizing a city to take stock in any chartered company for making roads to the city, includes railroads. *Evansville, I. & C. Straight Line R. Co. v. City of Evansville*, 15 Ind. 395, 411.

"Road," as used in a city ordinance granting a franchise to a street railway company, and providing that, should the company fail to fulfill the conditions, or willfully abandon such road, the franchise to be null and void, the word "road" includes the road-bed, with ties, rails, and all that constitutes a completed superstructure on which cars transported passengers or property, or both, and is used synonymously with "railroad." *City of Tower v. Tower & S. St. Ry. Co.*, 71 N. W. 691, 692, 68 Minn. 500, 38 L. R. A. 541, 64 Am. St. Rep. 493.

The word "road," as used in Act Neb. Jan. 11, 1861, giving county commissioners power to submit to the people of the county the question whether the county should aid in the construction of any road or bridge, is a generic term, and includes all highways of whatsoever kind over which people ordinarily travel, whether they are dirt roads, macadam roads, plank roads, or railroads. *Washington County, Neb., v. Williams* (U. S.) 111 Fed. 801, 808, 49 C. C. A. 621.

#### **Right of way distinguished.**

See "Right of Way."

#### **Sidewalk.**

A road is an open way or public passage; ground appropriated for public travel. As a generic term, it includes "highway, street, and a lane." *Webst. Dict.*; *Bouv. Law Dict.* 1 Priv. Acts, 387, imposes upon cities the duty of constructing and repairing all the streets, highways, and roads within the limits of the city. A "sidewalk" is a part of the road. So that it must be maintained by the city, and kept in such repair as to be reasonably safe and convenient for travelers. *Manchester v. City of Hartford*, 30 Conn. 118, 120.

#### **Streets.**

"Street," in common parlance, is equivalent to a highway, and is another name for a road. *Kelsey v. King* (N. Y.) 33 How. Prac. 39, 44; *In re Murtland's Estate* (Pa.) 40 Leg. Int. 120, 13 Wkly. Notes Cas. 179, 180; *In re Sharet's Road*, 8 Pa. (8 Barr) 89, 92.

A "street" is defined by Worcester as a public way of a town passable by carriages, and by Webster as a paved way or city road; while "road" is defined to be an open way or passage as between one town, city, or place and another, and as a track for travel, forming a connection between one city, town, or place and another; and the title of an act "relating to roads and highways," where the statute itself makes no mention of streets, but speaks throughout of roads and highways, was manifestly intended to apply to country territory outside of cities, and not to the territory within the city limits. *Osborne v. Mecklenburg County Com'rs*, 82 N. C. 400, 402.

The word "street" is equivalent, in common parlance, to "road" or "highway," and therefore the word "street" in an incorporated town is synonymous with the word "road," within the meaning of the resolution of May 29, 1840, providing for the assessment of road damages in consequence of injury sustained from the location and opening of a road. *In re Sharet's Road*, 8 Pa. (8 Barr) 89, 92.

"Road," as used in Laws 1850, c. 140, § 44, requiring railroads to construct and maintain cattle guards at "road" crossings, cannot be construed to include streets in cities or villages. *Vanderkar v. Rensselaer & S. R. Co.* (N. Y.) 13 Barb. 390, 391.

"Roads, highways, or alleys," as used in Const. art. 3, § 18, providing that the Legislature should not pass a private or local bill laying out, opening, altering, working, or discontinuing roads, highways, or alleys, on their face do not include "streets" as that term is usually understood. In common parlance the word "streets" is supposed to relate entirely to the avenues and thoroughfares of cities and villages, and not to roads and highways outside of municipal corporations, and it would be placing a very liberal construction on this word to hold that it meant a highway or a road within the meaning of the Constitution, when it is not named or included within its express terms. *In re Woolsey*, 95 N. Y. 135, 138.

Where a power has been granted to the authorities to lay out roads and highways across the right of way of railroads, such authorities have power to lay out a street, since a street is a road or public way in a city, town, or village. *Southern Kansas Ry. Co. v. Oklahoma City*, 69 Pac. 1050, 1051, 1054, 12 Okl. 82.

In common usage, and according to our statutory nomenclature, the term "road" denotes a township or county highway. And the road act (Revision, p. 1017) giving an action to any person damaged by means of insufficiency or want of repairs of any public road of any of the townships of this state

has no application to an accident occurring in consequence of a municipal street being out of order. *Carter v. City of Rahway*, 55 N. J. Law (26 Vroom) 177, 178, 26 Atl. 96.

#### **Temporary roads.**

In Rev. St. § 1339, providing that a town shall be liable for any damage that shall happen to any person, his team, carriage, or other property, by reason of the insufficiency or want of repairs of any "road" in any town, city, or village, the word "road" means a public highway, and does not include a road temporarily provided over a field adjoining a highway during its obstruction by snowdrifts. *Bogle v. Town of Wau-pun*, 43 N. W. 667, 668, 75 Wis. 1, 6 L. R. A. 59.

A way which is of irregular width, extending in an irregular course, not fenced or worked as a road or lane, cannot be called a "road." *Peabody v. Chandler*, 59 N. Y. Supp. 240, 244, 42 App. Div. 384.

#### **Turnpike.**

"Roads," as used in an act of assembly incorporating a certain town, and exempting the citizens of the town from working on roads without the limits of that town, means the ordinary public roads of the county, and does not include a turnpike road. It means public roads, or such as belong to the public only, and in which there was no private right. *Buncombe Turnpike Co. v. Baxter*, 32 N. C. 222, 225.

The phrase "road or highway now in general use by the traveling public," as employed in the Nevada toll road act of 1865, prohibiting interference with such roads, includes toll roads, there being no difference in the sense of the statute between such roads and the common highways. *State v. Lake*, 8 Nev. 276, 283.

#### **Way distinguished.**

See "Way."

#### **As way for travel.**

A road is a way for travel, not for water, and it would be ruinous to the public roads if each adjoining proprietor could insist on discharging the drainage of his land upon them, or preventing the roads from being drained upon his land. Roads are made for the convenience of travel, and in no sense to relieve land bordering upon them from the burdens to which they are naturally subservient. So, when there is a natural channel for discharging the flow of water, it must be suffered to remain until altered by agreement of those concerned, and the water cannot be turned upon the road until the proper authorities have provided means of carrying it away. *Martin v. Riddle*, 26 Pa. (2 Casey) 415, 417.

### **ROAD CROSSING.**

#### **Farm crossings.**

"Road crossing," as used in Gen. R. R. Act, § 44, requiring a railroad company to construct and maintain cattle guards at all "road crossings" suitable and sufficient to prevent cattle and animals getting onto the railroad, does not include farm crossings. *Brooks v. New York & E. R. Co. (N. Y.)* 13 Barb. 594, 597.

Comp. St. 1889, c. 72, recognized a clear distinction between "road crossings," which words are evidently here used as the equivalent of "public roads and highways," as designated in the fore part of the section, and "farm crossings." In the one case it requires a construction of actual grades, and in the other opens, gates, or bars, or, as we have seen, openings in the fence secured by gates or bars. *Omaha & R. V. R. Co. v. Severin*, 46 N. W. 842, 844, 30 Neb. 318.

#### **Village street crossings.**

"Road crossings," as used in Laws 1850, c. 140, § 44, as amended by Laws 1854, c. 282, § 8, requiring every railroad corporation to maintain cattle guards at all road crossings, includes street crossings in villages as well as country highway crossings. *Tracy v. Troy & B. R. Co.*, 38 N. Y. 433, 436, 98 Am. Dec. 54.

"Road crossing," as used in a statute requiring railroad corporations to maintain cattle guards at road crossings, applies as well to streets which are crossed by railroads in villages as to country highways, the term "highway" and "road" being synonymous. If a highway is called a street it would nevertheless be a road within the meaning of the statute. Strictly, a street is a paved way or road, but the term is used for any way or road in a city or village. Thus a highway is a road and a street is a road. *Brace v. New York Cent. R. Co.*, 27 N. Y. 269, 271.

### **ROAD DISTRICT.**

A road district is an involuntary political or civil subdivision of the state created by general laws to aid in the administration of government. They are but instrumentalities of the state, and the state incorporates them that they may more effectually discharge their appointed duty. *Farmer v. Myles*, 30 South. 858, 861, 106 La. 333.

A road district in California is not a political entity. It can neither sue nor be sued. Its affairs are entirely managed by the county officials. Its taxes are levied, collected, and expended by the county. Its affairs are county affairs. *San Bernardino County v. Southern Pac. R. Co.*, 70 Pac. 782, 783, 137 Cal. 659.



A "road district," under the laws of Nebraska, has no legal existence as a political subdivision in the sense that it may own or control property, or manage the corporate affairs relating to the establishment and improvement of the public highways within its boundaries, through its officers or agents chosen for that purpose. There is no statutory authority empowering a road district to exercise corporate rights and powers for any purpose. *Town of Denver v. Myers*, 88 N. W. 191, 192, 63 Neb. 107.

"Road districts" exist only for the purpose of a general politic government of the state. All the powers with which they are intrusted are the powers of the state, and all the duties with which they are charged are duties of the state. *Travelers' Ins. Co. v. Township of Oswego* (U. S.) 59 Fed. 58, 64, 7 C. C. A. 669.

"Road districts" are not municipal corporations proper, and, even when invested with corporate capacity and the powers of taxation, are but quasi corporations, with limited powers and liabilities. They exist only for the purpose of the general political government of the state. They are the agents and instrumentalities the state uses to perform its functions. All the powers with which they are intrusted are the powers of the state, and the duties imposed upon them are the duties of the state. *Madden v. Lancaster County* (U. S.) 65 Fed. 188, 191, 12 C. C. A. 566.

### ROAD ENGINE.

The distinction between a road engine and a switch engine is that a road engine has a pilot in front, and a yard or switch engine has a footboard both front and rear, upon which the brakemen and switchmen step and stand while switching cars. *Prosper v. Montana Cent. Ry. Co.*, 43 Pac. 81, 17 Mont. 372, 30 L. R. A. 814.

### ROAD OVERSEER.

Whenever in the Political Code the words "road overseer" occur, they shall be taken and construed so as to read "road commissioner." Pol. Code Cal. 1903, § 2642.

A "road overseer" is not an officer of the district, but of the township in which the road district is situated. Road overseers are specifically enumerated by the statutes of Nebraska as township officers, and they are recognized in the general laws providing for their election, qualification, and the duties to be by them performed as township officers. *Town of Denver v. Myers*, 88 N. W. 191, 192, 63 Neb. 107.

### ROAD SERVICE.

"Road service," as used in an agreement between a railroad and an engineer and

fireman of the locomotives providing that switch engines and firemen, when engaged in "road service," should receive road mileage, does not include services rendered in helping to push a train. *Thomas v. Cincinnati, N. O. & T. P. Ry. Co.* (U. S.) 62 Fed. 17, 20.

### ROAD SUPERVISOR.

The "road supervisor" of a township is a public officer. He has no private right or interest in the highways of the town, and the duties enjoined upon him by law with reference to highways are duties which he owes to the public as its officer. Their duties are supervisory in their nature, and he is not bound as an officer to perform manual labor in the maintenance of the highways. As an officer of the township, he is a special public agent, for whose acts the township is not liable. *Pittsburgh, C. C. & St. L. Ry. Co. v. Iddings*, 62 N. E. 112, 115, 28 Ind. App. 504.

### ROAD TAX.

"Road tax," as used in Acts 1851-52, p. 279, incorporating the Tuskaloosa Fire Insurance Company, and providing that its members shall be "exempt from military duty, road tax, performance of jury duty as grand and petit jurors," etc., means road duties; that is, the statutory duty of working the public roads. *Lewin v. State*, 77 Ala. 45, 46.

### ROADBED

"Roadbed" is the bed or foundation on which the superstructure of a railroad rests. *Cass County v. Chicago, B. & Q. R. Co.*, 41 N. W. 246, 25 Neb. 348, 2 L. R. A. 188.

The roadbed of a railroad is the foundation on which the superstructure of the railroad rests. The rails in place constitute the superstructure resting on the roadbed. *San Francisco & N. P. R. Co. v. Board of Equalization*, 60 Cal. 12, 34.

The word "roadbed," as relates to railroads, is the bed or foundation on which the superstructure of the railroad rests. The rails in place constitute the superstructure resting upon the roadbed. Thus, where the rails of a street railroad rested on ties which were seven feet wide, the ties constitute the roadbed, but when girders or sleepers were used the width of the roadbed is only that of the girders or sleepers. *City of Shreveport v. Shreveport Belt R. Co.*, 32 South. 189, 190, 107 La. 785.

### As entire road.

The word "roadbed" in Rev. St. 1889, § 7732, providing that the roadbed, rolling stock, etc., of all railroads shall be taxed for

school purposes, etc., was not used in its restricted sense, as meaning the mere foundation on which the superstructure of ties, rails, etc., rests, but as meaning the road, including the roadway or right of way, with the roadbed and its superstructure of ties, rails, etc., in place thereon. *State ex rel. Hayes v. Hannibal & St. J. R. Co.*, 135 Mo. 618, 637, 37 S. W. 532, 537.

#### Land held for prospective use.

Comp. St. c. 77, § 39, provides that the officers of a railroad company shall list and return to the auditor of public accounts for assessment the property of the company, including the roadbed, right of way, and superstructures thereon, depot buildings, and personal property necessary for the construction, repairs, or successful operation of the road, but that all machine and repair shops, and all real and personal property outside of said right of way and depot grounds, shall be listed with the local assessor. Held, that land not used as a part of the roadbed or right of way, though purchased in anticipation that some time in the future it might be necessary for tracks, etc., should be assessed by the local assessor. *Red Willow County v. Chicago, B. & Q. R. Co.*, 42 N. W. 879, 881, 26 Neb. 660.

#### Land used for sidings.

Land taken by a railroad company for sidings and turnouts for the speedy and safe passage of its cars would properly be termed roadbed within the meaning of its charter authorizing it to appropriate for a "roadbed" a strip of land of a certain width. *City of Philadelphia v. Philadelphia & R. R. Co.*, 35 Atl. 610, 611, 177 Pa. 292.

The word "roadbed," when used in reference to railways, has a well-understood meaning. It is the bed or foundation on which the superstructure of the railway rests, and the superstructure is the sleepers or ties, rails or fastenings. This, of course, includes the side tracks, which form a part of the railway. *Standard Life & Accident Ins. Co. v. Langston*, 30 S. W. 427, 429, 60 Ark. 381 (citing *Santa Clara County v. Southern Pac. R. Co.*, 118 U. S. 394, 413, 6 Sup. Ct. 1132, 30 L. Ed. 118; *City & County of San Francisco v. Central Pac. Ry. Co.*, 63 Cal. 467, 469, 49 Am. Rep. 98; *San Francisco & N. P. R. Co. v. State Board of Equalization*, 60 Cal. 12, 34; *Cass County v. Chicago, B. & Q. R. Co.*, 25 Neb. 348, 353, 41 N. W. 246, 2 L. R. A. 188).

#### As land used for the tracks.

The term "roadbed," as applied to a railroad, means that part of the railroad company's right of way which is occupied by the ties and rails constituting the railroad track, and not the entire space included in such

right of way. *Meadows v. Pacific Mut. Life Ins. Co.*, 31 S. W. 578, 585, 129 Mo. 76, 50 Am. St. Rep. 427.

The term "roadbed," when applied to railroads, means the track and a sufficient space on each side thereof to allow trains to pass each other in safety. *Mobile & G. R. Co. v. Alabama Midland Ry. Co.*, 6 South. 407, 408, 87 Ala. 520.

#### Roadway distinguished.

"Roadbed," as used in Const. 1879, art. 9, § 10, providing that the franchise, roadway, roadbed, rails, and rolling stock of railroads operated in more than one county in the state should not be assessed by the local assessors, but by the state board of equalization, means the bed or foundation on which the superstructure of the railroad rests, and, as applied to railroads, is not synonymous with "roadway," though, as applied to common roads, the words ordinarily mean the same thing. A roadway has a more extended signification as applied to roads, for, in addition to the part denominated "roadbed," it includes whatever space of ground the company is allowed by law in which to construct its roadbed and lay its tracks; hence "steam ferryboats, upon the decks of which were laid railroad tracks, and used for the purpose of transporting the cars of a railroad company across a bay, are not roadbeds, and should be taxed by the local assessors. *City and County of San Francisco v. Central Pac. R. Co.*, 63 Cal. 467, 469, 49 Am. Rep. 98; *Chicago, M. & St. P. Ry. Co. v. Cass County*, 76 N. W. 239, 240, 8 N. D. 18.

"The roadbed of a railroad is the foundation upon which the superstructure of the road rests. It is distinguished from 'roadway,' which means the right of way." *Santa Clara County v. Southern Pac. R. Co.*, 6 Sup. Ct. 1132, 1141, 118 U. S. 394, 30 L. Ed. 118.

#### Tracks and bridges.

The term "roadbed" refers to the bed on which the superstructure of the railroad rests, and, strictly speaking, does not include the track. *Dunn v. Burlington, C. R. & N. Ry. Co.*, 27 N. W. 448, 451, 35 Minn. 73.

"Roadbed," as used in Comp. St. c. 77, § 39, requiring the officers of railroad corporations to return to the Auditor of Public Accounts for assessment and taxation the total number of miles of railroad in the state, including "roadbed," right of way, and superstructure thereon, cannot be construed to include a bridge across the Missouri river. The roadbed, as defined by Webster, is the bed or foundation on which the superstructure of a railroad rests. *Cass County v. Chicago, B. & Q. R. Co.*, 41 N. W. 246, 25 Neb. 348, 2 L. R. A. 188.

**ROADSTEAD.**

A "roadstead" is a place where vessels usually anchor. The Willard Saulsbury (U. S.) 29 Fed. Cas. 1281, 1282.

The road or roadstead in the commercial sense and by the maritime definitions is a place where ships may ride at anchor at some distance from the shore. In the very name, therefore, of "Hampton Roads," is implied a place of anchorage at a distance from the shore. Paull v. The J. W. Everman (U. S.) 14 Fed. Cas. 64, 69.

Lord Hale, in the fourth chapter of his work on maritime law called "De Jure Maris," says that a road is "an open passage of the sea, which, though it lies out at sea, yet in respect of the situation of the land adjacent and the wideness of the place is a safe place for the common riding or anchoring of ships. United States v. Morel (U. S.) 26 Fed. Cas. 1310, 1311.

**ROADWAY.**

"Roadway," as used in the constitutional provisions that the franchise, roadway, roadbed, rails, and rolling stock of all railroads operated in more than one county in the state should not be assessed by the local assessors, but by the state board of equalization, means "whatever space of ground the company is allowed by law in which to construct its roadbed and lay its tracks, and has a more extended signification as applied to railroads than as applied to common roads. When applied to common roads, roadway and roadbed ordinarily mean the same thing. A roadbed is the bed or foundation on which the superstructure of the railroad rests." City and County of San Francisco v. Central Pac. R. Co., 63 Cal. 467, 469, 49 Am. Rep. 98; San Francisco & N. P. R. Co. v. State Board of Equalization, 60 Cal. 12, 34; Chicago, M. & St. P. Ry. Co. v. Cass County, 76 N. W. 239, 240, 8 N. D. 18.

The roadbed of a railroad being the foundation upon which the superstructure rests, it is distinguished from the roadway, which means the right of way. Santa Clara County v. Southern Pac. R. Co., 6 Sup. Ct. 1132, 1141, 118 U. S. 394, 30 L. Ed. 118.

**ROB.**

"Rob," as the term is used by the English law writers, "means the felonious taking from the person or the presence of another of money or goods against his will by force or putting him in fear." De Rothschild v. Royal Mail Steam Packet Co., 7 Exch. 734, 742.

"Rob" and "robbery" are synonymous. Robinson v. State, 11 Tex. App. 309, 313.

**As importing a crime.**

A statement that plaintiff was a "public robber," and had "robbed the town of St. Cloud," should be construed as denoting the acquisition of money or property of the public by fraud or indirection, and not as a charge of the technical crime of robbery, so as to be actionable as slander per se. McCarty v. Barrett, 12 Minn. 494, 499 (Gil. 398, 404).

The word "rob" ex vi termini includes all those circumstances which enter into the definition of robbery at common law, and in an indictment, where the word "rob" is used, those circumstances need not be particularly averred. Acker v. Commonwealth, 94 Pa. 284, 286.

"Rob" is a word giving a sufficient description of an offense punishable by law. It has but one legal sense, and to say of one that he "robbed" a certain person is actionable, as imputing such offense. Tomlinson v. Brittlebank, 4 Barn. & Adol. 630, 632.

The word "robbed" in a charge that another robbed a certain person may have been used according to its popular meaning as imputing a charge at larceny, instead of its technical meaning as imputing robbery. Shultz v. Chambers (Pa.) 8 Watts, 300, 302.

A statement that plaintiff in an action for slander had cheated and robbed orphan children out of \$1,400 is held not to impute the crime of larceny or robbery, so as to be actionable per se. In discussing the meaning of the word "robbed" as here used, the court says that, while it is doubtless actionable to say of another that he robbed any person, unless the words were used in a connection which shows that they were not intended to impute the crime of robbery, yet the word "robbed," as used in the statement under consideration, indicated not a taking by force, but rather a taking by fraud and wrong, and did not import a charge of the technical crime of robbery. Filber v. Dautermann, 28 Wis. 134-136.

**ROBBER.**

A "robber" is a thief, and to say of a man "You are a thief" imputes larceny, and hence to accuse a man of being a robber is libelous per se. Slayton v. Hemken, 36 N. Y. Supp. 249, 252, 91 Hun, 582.

"Robbers," as used in a bill of lading exempting the carrier from liability from loss by robbers of gold dust shipped from Panama to London, "means not thieves, but robbers by force, to whom the term is more reasonably applied, though in common parlance it is often applied to every description of theft." De Rothschild v. Royal Mail Steam Packet Co., 7 Exch. 734, 742.

In construing a bill of lading exempting the shipowner from loss or damage by robbers it was said that: "Even if the term 'robbers' in these bills of lading, in the absence of the usual term 'thieves,' could be construed as used in its most broad and general sense, and as including theft (Cent. Dict. 7), as used in Shakespeare's lines, 'Thieves for their robbery have authority when judges steal themselves,' rather than in the limited technical sense of a taking by open violence only, still it is doubtful, I think, whether the phrase 'loss or damage occasioned by robbers' could be extended beyond the direct and proximate consequences of accomplished acts of theft or robbery, or so as to include ultimate consequences which the ship's diligence would have avoided, and dependent upon subsequent navigation in heavy weather. *The Manitoba* (U. S.) 104 Fed. 145, 151.

### ROBBERY.

See "Assault with Intent to Rob";  
"Highway Robbery."

#### Common-law definition.

"Robbery" is defined to be "larceny committed by violence from the person of one put in fear." *State v. Segermond*, 19 Pac. 370, 371, 40 Kan. 107, 10 Am. St. Rep. 169 (citing Bish. Cr. Law [7th Ed.] § 1156); *State v. Will*, 22 South. 378, 379, 49 La. Ann. 1337; *State v. Perley*, 86 Me. 427, 432, 30 Atl. 74, 76, 41 Am. St. Rep. 564.

"Robbery" is larceny from the person either by privately stealing or by open and violent assault. *State v. Chambers*, 22 W. Va. 779, 786, 46 Am. Rep. 550.

"Robbery" is the larceny of property from the person of the owner accompanied by violence or putting him in fear. *State v. Osborne*, 89 N. W. 1077, 116 Iowa, 479.

"Robbery" is the unlawful taking against the will, by means of force or violence or fear of injury, immediate or future. In *re Coffey*, 56 Pac. 448, 449, 123 Cal. 522.

The common-law definition of "robbery" is that it consists in feloniously taking the personal property of another from his person or in his presence, against his will, by violence to his person, or by putting such person in fear of immediate injury to his person. *McColskey v. People* (N. Y.) 5 Parker, Cr. R. 299, 307.

Three ingredients are essential to constitute the crime of robbery: (1) The use of force and violence, or the use of means whereby the injured person is put in fear; (2) a taking from the person of another of money or other personal property; and (3) an intent to rob or steal. *Matthews v. State*, 4 Ohio St. 539, 540.

"Blackstone defines robbery as the felonious and forcible taking from the person of any of goods or money of any value by violence or putting him in fear, and he observes that violence or putting in fear is the criterion that distinguishes robbery from larceny." *Commonwealth v. Humphries*, 7 Mass. 242, 244; *Benson v. McMahon*, 8 Sup. Ct. 1240, 1242, 127 U. S. 457, 32 L. Ed. 234; *State v. Dengel*, 63 Pac. 1104, 1105, 24 Wash. 49; *State v. Gorham*, 55 N. H. 152, 166; *Commonwealth v. Prewett*, 82 Ky. 240, 241, 6 Ky. Law Rep. 195; *State v. Perley*, 86 Me. 427, 432, 30 Atl. 74, 75, 41 Am. St. Rep. 564; *People v. Loop* (N. Y.) 3 Parker, Cr. R. 559, 560.

"Robbery" is the wrongful, fraudulent, and violent taking of money, goods, or chattels from the person of another by force or intimidation without the consent of the owner. *Sweat v. State*, 17 S. E. 273, 275, 90 Ga. 315.

The term "robbery" means the felonious taking of the money or property of another from his person or in his presence, and against his will, either by violence to his person or by putting him in fear of some immediate injury to his person, with the intent to permanently deprive the owner of such money or property, and without any honest claim to it. *State v. McGinnis*, 59 S. W. 83, 87, 158 Mo. 105.

Robbery, at common law, was a larceny committed by violence from the person of one put in fear, so that an indictment charging that defendant, with violence, took from the possession of a certain person property described, does not charge robbery under the common law. *Smith v. State*, 39 S. W. 933, 934, 37 Tex. Cr. R. 342.

Robbery is a crime defined by the common law as the felonious and violent taking of any money or goods from the person of another; putting him in fear. The epithet "felonious" has reference to the intention, which must be "animo furandi," for the purpose of stealing or appropriating the thing taken. There need be no absolute personal violence used if there be threats, and the person robbed submits peaceably through fear of violence. When the robbery is committed by several acting together, all are equally guilty. *United States v. Smith* (U. S.) 27 Fed. Cas. 1134, 1135.

Robbery is the felonious taking of property from the person of another by force. Per Lord Mansfield in *Rex v. Donolly*, 2 East, P. C. 715, 725. To constitute robbery it is not necessary that the person robbed must have been first in fear of his person or property. If the goods be taken either by violence or putting the owner in fear, it is sufficient to render the felonious taking a robbery. *Whart. Cr. Law* (3d Ed.) 629. To

constitute a robbery there must be either some act of direct violence or some demonstration from which physical injury to the person robbed may be reasonably apprehended. 2 Bish. Cr. Law, § 1109. It is not necessary that the fact of actual fear should either be alleged in the indictment or proved upon the trial. It is sufficient if the offense be charged to be done *violenter et contra voluntatem*. 1 Hawk. P. C. (7th Ed.) 235, § 9. Yet many plead that the circumstance of actual fear at the time of the robbery needeth not be strictly proved. *State v. Gorham*, 55 N. H. 152, 166 (citing *Fost. Crown Law*, 128).

As defined by Greenleaf, "robbery is the felonious taking of property from the person of another by force." 3 Greenl. Ev. (14th Ed.) § 223. Bouvier defines robbery to be "the felonious and forcible taking from the person of another goods or money to any value, by violence or putting him in fear [citing 4 Bl. Comm. 243]. Robbery, by the common law, is larceny from the person, accompanied by violence or putting in fear. The taking must be by violence or putting the owner in fear, but both these circumstances need not occur." One who, in taking a pocketbook from the hand of another with felonious intent, overcomes resistance by force, is guilty of "robbery." *Williams v. Commonwealth (Ky.)* 50 S. W. 240; *Wilcox v. State*, 74 Tenn. (6 Lea) 571, 573, 40 Am. Rep. 53.

Robbery at common law is the felonious taking of goods or property of another, of any value, from his person, or against his will, by violence or putting him in fear. *United States v. Baker (U. S.)* 24 Fed. Cas. 962, 965. The gist of the offense in robbery is not the taking, but the force or terror used; and the rule is different in the offense of robbery and larceny both as to the value of the article taken and as to what constitutes a sufficient taking. Hence an instruction, on a trial for robbery, that if the prisoner kept the money in his hands one minute it was a sufficient taking, though he then threw the money away and abandoned it, was correct. *State v. Burke*, 73 N. C. 83, 87.

By "robbery" is meant the felonious stealing, taking, and carrying away of the personal property of another from his person or in his presence, against his will, by violence, or by putting him in fear. *State v. Brooks*, 5 S. W. 257, 261, 92 Mo. 542; *State v. Lawler*, 32 S. W. 979, 980, 130 Mo. 366, 51 Am. St. Rep. 575; *United States v. Reeves (U. S.)* 38 Fed. 404, 406; *State v. Brown*, 18 S. E. 51, 52, 113 N. C. 645; *Long v. State*, 12 Ga. 293, 314; *State v. Gorham*, 55 N. H. 152, 159; *Routt v. State*, 61 Ark. 594, 596, 84 S. W. 262.

"Robbery" is where one by assault, or by violence, and putting in fear of life or

bodily injury, fraudulently takes from the person or possession of another any property, with intent to appropriate the same to his own use. *Reardon v. State*, 4 Tex. App. 602, 610.

Where a statute punishes the crime of robbery without defining it, it means robbery as defined by the common law, which is larceny committed by violently taking money, etc., from the person of another, putting him in fear. To constitute this offense there must be (1) violence, but it need only be slight, for anything which calls out resistance is sufficient; or—what will answer in place of actual violence—there must be such demonstrations as put the person robbed in fear. The demonstrations of fear must be of a physical nature, with the single exception that, if one parts with his goods through fear of a threatened charge of sodomy, the taking is robbery. There must be, therefore, (2) a larceny embracing the same elements as a simple larceny; and (3) the taking must be from what is technically called the "person," the meaning of which expression is not that it must necessarily be from the actual contact of the person, but it is sufficient if it be from the personal protection and presence. Robbery is a mere compound larceny consisting of simple larceny and an assault attended by one or more of the circumstances of aggravation. *Houston v. Commonwealth*, 12 S. E. 385, 387, 87 Va. 257.

The authorities are well-nigh uniform to the position that the violence or putting in fear which is an essential element of the crime of robbery must precede or be concomitant with the act by which the offender acquires the possession of the property. The offense is against both the person and property. In so far as it is against the person, it consists in personal violence or personal intimidation; in so far as it is against property, it consists of manucaption *animo furandi*. If there be violence or putting in fear, however aggravated, without a taking and asportation of property, there may be an assault, or assault and battery, or an assault with intent to rob, but no robbery; on the other hand, if there be a taking by trick contrivance, and carrying away with felonious intent, but no violence or putting in fear as a means of the caption of another's property, there is a larceny, but no robbery. *Commonwealth v. James*, 18 Mass. (1 Pick.) 375. The three essential elements of the offense are felonious intent, force or putting in fear as a means of effectuating the intent, and by that means a taking and carrying away of the property of another from his person or in his presence. In the nature of things, all these elements must concur in point of time, else the act done is not rounded out to the full measure of the capital felony. If force is relied on in proof of the charge, it must be the force by which another is deprived of, and

the offender gains, the possession. If putting in fear is relied on, it must be the fear under duress of which the possession is parted with. The taking, as it has been expressed, must be the result of the force or fear; and force or fear which is a consequence, and not the means, of the taking, will not suffice. The fear of physical ill must come before the relinquishment of the property to the thief, and not after; else the offense is not robbery. "It may also be observed," says Archibald, "with respect to the taking, that it must not, as it should seem, precede the violence or putting in fear, or, rather, that a subsequent violence or putting in fear will not take a precedent taking, effected clandestinely, or without either violence or putting in fear, amount to robbery." "It must appear," says Roscoe, "that the property was taken while the party was under the influence of the fear; for, if the property be taken first, and the menaces or threats inducing the fear be used afterwards, it is not robbery." *Thomas v. State*, 9 South. 81, 82, 91 Ala. 34.

#### Statutory definitions.

"Robbery" is defined by the Revised Statutes of 1887 to be "the felonious taking of personal property in the possession of another from his person or immediate presence and against his will accomplished by means of force or fear." *Downing v. United States* (Ariz., 1902) 68 Pac. 555. So, also, *Comp. Laws*, § 4468, defines robbery as the felonious taking of personal property in the possession of another from his person or immediate presence, and against his will, accomplished by fear or by means of force. *People v. Kerm*, 30 Pac. 989, 990, 8 Utah, 268.

*Mansf. Dig.* § 1599, defining robbery as the felonious and violent taking of any goods, money, or other valuable things from the person of another by force or intimidation, is but an affirmance of the common-law offense of robbery, and an indictment must allege the ownership of the property. *Boles v. State*, 22 S. W. 887, 888, 58 Ark. 35; *Smith v. State*, 37 Tex. Cr. R. 342, 345, 39 S. W. 933.

*Pen. Code*, § 211, defines robbery to be the felonious taking of the personal property in the possession of another from his person or near presence. *People v. Ah Sing*, 30 Pac. 796, 95 Cal. 654; *People v. Clough*, 59 Cal. 438, 439; *People v. Chuey Ying Git*, 34 Pac. 1080, 100 Cal. 437; *People v. Gilbert*, 60 Cal. 108, 110; *People v. McElroy*, 48 Pac. 718, 719, 116 Cal. 583; *People v. Walbridge*, 55 Pac. 902, 123 Cal. 273.

"Robbery" is defined by statute in Georgia as "the wrongful, fraudulent, and violent taking of any goods or chattels from the person of another by force or intimidation without the consent of the owner. The statute

does not create two offenses, but makes two grades of one offense. One robbery by force, which is the highest grade, and the other by intimidation." *Long v. State*, 12 Ga. 293, 314; *Fanning v. State*, 66 Ga. 167, 168.

*Cr. Code Ill.* § 246, defines "robbery" as "the felonious and violent taking of money, goods, or other valuable thing from the person of another by force or intimidation." *Hall v. People*, 49 N. E. 495, 171 Ill. 540; *Collins v. People*, 39 Ill. 233, 239. On a prosecution for robbery, where the evidence showed that the accused unbuttoned the vest of the prosecuting witness and took his pocketbook from his inside vest pocket while the prosecuting witness was so intoxicated that he did not know what was going on, and made no resistance, the evidence was insufficient to establish the offense. *Hall v. People*, 171 Ill. 540, 542, 49 N. E. 495.

The statutes define robbery as "the felonious taking of personal property in the possession of another from his person or immediate presence, and against his will, accomplished by means of force or fear." *Territory v. McKern*, 26 Pac. 123, 124, 3 Idaho (Hasb.) 15.

One of the distinguishing characteristics between "robbery" in the first and second degrees, under the Crimes Act, §§ 73, 74, is that in the first the property is delivered and suffered to be taken through fear of immediate injury, while in the second it is through fear of injury to be inflicted at some future time. *State v. Stoffel*, 29 Pac. 685, 686, 48 Kan. 364.

By St. 1889, c. 250, whoever, by force or by violence or by putting in fear, feloniously takes from the person of another property that is the subject of larceny, is guilty of robbery. *State v. Perley*, 86 Me. 427, 432, 30 Atl. 74, 75, 41 Am. St. Rep. 564.

"Every person who shall be convicted of feloniously taking the property of another from his person, or in his presence, and against his will, by violence to his person, or by putting him in fear of some immediate injury to his person, shall be adjudged guilty of robbery in the first degree." 1 *Wagner's St. p.* 456, § 20. The statute has made no new definition, nor declared any new principle. At common law robbery was defined to be "the felonious and forcible taking of the property of another from his person, or in his presence, against his will, by violence or by putting him in fear." *State v. Broderick*, 59 Mo. 318, 319 (quoting 2 *Whart. Cr. Law* [6th Ed.] § 1695).

"Every person who shall be convicted of feloniously taking the personal property of another from his person, or in his presence, and against his will, by violence to his person or by putting such person in fear of some immediate injury to the person, shall

be adjudged guilty of robbery in the first degree." 2 Rev. St. 677, § 55. *People v. Loop* (N. Y.) 3 Parker, Cr. R. 559, 560; *Brooks v. People* (N. Y.) 1 Cow. Or. R. 503, 504; *People v. Glynn*, 7 N. Y. Supp. 555, 54 Hun, 332; *People v. Massett*, 7 N. Y. Supp. 839, 841, 55 Hun, 606.

Pen. Code, § 390, declares that "robbery" is the felonious taking of personal property in the possession of another from his person or immediate presence, and against his will, accomplished by means of force or fear. *State v. Johnson*, 66 Pac. 290, 291, 26 Mont. 9; *State v. Clancy*, 52 Pac. 267, 268, 20 Mont. 498.

"Robbery," as defined by the Penal Code, is the unlawful taking of personal property by means of force or violence from the person or in the presence of another against his will, or by putting him in fear of injury, immediate or future, to his personal property, or the personal property of a relative or member of his family, or any one in his company at the time of the robbery. *State v. O'Neil*, 73 N. W. 1091, 1092, 71 Minn. 399.

By Code, § 4631, "robbery" is defined to be the erroneous and felonious taking of the goods of another by violence or putting the person in fear. *Wilcox v. State*, 74 Tenn. (6 Lea) 571, 573, 40 Am. Rep. 53.

Pen. Code, art. 722, provides that "if any person by assault, or by violence and putting in fear of life or bodily injury, shall fraudulently take from the possession or person of another any property, with intent to appropriate the same to his own use, he shall be guilty of robbery." *Johnson v. State*, 35 Tex. Cr. R. 140, 141, 32 S. W. 537, 538; *Williams v. State*, 12 Tex. App. 240, 241; *Reardon v. State*, 4 Tex. App. 602, 610. It will be seen from this definition of robbery that the taking of property, to constitute robbery, must either be by assault or by violence and putting in fear of life or bodily injury. If by assault, violence and putting in fear may be omitted; and if by violence and putting in fear, the assault may be omitted. *Kimble v. State*, 12 Tex. App. 420, 422. Under Code, art. 722, three separate, distinct, and independent modes in which the offense of robbery may be committed are prescribed: (1) By assault; (2) by violence; and (3) by putting in fear of life or bodily injury. Violence without the concurrence of either one of the others is a mode in which the offense of robbery may be committed. *Bond v. State*, 20 Tex. App. 421, 435, 436.

By 2 Ballinger's Ann. Codes & St. § 7103, "robbery" is defined as follows: "Every person who shall forcibly and feloniously take from the person of another or from his immediate presence any article of value by violence or putting in fear, shall be deemed

guilty of robbery." *State v. Dengel*, 63 Pac. 1104, 1105, 24 Wash. 49; *State v. Hyde*, 61 Pac. 719, 724, 22 Wash. 551.

The word "robbery," as used in Act Cong. May 15, 1820 (3 Stat. 600), providing that if any person shall upon the high seas or in any open roadstead, etc., commit the crime of robbery in and upon any ship or vessel, etc., is used in the sense of robbery as defined by the common law. At common law robbery is larceny accomplished by intimidation or force. *United States v. Durkee* (U. S.) 25 Fed. Cas. 941, 942.

#### **Confidence game distinguished.**

Inducing men to bet on the top or bottom of dice, and procuring money from a man for that purpose, or getting possession of his pocketbook for the purpose of betting, is enough of a confidence game to sustain a conviction therefor and distinguish it from robbery, although fear is aroused in him for the loss of his money by threats and insinuations in regard to the danger of gambling in a saloon. *Van Eyck v. People*, 52 N. E. 852, 853, 178 Ill. 199.

#### **Embezzlement distinguished.**

See "Embezzlement."

#### **Felonious carrying away included.**

Where a person traveling in company with the owner is intrusted with goods to help carry them, and by violence exerted against the person or the property carries off the goods, he is guilty of robbery; the robber's possession up to the time of the felonious violence being constructively the possession of the owner, and the taking being in his presence, and constructively from his person. *James v. State*, 53 Ala. 380, 387.

#### **Felony distinguished.**

See "Felony."

#### **Force or fear.**

To constitute "robbery" there must be force, or a putting in fear. Either will suffice if the other elements of a fraudulent and felonious taking are present. *Higgs v. State*, 21 South. 353, 113 Ala. 36.

The mere snatching of a thing from the hand of a person without any struggle or resistance by the owner, or any force or violence on the part of the thief, will not constitute "robbery." Robbery, under the Revised Statutes, consists in feloniously taking personal property of another from his person or in his presence against his will, by violence to his person, or by putting such person in fear of immediate injury to his person. *McColskay v. People* (N. Y.) 5 Parker, Cr. R. 299, 306.

The mere snatching of an article from the person of another is not "robbery" with-

in 2 Rev. St. 677, § 5, providing that robbery consists in the felonious taking of the personal property of another from his person, or in his presence, or against his will, by violence to his person, or by putting him in fear of some immediate injury to his person. *People v. Hall* (N. Y.) 6 Parker, Cr. R. 642, 650.

Robbery is the felonious and forcible taking from the person of another of money or goods of value by violence or putting him in fear. Comp. Laws, §§ 6481, 6482. To constitute robbery the force or fear must be employed to obtain or retain possession of the property, or to prevent or overcome resistance to the taking; but, if employed merely as means of escape, it does not constitute robbery. *State v. Fallon*, 52 N. W. 318, 319, 2 N. D. 510.

The crime of "robbery" may be committed by assault or violence, as well as by putting the party in fear of death or serious bodily injury. *Pendy v. State*, 31 S. W. 647, 34 Tex. Cr. R. 643.

Where a statute punishing "robbery" does not define the offense, recourse must be had to the common law for a definition of the term. The generally accepted common-law definition of "robbery" is the felonious and forcible taking from a person of another of goods or money of any value by violence or by putting him in fear. Where it appeared that defendant seized a purse in the hand of one who resisted, and overcame the resistance by force, the offense was robbery, and not larceny, though no blow was struck or injury inflicted; the court remarking that it is not so much the extent and degree of violence which makes the crime as the success thereof. Any force which is sufficient to take the property against the owner's will is all that is necessary to make up the crime of robbery. *Commonwealth v. Davis* (Ky.) 66 S. W. 27.

In a robbery in the first degree it is indispensable that the putting in fear be a fear of some immediate injury. *State v. Hower-ton*, 59 Mo. 91, 92.

It was robbery at common law to extort money under the threat of charging one with an unnatural crime. *People v. Baroness*, 16 N. Y. Supp. 436, 438, 61 Hun, 571.

At common law robbery was the felonious and forcible taking of the property of another from his person, or in his presence, against his will, by violence or by putting in fear. The putting in fear or intimidation was considered the equivalent of constructive violence. *Simmons v. State*, 41 Fla. 316, 318, 25 South. 881, 882.

Robbery is defined to be the unlawful taking of property from the person of another, or in the presence of another, against his will, by means of force, or by violence.

Fear does not enter into this definition. *People v. Glynn*, 7 N. Y. Supp. 555.

#### **Intent.**

"Robbery" at common law is the felonious and forcible taking from the person of another of goods or money to any value by violence or putting in fear. Hence it is held that an instruction defining robbery as the taking of any property from the person of another by force omits the very essence of the offense in failing to require the taking to be done with felonious intent. *Commonwealth v. White*, 19 Atl. 350, 133 Pa. 182, 19 Am. St. Rep. 628.

Where it appeared that the taking of the property was violent, but done in the presence of others under a claim of title, there was no robbery. *Brown v. State*, 28 Ark. 126, 128.

#### **Larceny included.**

"Robbery" is thus defined: "Every person who shall forcibly and feloniously take from the person of another any article of value by violence or putting in fear shall be deemed guilty of robbery." Grand larceny is to feloniously steal, take, and carry away the personal goods of another of the value of \$5 or upward. It thus appears that robbery is larceny committed by violence from the person of one put in fear, and that the latter is included in the former. Therefore the state may prosecute and convict for larceny, though the proof shows the offense to have been robbery. *Hickey v. State*, 23 Ind. 21, 22.

Robbery is larceny committed by violence from the person of one put in fear. An indictment for robbery charges a larceny together with the aggravating matter which makes it in the particular instance robbery. *People v. Jones*, 53 Cal. 58, 59.

#### **Larceny distinguished.**

Robbery is larceny with the element of force or fear entering into it. *Commonwealth v. Prewitt*, 82 Ky. 240, 241.

"Robbery," the rapina of the civilians, is the felonious and forcible taking from the person of another of goods or money to any value by violence or putting him in fear. The taking must be by force or a previous putting in fear, which makes the violation of the person more atrocious than privately stealing. This previous violence or putting in fear is the criterion that distinguishes robbery from larceny; for, if one privately steals six-pence from the person of another, and afterwards keeps it by putting him in fear, this is no robbery, for the fear is subsequent. *Clary v. State*, 33 Ark. 561, 563.

Larceny accompanied with violence or putting in fear was denominated "robbery"



at common law. *State v. Savage*, 60 Pac. 610, 611, 38 Or. 191.

"The text-books speak of 'robbery' as an aggravated species of larceny. In East's Pleas to the Crown the author, after speaking of certain larcenies from the person, says the next species of aggravated larceny from the person is robbery. *State v. Rodgers*, 53 Pac. 97, 98, 21 Mont. 143.

Robbery is larceny with the aggravating circumstances of taking by force and putting in fear. *Keeton v. State*, 66 S. W. 645, 70 Ark. 163; *People v. Clary*, 13 Pac. 77, 78, 72 Cal. 59; *State v. Johnson*, 53 Pac. 667, 668, 19 Wash. 410; *People v. Crowley*, 35 Pac. 84, 100 Cal. 478.

Robbery is the felonious taking of personal property of another by violence or putting in fear; or perhaps we may say it is the felonious taking of the personal property of another by subduing him by actual violence, or a show of it. It is not simply stealing from the person of another, and it is different from all stealing. We might steal from the person of another—for instance, from one who was asleep. That would be larceny, and not robbery. *Commonwealth v. Hollister*, 27 Atl. 386, 387, 157 Pa. 13, 25 L. R. A. 349.

#### **Larceny from person distinguished.**

Section 13 of the Criminal Code provides that: "If any person shall forcibly and by violence, or by putting in fear, take from the person of another any money or personal property, of any value whatever, with the intent to rob or steal, every person so offending shall be deemed guilty of robbery, and upon conviction thereof, shall be imprisoned in the penitentiary not more than fifteen nor less than three years." This section took effect in 1873. In 1887 the Legislature passed an act which declares that "every person who steals property of any value, by taking the same from the person of another without putting said person in fear by threats, or the use of force and violence, shall be deemed guilty of grand larceny, and shall, upon conviction thereof, be punished by confinement in the penitentiary for not less than one nor more than seven years." Held, that the charge of robbery includes the offense of stealing from the person without force and violence or putting in fear, and that under an information for robbery the accused may be convicted of stealing from the person. *Brown v. State*, 50 N. W. 154, 155, 33 Neb. 354.

"Robbery" is compound larceny, or larceny committed by violence on the person of one put in fear, and it consists in the main of larceny and assault, and hence an indictment for larceny from the person was good, though the evidence tended to show that

the crime was robbery. *State v. Keeland*, 90 Mo. 337, 339, 2 S. W. 442, 443.

"Robbery" is not of the same character of crime as larceny from the person or cheating or swindling. Robbery involves force; the others do not. *Doyle v. State*, 77 Ga. 513.

#### **Ownership of property.**

The felonious taking of a pistol from the possession of one against his will by means of force is robbery, whether the pistol belongs to him or not, under Pen. Code, § 211. *People v. Anderson*, 22 Pac. 139, 140, 80 Cal. 205.

2 Rev. St. p. 677, § 55, defines "robbery" as follows: "Every person who shall be convicted for feloniously taking the personal property of another from his person or in his presence and against his will, by violence to his person or by putting such person in fear of some immediate injury to his person shall be adjudged guilty of robbery in the first degree." In order to constitute robbery in the first degree as defined by this section, it is not necessary that the one from whose person or in whose presence the property is taken should be the actual owner thereof, and as against the robber he is the owner of all goods in his possession and custody whereof he is robbed. *Brooks v. People*, 49 N. Y. 436, 438, 10 Am. Rep. 398.

#### **An offense against the person.**

Robbery is an offense against the person as well as against the property of the party robbed—against the person by violence, and against the property by manucap-tion, with felonious intent of taking the property. *Brown v. State*, 25 South. 182, 184, 120 Ala. 342.

"Robbery" at common law is defined as larceny committed by violence from the person of one put in fear. By Cr. Code, § 13, it is provided that if any person shall by violence or putting in fear take from the person of another any property of value with intent to steal, he shall be guilty of robbery. The taking, therefore, according to each definition, must be from the person, since the crime of robbery is an offense as well against the person as against the property. *Hill v. State*, 60 N. W. 916, 923, 42 Neb. 503.

#### **Taking from person.**

It is not necessary, in a case of robbery, to prove that the property was actually taken from the person of the owner, but it is sufficient if it is taken in his presence. *Clements v. State*, 11 S. E. 505, 506, 84 Ga. 660, 20 Am. St. Rep. 385.

To constitute "robbery" it is unnecessary that the taking of the property should be directly from one's person. It is sufficient if it be taken while in his possession and immediate presence. But to constitute robbery there must be force or intimidation, asportation without the consent of the owner, and intent to steal. A person taking property from another under a bona fide claim of right, and for the purpose of applying it to the payment of a debt from the latter to himself, is not guilty of robbery. *Crawford v. State*, 17 S. E. 628, 629, 90 Ga. 701, 35 Am. St. Rep. 242.

The common-law authorities all agree that, in order to constitute the crime of robbery, the taking must be laid in the indictment and proven on the trial to be from the person or in the presence of the owner. *State v. Lawler*, 32 S. W. 979, 980, 130 Mo. 368, 51 Am. St. Rep. 575.

The treaty between the United States and Salvador defines "robbery" as the act of feloniously and forcibly taking from the person of another goods or money by violence or putting him in fear. Held, that by taking money or goods from the presence or view of party robbed by violence or by putting in fear is robbery within the meaning of such treaty. *In re Ezeta*, 62 Fed. 972, 993.

Our statute defines "robbery" to be "the felonious taking, from the person of another, goods or money of any value, by violence, or putting in fear." Robbery is but an aggravated larceny, and the statutory definition is, in substance, the same as at common law. The elements necessary to make out this offense in the one case are demanded in the other. The taking must be felonious and forcible, from the person of the party robbed, either actual or constructive. It is actual when, in fact, the taking is immediately from the person, and constructive when in possession of the party robbed. But the construction of taking from the person extends no further than a taking in the presence and under the view of the party robbed. *Crews v. State*, 43 Tenn. (3 Coldw.) 350, 353.

#### Possession.

By Code, § 3858, robbery is where a person with force or violence, or by putting one in fear, steals and takes from such person any property that is the subject of larceny. Held, that it is sufficient if the goods are taken while in his possession or under his control though they are in another room of the house than that wherein the force or violence or putting in fear is used. *State v. Calhoun*, 34 N. W. 194, 196, 72 Iowa, 432, 2 Am. St. Rep. 252.

#### Value of property.

"Robbery" is defined to be the felonious and forcible taking from the person of an-

other of goods or money to any value by violence or putting him in fear, and the value of the property taken has nothing to do with whether or not the offense is robbery. *State v. Perley*, 30 Atl. 74, 75, 88 Me. 427, 41 Am. St. Rep. 564.

If by putting in fear or by actual violence to the person a promissory note is extorted, this is not robbery, for the note is void. But taking by violence from the person of the prosecutor a slip of paper containing a memorandum of a sum of money which was due or owing to him from another is robbery. The paper was not evidence of the debt that could have been used against the debtor, but it was evidence that reminded the prosecutor of the existence of the debt, and his keeping it was evidence that he considered it of some value. *Jackson v. State*, 69 Ala. 249, 250.

To constitute a robbery it is essential that some property be feloniously taken by violence from the party robbed. The value of the property taken is immaterial; and where the property taken was a sack of flour and a jug of whisky which a witness testified he purchased, the jury are justified in finding it was of some value, without more specific proof on that point. *James v. State*, 53 Ala. 380, 387.

## ROCHESTER TONIC.

A beverage known to the manufacturers as "lager beer," which contained a less per cent. of alcohol than contained in ordinary beer—that is, the second brew or draw of the beer—though called a health restorative, and named "Rochester Tonic," is still a beer within the meaning of a statute prohibiting the introduction of "ardent spirits, ale, beer, wine, or intoxicating liquors of whatsoever kind," and such health restorative could not be sold within the prohibited limits. The evidence showed that at one time such beer was sold under the name of "Malt Ale," but the name, being too suggestive, was changed to suit the change in law. *United States v. Cohn*, 52 S. W. 38, 46, 2 Ind. T. 474.

## ROCK.

A stone weighing two pounds cannot properly be styled a "rock." *State v. Seamons* (Iowa) 1 G. Greene, 418, 421.

The word "rock," as used in a contract whereby plaintiff undertook to drill a well for defendant which should furnish a sufficient supply of water, and to insert therein two-inch galvanized pipes to rock and one and one-fourth galvanized pipe in rock, is meant the stratum or formation of stone or other fixed, hard material underlying and supporting the loose material of which the surface of the earth is ordinarily composed,

and includes a rock known as soapstone. *Okey v. Moyers*, 91 N. W. 771, 117 Iowa, 514.

### ROCK EXCAVATION.

"Rock excavation," as used in a contract specifying a particular price for "rock excavation," means the excavation of all the diverse qualities of what was properly called rock encountered in the progress of the work. *Drhew v. City of Altoona*, 15 Atl. 636, 639, 121 Pa. 401.

### ROCK IN PLACE.

See "In Place."

### ROCK OR EARTH OIL.

"Rock or earth oil," as used in a policy of fire insurance upon a paper mill and machinery containing a clause prohibiting the storing or use on the premises of "petroleum, rock or earth oil," etc., includes kerosene. *Buchanan v. Exchange Fire Ins. Co.*, 61 N. Y. 26, 29.

### RODEO BOUNDARIES.

"Rodeo boundaries," under the customs and acknowledged usages which prevailed in California, constituted as notorious evidence of the possession of land as the cultivation or fencing in an old settled country. *Boyreau v. Campbell* (U. S.) 3 Fed. Cas. 1112, 1116.

### RODS.

An award of appraisers in condemnation proceedings brought by a railroad company to acquire land for a right of way describing the land taken in lot three as "about four rods," unexplained by other testimony, should properly be construed to mean four square rods; but where the description also referred to a 200-foot line, and taking the center line of the track as constructed as the basis, and including all within 200 feet of that center line, the land would include just about four rods measuring north and south along lot 3, which would reach the same result, the term should be construed to mean four square rods. *Hanlon v. Union Pacific Ry. Co.*, 58 N. W. 590, 593, 40 Neb. 52.

### ROGATORY.

See "Letters Rogatory."

### ROGUE.

In an action for slander the declaration in the first count alleged that defendant said of the plaintiff that he (the plaintiff) "was a damned 'rogue,' meaning that he [the plaintiff] was guilty of having or concealing

the goods of defendant." The court said: "The first count does not allege the speaking of words which import any crime; nor does the explanation or innuendo import any theft, felony, or other ground of action. It is well settled that to call another a rogue is not actionable. The expression is very equivocal, and is taken to be the result of heat and passion." *Caldwell v. Abbey*, 3 Ky. (1 Hardin) 529, 530.

### ROLL.

See "Assessment Roll"; "Judgment Roll"; "Tax Roll."

What is strictly and technically a "roll" is a schedule of parchment which may be turned up with the hand in the form of a pipe or tube, sheet to sheet, tacked together in such a manner that the whole length might be wound up together in the form of spiral rolls. Thus in an assessment roll every sheet is included in the term "roll." *Colman v. Shattuck* (N. Y.) 2 Hun, 497, 502.

The words to "play or roll" billiards in an indictment charging the defendant with permitting a minor to play or roll billiards without the consent of his parents, did not describe two distinct offenses. It was said that: "The words 'play or roll' are evidently used as synonymous in the act, and do not describe different offenses. In the case of tenpins, 'play and roll' are commonly used to describe the game, and, though not so frequently used to describe the game of billiards, yet sometimes this is the case, and it is not to be supposed that grave members of the Legislature are so familiar with the language used in the games they prohibit as to use it with technical accuracy." *Cobb v. State*, 45 Ga. 11, 13.

### ROLLING CREDIT.

"Rolling credit" is a mercantile term meaning a continuing and ever-extending credit up to a certain amount. Thus, where a purchaser of goods was granted a rolling credit of three thousand dollars for about three years, the meaning of the term was that, where purchases were made on sixty days' time from time to time under such credit, the purchaser would not have the right to continue the purchase up to the given amount, except on payment of overdue accounts, but that the seller would have the right to refuse further sales on default of the purchaser to pay overdue accounts promptly, notwithstanding the stipulation for rolling credit. *Tobler v. Willis*, 59 Tex. 80, 85.

### ROLLING MILL.

A conveyance of a "rolling mill" should be construed to include the rolls and the

iron plates with which the floor of such mill is covered, and which are an indispensable part of it, though not manufactured for that purpose. *Pyle v. Pennock* (Pa.) 2 Watts & S. 390, 37 Am. Dec. 517.

### ROLLING STOCK.

The "rolling stock" of a railroad is incapable of being affixed or annexed in any one place, but is intended for locomotion. Its whole use is in its locomotive facilities. The term by which it is ordinarily designated—"rolling stock"—implies the very reverse of annexation and a permanent fixture. It is essential to the successful operation of the railroad, but not a part of the railroad itself. It is an accessory to the trade and business of the road, and not to the road itself. The road is completed when the bed is graded, the superstructure laid, the rails put down, and everything is ready for the reception of the locomotives and cars. It is equipped when the rolling stock and all other necessary appliances and facilities for business are finished and put upon it for use. *Beardsley v. Ontario Bank* (N. Y.) 31 Barb. 619, 635.

The rolling stock of a railroad company "embraces the movable property belonging to the corporation," by which "is plainly meant such property as in its ordinary use is taken from one part of the line to another, such as cars, locomotives, and their attachments and usual accompaniments." *Ohio & M. R. Co. v. Weber*, 96 Ill. 443, 448.

Rolling stock taken together with the railroad track include the entire railroad property. A statute providing for the taxation of railroad track and rolling stock includes all property owned or used by the railroad company in the operation of its road which may come within the term "railroad property." *Pittsburgh, C., O. & St. L. R. Co. v. Backus*, 14 Sup. Ct. 1114, 1118, 154 U. S. 421, 38 L. Ed. 1031.

"Rolling stock," within the meaning of a mortgage by a railroad company on the road together with its rolling stock, includes rolling stock acquired subsequent to the execution of the mortgage. *Pennock v. Coe*, 64 U. S. (23 How.) 117, 126, 16 L. Ed. 436.

For the purpose of the title relating to the revenue, "rolling stock" shall be deemed to include all movable property owned, used, or occupied or operated in connection with any railroad wholly or partly within the state. *Pol. Code* 1901, Idaho, § 1357.

The movable property belonging to a railroad company shall be held to be personal property, and denominated, for the purpose of taxation, rolling stock. *Ballinger's Ann. Codes & St. Wash.* 1897, § 1689; *Ann. St. Ind. T.* 1899, § 4966.

**As fixture or real estate.**

See "Fixtures"; "Real Property."

**As personal property.**

The "rolling stock" owned and used upon its tracks by a railroad company is personal property, and as such is liable to be seized and sold for the collection of a tax against a company. *Randall v. Elwell*, 52 N. Y. 521, 524, 11 Am. Rep. 747.

The "rolling stock" of a railroad is not a part of the realty, but retains its character as personal property. The general doctrine is that things originally personal in their nature remain personal, though used in connection with land. All the implements of agriculture have their use only in the cultivation of land, and yet they are never thought to be part of the realty. Some element of annexation, usually physical in its character, is the common criterion for determining whether things personal in their origin have lost that quality and become part of the realty. Generally, the connection is appreciable by the senses, so that what belongs to the land and what is personal may be determined by inspection alone. Cases of constructive annexation are few, and rest upon peculiar and obvious reasons of their own. Thus keys, which must be movable to answer their end, and which are a necessary part of the fixed locks to which they are adapted; sashes and window frames; and the old example of an upper millstone, removed to be picked—illustrate the same principle. Deer in a park, rabbits in a warren, doves in a dovecot, and fish in a pond depend on a different reason. In these conditions they are reckoned not property at all; but any of them caught and secured becomes at once personal property. *Hoyle v. Plattsburgh & M. R. Co.*, 54 N. Y. 314, 320, 323, 13 Am. Rep. 595.

"Rolling stock" and other property strictly and properly appurtenant to a railroad is part of the road, and a mortgage covering such road with the rolling stock is properly regarded as a real estate mortgage, and need not be recorded as a chattel mortgage. *Farmers' Loan & Trust Co. v. St. Joseph & D. C. R. Co.* (U. S.) 8 Fed. Cas. 1053.

The rolling stock of a railroad within the meaning of a chattel mortgage on its roadbed and franchises, engines, cars, and rolling stock is personal property, and therefore the mortgage is a chattel mortgage in so far as it relates to such property. *Williamson v. New Jersey S. R. Co.*, 29 N. J. Eq. 311, 323.

### ROMAN CATHOLIC.

A Roman Catholic is a Christian who admits the authority of the pope. *Hale v. Everett*, 53 N. H. 955, 16 Am. Rep. 82.

## RONDO.

As banking game, see "Banking Game."

## ROOM.

See "Barroom."

"Room," as used in Gen. St. 1894, §§ 2018, 2026, declaring a licensee to give bond not to sell liquor at any other place than the room named in the license, is used in its ordinary sense as meaning a single inclosure, separated by partitions or other means from the other parts of the building; so that, if a room named in the license be divided into inclosed drinking rooms, booths, or stalls, the purposes of the law would be wholly defeated. *State v. Barge*, 84 N. W. 911, 913, 82 Minn. 256, 53 L. R. A. 428.

In its broadest sense a room is any space or apartment separated from others by partitions, and in this sense any closet or any small apartment would be a room, but, as commonly used, the rooms of a dwelling house are understood to include those apartments which are adapted, with more or less convenience, to personal occupation. *Crosby v. City Council of Montgomery*, 18 South. 723, 726, 108 Ala. 498.

As building.

See "Building (In Criminal Law)."

Floor distinguished.

The word "room" includes a description of the perpendicular as well as of the horizontal planes which bound the parcel of the house described by it, and excludes the outside of lateral walls, at least, when they constitute the walls of another room, and in this respect differs from the word "floor" in a building. *Lowell v. Strahan*, 12 N. E. 401, 404, 145 Mass. 1, 1 Am. St. Rep. 422.

House distinguished.

In *Weiss v. State*, 16 Tex. App. 431, 432, it was held that "room" and "house," as used in an indictment for gaming, were not synonymous terms. *Hodges v. State*, 72 S. W. 179, 180, 44 Tex. Cr. R. 444.

As real property.

See "Real Property."

## ROOTS.

Sarsaparilla is not included in the word "roots." *Colt v. Commercial Ins. Co.*, 7 Johns. 385, 389, 5 Am. Dec. 282.

A clause in an insurance policy exempting among other articles "roots, prepared or otherwise," includes pink root cut up and prepared. *Klett v. Delaware Ins. Co.*, 23 Pa. (11 Harris) 262, 264.

## ROPEMAKER.

"Ropemaker," as used in a policy of fire insurance, providing that the policy should be void if the property insured should be used for the purpose of carrying on any trade or business denominated hazardous, among which are that of "ropemakers," means one who twists the yarn into rope. The trade or business of a ropemaker means the making of the rope from the yarn, and not the spinning of the yarn nor the hackling of the hemp; and, although all these branches of the business might be carried on by the same person, still the one who twisted the yarn into rope is alone strictly a ropemaker. Where a building was used for hackling the hemp and spinning it into yarn, and the yarn thus made was taken to another building, where it was made into rope, the trade or business of ropemakers was not conducted in such building. *Wall v. Howard Ins. Co.* (N. Y.) 14 Barb. 383, 387.

## ROPEWALK.

A deed conveying a "ropewalk" includes the land on which the ropewalk stood, and also such land in addition as was used habitually and necessarily in the absence of the ropewalk, in the same way that under the description of a house or a mill used in a deed the yard and curtilage of the house and the millyard will pass. *Davis v. Handy*, 37 N. H. 65, 71.

## ROSARY.

"Rosaries" are composed of beads, a metal chain, and a cross, the beads being fastened on the chain at regular intervals, and is not complete without a cross. They are used by Roman Catholics in counting their prayers, and are carried in the pocket when not so in use, and are never used for ornament. In all cases the beads are the component material of chief value, and are dealt in only by dealers in religious and devotional articles pertaining to the Catholic Church, and are not dealt in by those who deal generally in beads and bead ornaments. The people who use rosaries sometimes call them beads and sometimes rosaries. *Ben-ziger v. Robertson*, 7 Sup. Ct. 1169, 1170, 122 U. S. 211, 30 L. Ed. 1149.

## ROSEWOOD.

"Rosewood furniture," as used in United States revenue laws, includes only furniture which is made entirely of rosewood, and does not include any furniture which is a combination of rosewood and other kinds of wood. *Pansot v. Maxwell* (U. S.) 19 Fed. Cas. 986, 987; *Sill v. Lawrence* (U. S.) 22 Fed. Cas. 115, 116.

The terms "ebony and rosewood," as used in Tariff Act July 30, 1846, Schedule B, providing that manufacturers of ebony and rosewood, etc., should be subject to a duty of forty per cent. ad valorem, did not mean articles manufactured from ebony and rosewood entirely, but included as well fancy boxes made of common wood and veneered with rosewood or ebony, invoiced as rosewood and ebony boxes, and known to the trade by those names, and also as fancy boxes and furnishing boxes; it not appearing that there are any articles known as ebony boxes or rosewood boxes made wholly from those woods. *Sill v. Lawrence* (U. S.) 22 Fed. Cas. 115, 116.

## ROSTER.

The word "roster" is used instead of "register," and comprehends a list of military officers connected with a regiment, brigade, or division, and is kept as records of orders and official communications. *Matthews v. Bowman*, 25 Me. (12 Shep.) 157, 167.

## ROTTEN.

"Rotten," as used in an action for using, in a platform, unsound or "rotten" material, means unsound, and that the strength of the material was weakened by time and exposure, though the board was not decayed, so as to come within the ordinary acceptance of the term "rotten." One definition given by Webster for "rotten" is "not firm or trusty; unsound; defective," etc. *Haworth v. Seewers Mfg. Co.*, 51 N. W. 68, 71, 87 Iowa, 765.

Under a clause in a policy of insurance providing that "if the vessel, after regular survey, should be condemned for being unsound or rotten, the assurers shall not be bound to pay their subscription," a finding on a survey that her stern, apron, bends, and the most of her timbers are "decayed" is equivalent to finding that the vessel is "unsound" or "rotten," although those terms are not used, as "decayed" is the same as "rotten." *Steinmetz v. United States Ins. Co. (Pa.)* 2 Serg. & R. 293, 296.

## ROUND.

The term "round" should not be employed in an instruction on damages, it being equivalent to "large," "great," or "considerable."—*Golden v. City of Clinton*, 54 Mo. App. 100, 118.

"Round," as used in a deed conveying certain plains, together "with the woodland adjoining to said plains extending four English miles round the said plains," is satisfied by the giving of land on every side of the plains, let the exterior lines of the same be either circular or straight, and does not

necessarily imply that the exterior line must be a circle. *Jackson v. Reeves* (N. Y.) 3 Caines, 293, 298.

### As applied to logs.

"Round," as applied to logs, indicates that their shape is circular or cylindrical. *Bucki v. McKinnon*, 20 South. 540, 541, 37 Fla. 391.

## ROUND SUM.

"Round," as used in an instruction that, if the plaintiff recover, he would be entitled to compensatory damages, and that by compensatory damages was meant such "round" sum in measurement as would compensate plaintiff for the injury done to him, was used to describe a lump sum in contradistinction from one that is the result of calculation or exact petition. *Times Pub. Co. v. Carlisle*, 94 Fed. 762, 771, 38 C. C. A. 475.

## ROUND TRIP.

The term "round trip," when used with reference to a sea voyage, means a trip from the port of departure to the same port on return. *Pacific Mail S. S. Co. v. United States* (U. S.) 18 Ct. Cl. 30, 38.

## ROUND-UP.

A "round-up," in the custom of cattle men, is a gathering together of the cattle every spring, at which the brands are examined, and the cattle of the several ranches and owners are separated. *Hebberd v. Southwestern Land & Cattle Co.*, 36 Atl. 122, 126, 55 N. J. Eq. 18.

## ROUSTABOUT.

A "roustabout" is a deck hand, whose work is loading and unloading a steamer. *United States v. Trice* (U. S.) 30 Fed. 490.

## ROUT.

A "rout" is where three or more persons unlawfully assembling for the purposes of a riot "move forward to the execution of their design." *People v. Judson* (N. Y.) 11 Daly, 1, 23.

*Hawkins* (Pleas of the Crown, c. 65, § 9) says "that unlawful assemblies, routs, and riots are three allied disturbances of the public peace. If an assembly moves forward towards the execution of its unlawful design, it is a rout." An actual execution of the design is a riot. *Follis v. State*, 40 S. W. 277, 37 Tex. Cr. R. 535.

Whenever two or more persons assembled and acting together make any attempt or advance toward the commission of an act

which would be a riot if actually committed, such assembly is a "riot." Pen. Code Cal. 1903, § 406.

## ROUTE.

See "Best Route"; "Direct Route"; "Post Routes."

"Route," as used in a statute making provisions for an amended route of a railroad and the location of tracks upon it, does not mean the same thing as "location of tracks"; it means only the course of the railroad, the streets through which it will pass. *Theberath v. City of Newark*, 30 Atl. 528, 57 N. J. Law (28 Vroom) 309.

Where a railroad charter authorizes the entry upon land for the purposes of exploring and locating the "route of the road," and provides that when the route of the road shall have been determined upon, and a survey thereof filed with the proper official, the company may take possession of the land, the words "route of the road" should not be construed to mean the entire line of the road from its commencement to its termination, so as to require the location of the whole route to be filed before any land could be taken, but mean the route over the lands about to be taken; and hence it is sufficient if the location through such lands is filed. *Doughty v. Somerville & E. R. Co.*, 21 N. J. Law, 442, 462.

The term "route," as used in a contract to convey to a railroad company a right of way "on the route lately surveyed" (or to be surveyed), is not necessarily so precise as to preclude a variation sufficient to change an oblique angle into a curve, but the company under such a contract has no authority to locate its road so as to commence on the eastern side of the land at a point fifteen miles north of the original line, and extending westerly so as to leave his land five rods south of the original line. *Wood v. Michigan Air Line R. Co.*, 90 Mich. 334, 337, 51 N. W. 263.

### Terminal points.

"Route," as used in the act of 1872 conferring power on railroad companies to change the route of their roads, does not include the terminal points of the road. The word "route," according to the dictionaries, implies passage to and from. It is a French word, and is defined in Fleming and Tibbin's Standard French Dictionary as a way used for going from one place to another, and, corresponding with its defined meaning, its common acceptation excludes terminal points and makes it dependent on them. *Attorney General v. West Wisconsin Ry. Co.*, 36 Wis. 466, 494.

"Route," as used in Act April 5, 1871, authorizing a railroad company to construct

its road from one city to another on such route and location and through such counties as the board of directors should deem most feasible, necessarily involved a starting point and a terminus, and there cannot be a complete route and a complete location which does not comprehend the entire structure throughout its length. *Mellen v. Town of Lansing* (U. S.) 11 Fed. 820, 825.

## ROUTE OF TRAVEL.

"Route of travel," as used in Code, § 3788, requiring mileage to be computed by the most direct "route of travel," means the way or route traveled. A way or route not traveled is not within the meaning of the term. A traveled route is the way traveled by persons pursuing a journey between given points. *Maynard v. Cedar County*, 1 N. W. 701, 702, 51 Iowa, 430.

## ROUTE USUALLY TRAVELED.

"Route usually traveled," as used in Code, § 3931, providing that in conveying a convict to the penitentiary it is the duty of the sheriff to travel the "land route usually traveled," means the land route usually traveled within the state, and not one which may be through other states; there being a land route exclusively within the state which is sometimes traveled. In cases where there are courthouses in the state from which there is no route to the penitentiary which is usually traveled through its entirety, or over which persons are accustomed to pass from the courthouse to the penitentiary in a continuous travel, the route leading to the penitentiary, and the different parts of which are usually traveled, and which is in a reasonable direct course from point to point, is within the meaning of the law the "land route usually traveled." *Greene v. McGhee*, 37 Ala. 164, 165.

## ROUTES AND BOUNDS.

1 Rev. St. 515m, § 63, requiring the commissioners in laying out a highway to make out and subscribe a certificate describing "the road so laid out particularly by routes and bounds," is sufficiently complied with by a description referring to an established highway. *People v. Town of Milton Com'rs*, 37 N. Y. 360, 364

## ROWBOAT.

As vessel, see "Vessel."

## ROYAL FISHERY.

The term "royal fishery" at common law was used to designate the right of fishery in a navigable river in which the sea ebbed and flowed, and was so called because the right

was a part of the prerogative of the King. *Arnold v. Mundy*, 6 N. J. Law (1 Halst.) 1, 86.

## ROYAL FISHES.

The term "royal fishes" was used at the common law to designate whales and sturgeons. They were so designated because they belonged to the King as a matter of prerogative. *Arnold v. Mundy*, 6 N. J. Law (1 Halst.) 1, 86.

## ROYAL RIVER.

The term "royal river" was used in the common law to designate a navigable river in which the sea ebbed and flowed. *Arnold v. Mundy*, 6 N. J. Law (1 Halst.) 1, 86.

## ROYALTY.

As income, see "Income."

"Royalty" is the most appropriate word to apply to rental based on the quantity of coal or other mineral that is or may be taken from a mine. *Raynolds v. Hanna* (U. S.) 55 Fed. 783, 800.

A royalty is a tax or duty paid to the owner of a patent for the privilege of manufacturing or using the patented article. *Hubenthal v. Kennedy*, 39 N. W. 694, 695, 76 Iowa, 707.

Royalties are commonly understood as meaning something proportionate to the use of a patented device; in other words, a kind of excise. (Bouv. Law Dict.) In its more ordinary meaning it would not literally include the shares of stock in a corporation for which an accounting is demanded. In some of its uses it is a broader word than "rentals," and yet in other aspects "rentals" is a broader word than "royalties." Rentals, in their ordinary signification, are not limited as royalties in their ordinary signification; that is, to something proportionate to the use of a patented device. *Western Union Telegraph Co. v. American Bell Telephone Co.* (U. S.) 125 Fed. 342, 348, 60 O. C. A. 220.

Plaintiffs and defendant, each of whom owned patents relating to telephones, which were in litigation between them, made a settlement, and entered into a contract by which defendant was granted an exclusive license to use all the patents of plaintiffs, and agreed to pay them upon all telephones used in the United States under license from it, "express or implied, unless expressly excepted, a royalty or bonus of twenty per cent. of all rentals or royalties actually received or rated as paid, in accordance with the provisions of this contract, from licenses or leases for speaking telephones, exclusive of call bells, batteries, wires, and other appliances, or services furnished or performed." The contract stated the then recognized

"standard" annual rentals or royalties for each telephone, which was subject to commissions, and provided the commissions which might be paid therefrom, and the minimum rentals which might be charged, without a special agreement of the parties. It required defendant to keep accounts of the number of telephones manufactured, licensed, and put out of use, and of the rentals received and commissions paid, and provided that, where exchanges were conducted by defendant or other corporations in which it was interested, the usual rentals on the telephones used should be "rated as paid," within the meaning of the contract. Subsequently defendant adopted the plan of selling a perpetual license to use its instruments in a certain territory to a local company, taking in payment stock of the company; and in such cases the company paid the usual rentals on the telephones used, less the usual commissions. Held, that the term "rentals or royalties," used in the contract, did not include the general profits which defendant might make from the monopoly given by its patents, either by conducting exchanges itself or from licenses granted to others therefor, but was intended to cover only rentals from instruments, as specified and defined in the contract, which by the recognized custom were rented, and not sold, and that defendant was not entitled to any portion of the stock received from the sale of such licenses. *Western Union Telegraph Co. v. American Bell Tel. Co.* (U. S.) 105 Fed. 684, 685.

## RUBBER HOSE.

A "rubber hose" is a tubing of indefinite length, open at both ends. It is not an annular pneumatic tube forming a tire. *Dodge v. Porter* (U. S.) 98 Fed. 624, 627.

## RUBBISH.

The word "rubbish" in the metropolitan paving act (57 Geo. 3, c. 29, §§ 59, 60), entitling scavengers to dust, ashes, rubbish, etc., within certain districts means "such things as are in the contemplation of the owner rubbish, and which he desires to dispose of in that character. If there be any other purpose to which the dust, etc., can be applied except treating it merely as rubbish, he has a right to do so either where it is produced or on any other premises. If it be combustible as a fuel, he has a right to use it on any premises he may have. The right of the scavenger only attaches when the owner has no use for the articles mentioned in the act except as rubbish." *Filbey v. Combe*, 2 Mees. & W. 677, 683.

## RUBLE.

The term "ruble" is that given to the "money of account in Russia. It was orig-



inally a coin corresponding in value to the American dollar." *Pleasants v. Maryland Ins. Co.*, 12 U. S. (8 Cranch) 55, 58, 3 L. Ed. 486.

## RUBRICS.

"Rubrics" was a name given in England to the titles of acts of Parliament, and were so called because written in red ink. The title was no part of the act, and was prefixed by the clerk, and prior to the eleventh year of Henry VII (1495) titles were very rarely prefixed at all. *State v. Woolard*, 25 S. E. 719, 119 N. O. 779.

## RUDE.

"Rude and indecent behavior," as used in Code, § 4032, punishing rude or indecent behavior, means "conduct which is bolsterous, rough, or uncivil, or is offensive to modesty or delicacy." *Reeves v. State*, 11 South. 295, 299, 96 Ala. 33.

## RUG.

Webster defines "rug" to be a coarse, nappy, woolen fabric used for various purposes—for covering a bed; for protecting a carpet before a fire; for protecting the legs against the cold when riding. The term "rugs" in Schedule K of the tariff act of March 3, 1883, fixing a duty on rugs, does not include Chinese goat skins tanned with the hair on, sewed together, and used as rugs, sleigh or carriage robes, or for lap robes and overcoat trimming, as Schedule K is entitled "Wools and Woolens," and the goat skins are not exclusively used for rugs. *Seeberger v. Schlesinger*, 14 Sup. Ct. 729, 731, 152 U. S. 581, 38 L. Ed. 560.

Wool traveling rugs, which are not "portions of carpets or carpeting," are not included in the provision in Tariff Act Oct. 1, 1890, c. 1244, § 1, Schedule K, par. 408, 26 Stat. 598, for "rugs \* \* \* and other portions of carpets or carpeting, made wholly or in part of wool," but are dutiable under the provision in paragraph 392 of said act (section 1, Schedule K, 26 Stat. 596), for "all manufactures of every description made wholly or in part of wool." *United States v. Haynes*, 124 Fed. 295.

Traveling rugs, during 1888, were dutiable at 40 per cent. ad valorem, as rugs, under Tariff Act March 3, 1883, par. 378, Schedule 12, and not as manufactures of wool, under par. 362. *Ingersoll v. Magone* (U. S.) 53 Fed. 1008, 1010, 4 C. C. A. 150 (reversing [U. S.] 48 Fed. 159).

## RUIN.

"Ruin," as used in a lease of a coal mine in which the lessees covenanted that they would work the mine in a sound, safe, and

workmanlike manner, so as not to "ruin" the works, does not mean an utter destruction of the works, but includes a serious impairment of the works, and anything which would essentially promote their injury, decay, or obstruction. *Consolidated Coal Co. v. Schaefer*, 25 N. E. 788, 789, 135 Ill. 210.

## RULE.

See "Home Rule"; "Usual Rules and Regulations."

A "rule" is a definite regulation prescribed as a law of conduct. *Watts v. Holland*, 56 Tex. 54, 60.

"Rule" is that which is prescribed or laid down as a guide to conduct; that which is settled by authority or custom; a regulation; a prescription; a minor law; a uniform course of things. *South Florida R. Co. v. Rhodes*, 5 South. 633, 635, 25 Fla. 40, 3 L. R. A. 733, 23 Am. St. Rep. 506 (citing Webster).

"Rules," in a legal sense, mean laws." *In re Higbee*, 5 Pac. 693, 694, 4 Utah, 19.

An application for membership in a fraternal insurance society contained an agreement in one clause that the order should not be liable if the member committed suicide, and in another clause that he would make punctual payment of all dues and assessments and conform to the "constitution, laws, and rules" of the order. One section of the constitution of the society substantially stated the provisions of the first of the above sections of the application, and another section of the constitution provided that if the member should pay all dues and assessments and conform to the "laws and rules"—thus omitting the word "constitution"—of the order, the certificate should be incontestable after a certain date. Held, that the "laws and rules" of the order to which the member was to conform in order that the certificate should be incontestable were those mentioned in the latter of the above clauses of the application, and did not include the former clause of the application, which was an independent clause of forfeiture, nor the similar clause of the constitution. *Royal Circle v. Achterrath*, 68 N. E. 492, 493, 204 Ill. 549, 63 L. R. A. 452, 98 Am. St. Rep. 224.

### As by-law or regulation.

In a city charter empowering the council to make "ordinances, rules, regulations, and by-laws" for certain purposes, such terms are all equivalent to each other, so that whatever rule, regulation, or by-law affects the subjects mentioned must be passed with formalities required for an ordinance proper. *Hunt v. Common Council of City of Lambertville*, 45 N. J. Law (16 Vroom) 279, 282; *Taylor v. Lambertville*, 10 Atl. 809, 811, 43 N. J. Eq. (16 Stew.) 107.

**Order distinguished.**

The words "rule" and "order," when used in a statute, have a definite signification. They are different in their nature and extent. A rule, to be valid, must be general in scope and undiscriminating in its application. An order is specific and limited in its application. The function of an order relates more particularly to the execution or enforcement of a rule previously made. Thus a provision that a board of pilot commissioners may make rules for the government of pilots does not authorize the commissioners to order pilots who own and operate their boats, and have the same fully manned, to allow another pilot to cruise on the boat. *Morris v. Board of Pilot Com'rs*, 30 Atl. 667, 669, 7 Del. Ch. 136.

**Ordinance distinguished.**

Rules for the government of the city council are of the dignity and effect of an ordinance where they are reported in writing by the committee appointed to draft them and adopted on a regular motion at a regular meeting of the council. *State v. Swindell*, 45 N. E. 700, 701, 148 Ind. 527, 53 Am. St. Rep. 375.

"Rule" is defined as a regulation adopted by a deliberative body for the conduct of its proceedings; so rules adopted by a legislative or municipal body cannot be deemed ordinances, which are local laws of a municipal corporation, passed by the governing body. *Armatage v. Fisher*, 26 N. Y. Supp. 364, 367, 74 Hun, 167.

**As temporary rule.**

Comp. St. c. 5, § 8, enacts that in the Fifteenth Judicial District there shall be drawn a panel of 48 jurors, with a proviso that, where such numbers may not be required, the judges may, by appropriate rule, provide for the drawing of a less number. Held, that the statute did not contemplate a fixed and permanent general rule, but meant one to be made from time to time, according to the condition of business. *Barney v. State*, 68 N. W. 636, 638, 49 Neb. 515.

**RULE ABSOLUTE FOR NEW TRIAL.**

The entry, "Rule absolute for new trial," implies that a judgment has been vacated, verdict set aside, and new trial granted. The better practice is, where a judgment is set aside, after the term at which it is entered, to make a formal entry, "Judgment vacated, verdict set aside, and new trial granted." *Fisher v. Hestonville, M. & F. Pass. Ry. Co.*, 40 Atl. 97, 185 Pa. 602.

**RULE DAY.**

"Rule day," as used in Cir. Ct. Rule 13, providing that all declarations shall be filed

on or before the rule day to which the process is made returnable, means the return day on which a defendant is required to appear by summons duly served and returned. *Cook v. Cook*, 18 Fla. 634, 637.

**RULE IN SHELLEY'S CASE.**

The "rule in Shelley's Case" was of feudal origin and policy, and was designed to favor the transmission of estates by descent, and to prohibit their transmission in certain lines of succession by means of a deed or will, instead of by inheritance according to the course of law. In that ancient case it was expressed that when the ancestor by any gift or conveyance taketh an estate of freehold, either immediately or mediately, to his heirs in fee or in tail, "to his heirs" are words of limitation of the estate, and not of purchase. By which is meant that the ancestor—or, in other words, the first taker—takes the whole estate in fee, instead of for life, when the words are "to his heirs," and an estate tail instead of for life, when the words are "to the heirs of his body." This rule was not one of interpretation, but of positive law. It did not seek any intentions, but in most cases defeated it. *Zabriskie v. Wood*, 23 N. J. Eq. (8 C. E. Green) 541, 544.

The "rule in Shelley's Case" did not originate with the case, but is a still more ancient dogma. It is a rule of construction, and is as follows: Where one takes an estate by grant or devise, and the deed or gift, by its terms, gives him a life estate only, with remainder immediately thereafter, or after the expiration of an intermediate estate, to his heirs or the heirs of his body, then, if there should be such heirs, the tenant for life would become seised of an estate in fee simple, and those in remainder would take as heirs, and not as purchasers. The word "heirs" or "heirs of the body," in defining who should take the remainder, were regarded as words of limitation of the estate, and not as words of purchase. And this rule was so stubborn that, if such were the words of the grant, it would therefrom conclusively infer as a matter of law that the intent and purpose of the grant was to create an estate of inheritance, which would descend to those nominated by the general description of heirs, notwithstanding the grantor should declare his intention to be otherwise. To become subject to this rule, there must be, by the terms of the grant, a life estate in the first taker, with remainder to heirs or the class of heirs named in the deed. The result of this was that the first taker, immediately on the birth of heirs, such as were mentioned in the grant, would take the remainder also, and thereupon have the whole estate. This he could alienate and thereby disappoint the heirs, who would be cut out of their estate in the remainder. *Duffy v. Jarvis* (U. S.) 84 Fed. 731, 733.

The principle of the common law known as the "rule in Shelley's Case" is defined as follows: "When a person takes an estate of freehold, legally or equitably, under a deed or will or other writing, and afterwards in the same deed or will or other writing there is a limitation by way of remainder, with or without the interposition of any other estate, of an interest of the same quality, as legal or equitable, to his heirs generally, or his heirs of his body, by that name in deeds or writings of conveyance, or by that or some such names in wills, and as a class or denomination of persons to take in succession from generation to generation, the limitation to the heirs will entitle the person or ancestor himself to the estate or interest imported by that limitation." *Hampton v. Rather*, 30 Miss. 193, 203.

The rule in Shelley's Case is stated as follows by Lord Coke: "It is a rule of law, when the ancestor by any gift or conveyance takes an estate in freehold, and in the same gift or conveyance the estate is limited either mediately or immediately to the heirs in fee or in fee tail, that always in such cases 'the heirs' are words of limitation of the estate, and not words of purchase." *Jones v. Jones*, 20 Ga. 699, 700 (quoting 1 Coke, 104).

The rule in Shelley's Case "is that when a person takes an estate of freehold, legally or equitably, under a deed, will, or other writing, and in the same instrument there is a limitation by way of remainder, either with or without the interposition of another estate, of an interest of the same legal or equitable quality to his heirs or heirs of his body as a class of persons to take by succession from generation to generation, the limitation to the heirs entitles the ancestor to the whole estate. This result would follow, although the deed might express that the first taker should have a life estate only. It is founded on the use of the technical words 'heirs' or 'heirs of his body' in the deed or the will. The rule in Shelley's Case is said to be a rule of law. It is really an organic rule entering into the creation of an estate of inheritance. The whole must embrace all its parts. The existence of the whole being established or taken for granted, it cannot be true that a part of the whole is wanting; that is, if it takes four sides to complete a mansion, its completion being admitted by a law in physics, it cannot be true that the mansion has three sides only. In that sense it is a rule of law." *Hancock v. Butler*, 21 Tex. 804, 807.

The rule in Shelley's Case as stated by Mr. Preston, which Chancellor Kent says is full and accurate, is as follows: "When a person takes an estate or freehold, legally or equitably, under a deed, will, or other writing, and in the same instrument there is a limitation by way of remainder, either with or without the interposition of another es-

tate, of an interest in the same legal or equitable quality to his heirs, or heirs of his body, as a class of persons to take in succession from generation to generation, the limitation to the heirs entitles the ancestor to the whole estate." *Hardage v. Stroope*, 24 S. W. 490, 491, 58 Ark. 303; *Klene v. Gmeble*, 52 N. W. 232, 233, 85 Iowa, 312; *Wescott v. Binford*, 74 N. W. 18, 19, 104 Iowa, 645, 65 Am. St. Rep. 530.

"The rule in Shelley's Case is that where an ancestor takes an estate or freehold, with a remainder to his heirs or heirs of his body, the word 'heirs' is a word of limitation of the estate, and not of purchase; that is, in other words, that such remainder vests in the ancestor himself, and the heir, when he takes, shall take by descent from him, and not as a purchaser. This rule may give way to the manifest intentions of the testator, providing that the intent be so fully expressed as to leave no doubt whether it was an intent or not." *Rogers v. Rogers* (N. Y.) 3 Wend. 503, 511, 20 Am. Dec. 716.

The rule in Shelley's Case was that where an estate in freehold is limited to a person, and in the same instrument there is a limitation, either mediate or immediate, to his heirs or the heirs of his body, the word "heirs" is to be taken as a word of limitation, or in other words, the ancestor takes the whole estate comprised in these words—if it be to the heirs of his body, a fee tail; if to his heirs, a fee simple. *Trumbull v. Trumbull*, 21 N. E. 366, 149 Mass. 200, 4 L. R. A. 117.

The rule in Shelley's Case is this: Where a freehold is limited to one for life, and by the same instrument the inheritance is limited, either mediately or immediately, to heirs of his body, the first taker takes the whole estate either in fee simple or fee tail; and the word "heirs" or "heirs of the body" are words of limitation, and not of purchase. *McIlhinny v. McIlhinny*, 37 N. E. 147, 148, 137 Ind. 411, 24 L. R. A. 489, 45 Am. St. Rep. 186 (citing *Andrews v. Spurlin*, 35 Ind. 262).

"We know of no clearer definition of the rule than that given by Chancellor Harper in *Williams v. Foster* (S. C.) 3 Hill, 194: 'By the rule in Shelley's Case it was determined that if an estate of freehold is given to the ancestor, and the remainder be therein limited to his heirs or the heirs of his body, such remainder is immediately executed in possession in the ancestor so taking the freehold, and he takes an estate in fee or in tail, according to the terms of the limitation.' As we understand it, the principle is that where the remainder is given to the very persons who would, without such remainder, take by descent from the life tenant, they shall be held to take by descent, and not by purchase." *Smith v. Smith*, 24 S. C. 304, 314.

## RULE OF CONSTRUCTION.

In *Post v. Herbert's Ex'rs*, 27 N. J. Eq. (12 C. E. Green) 540, 543, in speaking of a subordinate rule of construction, it is said that it is a mere judicial exposition of the natural meaning of a certain form of expression. It is not an artificial contrivance, which, when presented, is to have a supreme effect, but is a rule simply because the phrase in question, considered intrinsically and without qualification *ab extra*, affords a definite testamentary purpose. The phraseology has received its accepted interpretation, because it is supposed that such interpretation will carry out the views of the testator. The consequence is that the rule is always subject to be modified or abrogated by the conditions of the case to which it applies. *Dutton v. Pugh*, 18 Atl. 207, 209, 45 N. J. Eq. (18 Stew.) 426.

## RULE OF COURT.

A rule of court is an order generally made by a court having competent jurisdiction. *Barney v. State*, 49 Neb. 515, 522, 68 N. W. 636 (citing *Bouvier*).

A rule is an order made by a court, between the parties to a cause before it or touching the discharge of duty by those engaged in the conduct of its proceedings, either as permanent officers of the court or as serving therein in some temporary capacity. It is authenticated by the signature of the judge, or, in certain instances, that of the clerk. *Goodlett v. Charles* (S. C.) 14 Rich. Law, 46, 49.

## RULE OF EVIDENCE.

"A rule of evidence may be defined to be the mode and manner of proving the competent facts and circumstances on which a party relies to establish the fact in dispute in judicial procedure." *Lapham v. Marshall*, 3 N. Y. Supp. 601, 603, 51 Hun, 36.

## RULE OF PROPERTY.

A rule of property is a settled legal principle governing the ownership and devolution of property. This principle can only be settled by the Supreme Court of the state, and its utterances in cases pending before it involving the title to property construing statutes or constitutional provisions have the effect of establishing a rule of property to the extent only that the particular statute or constitutional provision was in that case involved, or necessarily considered and determined by the court in the case then pending before it; and such rule of property, when so established, becomes and remains the settled legal principle governing the acquisition and title to property, to which construction is applicable so long as such de-

cision remains unreversed by the Supreme Court giving such construction. *Yazoo & M. V. R. Co. v. Adams*, 32 South. 937, 946, 81 Miss. 90.

The decisions of the highest court of a state may be said to constitute a "rule of property" when they relate to and settle some principle of local law directly applicable to title. *Edwards v. Davenport* (U. S.) 20 Fed. 756, 763.

## RULE TO SHOW CAUSE.

As process, see "Process."

As writ, see "Writ."

## RULES AND REGULATIONS.

The phrase "rules and regulations," as used in an act authorizing a railroad company to construct a branch road under the rules and regulations under which the road was empowered to construct its main line, does not imply an exemption from taxation of its branch line to the same extent that the main line was exempt from taxation. The exemption was only for the main line, and, if the act authorizing the branch road does not in terms apply the exemption to the additional road which was to be built under it, the court will presume that nothing of the kind was intended, and the state was left free to tax the road like other property. *Southwestern R. Co. v. Wright*, 6 Sup. Ct. 375, 378, 116 U. S. 231, 29 L. Ed. 626 (affirming 68 Ga. 311).

"Rules and regulations," as used in 5 Stat. 394, conferring on federal courts power to make all necessary rules and regulations for conforming the impaneling of juries to the laws and usages in force in the state, includes the power to adopt the laws and usages of the state in respect to the challenges of jurors. *United States v. Shackelford*, 59 U. S. (18 How.) 588, 590, 15 L. Ed. 495.

The term "rules and regulations" implies uniformity in operation, and not discrimination for the pecuniary advantage of the promulgator. *Indianapolis Union Ry. Co. v. Dohn*, 53 N. E. 937, 938, 153 Ind. 10, 45 L. R. A. 427, 74 Am. St. Rep. 274.

Const. U. S. art. 4, § 3, cl. 2, declares that the Congress of the United States shall have power to dispose of and make "all needful rules and regulations" respecting the territory and other property belonging to the United States. "No one has ever doubted the authority of Congress to erect territorial government within the territory of the United States under the general language of this clause." 2 Story, Const. § 1325. Rules and regulations, in a legal sense, mean laws. Blackstone says that "municipal law is a rule of civil conduct prescribed by the su-

preme power in a state," and such provision authorizing Congress to make rules and regulations should be construed in a broad sense to authorize Congress to make all laws for the government of the territories within its legislative scope. *In re Higbee*, 5 Pac. 693, 694, 4 Utah, 19.

## RULES OF COMMON LAW.

The phrase "rules of the common law," as used in Const. art. 3, § 13, providing for a jury trial, and declaring that in actions before a justice a jury may consist of six persons, and providing that no fact tried by jury shall be otherwise re-examined in any case than according to the rules of the common law, has reference to the re-examination of facts tried by jury as defined and known at the time of the adoption of the Constitution. By these rules the only proceeding by which such facts could be examined was by the setting aside of the verdict of the jury by the court before which the trial was had or by proceeding in error to an appellate court, and in the latter case the record alone could be examined. A case tried by a jury of six before a justice cannot be retried by the circuit court de novo. *Barlow v. Daniels*, 25 W. Va. 512, 513.

## RULES OF THE GAME.

The ordinary rules of the game, where there are no special rules stipulated, constitute the terms of the agreement on which betting upon a game are based, and define the contingency upon which one or the other is to receive the gift, and a staking of money is an ostensible adoption or sanction of such agreement, and also a conditional tender. *Stearnes v. State*, 21 Tex. 692, 694.

## RULES OF LIMITATION.

The term "rules of limitation," as used in Code Civ. Proc. § 414, providing that the provisions of the chapter are the only rules of limitation applicable to a civil action or special proceeding, refers only to the period of time designated in the chapter for the commencement of said actions. *Hayden v. Pierce*, 39 N. E. 638, 640, 144 N. Y. 512.

## RULES OF PROCEDURE.

"Rules of procedure" are rules made by any legislative body relating to the mode and the manner of conducting the business of the body, and for the purpose of making an orderly and proper disposition of the matters before such body, such as rules prescribing what committees shall be appointed, upon what subjects they shall act, what shall be the daily order in which business shall be taken up, and in what order certain motions shall be received and acted on, etc. Such

rules operate nowhere except in the legislative hall that adopts them, and never contravene the statute and common law of the land. *Heiskell v. City of Baltimore*, 4 Atl. 116, 118, 65 Md. 125, 57 Am. Rep. 308; *Heyker v. McLaughlin*, 50 S. W. 859, 860, 106 Ky. 509, 20 Ky. Law Rep. 1983, 1985.

## RULING.

The word "ruling," as used in Pen. Code Mont. 1895, § 2321, providing that on appeal from a judgment the court may review any order or "ruling," permits a review of the actions of the district court upon matters of law in the exclusion or admission of testimony involving the merits of the case on an appeal from the judgment only; the word "ruling" meaning generally a settlement or decision of a point of law arising from the trial of the case, without necessarily the force and solemnity of a judgment or order. *State v. O'Brien*, 43 Pac. 1091, 18 Mont. 1.

Where the certificate of a bill of exceptions recites that a motion for a new trial was made and refused, and that defendants asked for 30 days in which to file a bill of exceptions to the rulings of the court, the word "rulings" covers all rulings, including that on a motion for a new trial. *Gilmer v. Sidenstricker*, 24 S. E. 566, 567, 42 W. Va. 52.

The refusal of a judge to do a ministerial act, such as to issue a certificate of competency to teach, is not a "ruling" or "decision," within Sayles' Civ. St. art. 3715, providing that the State Superintendent shall hear and determine all appeals from the rulings and decisions of subordinate school officers. *Cruse v. McQueen (Tex.)* 25 S. W. 711, 712.

The use of the word "rulings" in a municipal ordinance providing that the aldermen, on hearing appeals from the mayor's court, may review the rulings made by the mayor on the trial, clearly indicates a power in the aldermen to review the law as applied by the mayor, "as it is a word peculiarly applicable to a legal question, and is seldom, if ever, applied to a finding of fact." *City Council of Anderson v. O'Donnell*, 7 S. E. 523, 527, 29 S. O. 355, 1 L. R. A. 632, 13 Am. St. Rep. 728.

## RULING MARKET RATES.

"In *Manchester Paper Co. v. Moore*, 104 N. Y. 680, 10 N. E. 861, it was held that where goods were delivered under an agreement by which the buyer agreed to pay the 'ruling market rates,' and it appeared that there were two market rates, one for goods of the kind bought by importers and another for them as sold by jobbers, evidence of conversations of the parties and the surround-

ing circumstances was competent for the purpose of showing which of the two was intended." *Beemer v. Packard*, 38 N. Y. Supp. 1045, 1046, 92 Hun, 546.

### RULINGS IN PROGRESS OF TRIAL.

Rev. St. § 700 [U. S. Comp. St. 1901, p. 570], providing that the "rulings of the court in the cause in the progress of the trial," excepted to at the time, may be reviewed upon a writ of error, etc., refers only to rulings on the admission or rejection of evidence; and hence no exceptions can be taken to the refusal of the judge to approve or disapprove a list of propositions of law. *City of Key West v. Baer* (U. S.) 66 Fed. 440, 441, 13 O. C. A. 572.

The phrase "rulings of the court in the progress of the trial" is held not to include the general finding of the Circuit Court, nor the conclusions of the Circuit Court embodied in such general finding. *Town of Martinton v. Fairbanks*, 5 Sup. Ct. 321, 322, 112 U. S. 670, 28 L. Ed. 862.

Within the meaning of the rule that, in a case where issues of fact are submitted to the Circuit Court and the finding is general, nothing is open to review by the losing party under a writ of error except the "rulings of the court in the progress of the trial," the phrase quoted does not include the general finding of the Circuit Court, nor the conclusions of the Circuit Court embodied in such general findings. *Cooper v. Omohundro*, 86 U. S. (19 Wall.) 65, 69, 22 L. Ed. 47.

### RUM.

#### As intoxicating liquor.

See "Intoxicating Liquor."

#### As spirituous liquor.

See "Spirituous Liquors."

### RUM DISEASE.

"Rum disease" is that appetite for spirits which cannot be overcome, except by actual restraint. *Streitwolf v. Streitwolf* (N. J.) 47 Atl. 14, 18.

### RUMOR.

"Rumor," as used in Rev. St. § 1897, providing that if a juror's opinion is founded only on rumor and newspaper reports, and is not such as to bias or prejudice his mind, he may be sworn, is defined by Webster to be "flying or popular report; a current story passing from one person to another, without any known authority for the truth of it." "Report" is a synonym for "rumor." Another is "hearsay"; and another, "story." *State v. Culler*, 82 Mo. 623, 626.

In an action for slander, a witness was asked if there was any rumor in a certain place and vicinity that defendant had accused plaintiff of stealing and being a thief, and it was objected that this evidence was intended to show an individual rumor. It was held that the word "rumor" signifies a flying or popular report—the common talk. Therefore any rumor meant any current report, and not the remarks of a single person. *Smith v. Moore*, 52 Atl. 320, 321, 74 Vt. 81.

### RUN.

"Run," as used in the statement of a witness in a personal injury case that the wagons causing the injury are run by defendant, will be interpreted as meaning that they were operated, controlled, and managed by the defendant, thus rendering it liable. *Diel v. Henry Zeltner Brewing Co.*, 51 N. Y. Supp. 930, 931, 30 App. Div. 291.

An order of court directing a receiver to "conduct and run" a hotel is sufficient authority to perform acts necessary to the conduct of the business, and hence sufficient to authorize the receiver to make purchases of necessary merchandise on credit, in the absence of any provision enabling him to raise money. *Highland Ave. & B. R. Co. v. Thornton*, 16 South. 699, 700, 105 Ala. 225.

#### As remove.

The word "run," as used in an indictment alleging that the mortgagor of certain horses did run the mortgaged property out of the state, is equivalent to the word "remove," as used in Pen. Code, art. 797, making it unlawful for a mortgagor to remove mortgaged property out of the state. *Williams v. State*, 11 S. W. 114, 115, 27 Tex. App. 258.

#### As spread or communicate.

"Run," as used in Rev. St. tit. 1, § 277, providing that every person who shall set fire on any land that shall run on the land of another, meant "to pass, spread, or communicate in ordinary modes." *Ayer v. Starky*, 30 Conn. 304, 307.

### RUN INTO MONEY.

Where notes payable in specific articles of property are unpaid, and the time of payment has elapsed, the common and uniform phrase of the community is that the note has "run into money." *Perry v. Smith*, 22 Vt. 301, 306.

### RUN-OUT.

A term used by founders to denote the escape of heated metal by reason of imperfections in the mold. *Kehoe v. Allen*, 52 N. W. 740, 92 Mich. 464, 31 Am. St. Rep. 608.

# **RUN OUT A LINE.**

Act April 4, 1887, § 1, providing that, whenever the boundary line of any county in the state shall be so indefinite that a portion of the territory is claimed by two counties, it shall be the duty of the state engineer and county surveyors to run out and establish such lines as nearly as may be in accordance with such defective description, does not necessarily mean passing over it physically, and whether it is necessary, in order to the adjustment of a boundary, to run it out on the ground, depends on the nature of the country through which the line runs; but where lines have been drawn and unmistakably defined by nature, if a disputed boundary falls upon one of them, its designation as the true line, naming known points as its termini, and giving its course, is a running out and establishment of the line. *Hinsdale County Com'rs v. Mineral County Com'rs*, 48 Pac. 675, 678, 9 Colo. App. 368.

"Run out a line," when used in connection with surveying, means that a person qualified to do such work shall go upon the ground and with proper instruments, chainmen, and necessary assistants establish and mark a line upon the surface of the earth. They clearly impose the duty of going upon the ground and actually running out the line. *Mineral County Com'rs v. Hinsdale County Com'rs*, 53 Pac. 383, 384, 25 Colo. 95.

# **RUN TO MARKET.**

A draft drawn by F. on defendants in plaintiffs' favor was accepted "payable when the lumber is run to market." The draft was given in payment for plaintiffs' labor on logs of F., from which lumber was to be made. An agreement was made between defendants and F., at the time of the acceptance, that the lumber from the logs should be delivered to them to be sold for F. F. sold all his interest in the logs before plaintiffs commenced the action. Held, that the words "payable when the lumber is run to market," in the acceptance, should be construed to mean that the defendants would pay the draft when they had run the lumber to market, and did not mean that the lumber had been run to market when F. had sold his interest. Defendants promised to pay when they had run to market the lumber against which the draft was drawn, and on the faith of the possession and sale of which the acceptance was made. They did not mean that they would pay whenever the drawer of the draft should sell out his interest to other parties and pocket the proceeds. *Lamon v. French*, 25 Wis. 37, 41.

# **RUNNING.**

Within the meaning of Sand. & H. Dig. § 6349, providing that all railroads operated

in the state shall be responsible for damages to persons or property done or caused by the running of trains in this state, the word "running" was used in a narrow and restricted sense of causing trains to be moved or propelled. The rule had its origin in the inability of plaintiff to prove his injuries to have been the result of negligence in cases where the facts lie peculiarly within the knowledge of those who produce the injury. This may be said to be the case where the injury is caused by the actual running of the train, and the word "running" will not be construed to mean the operation of the train in its broad and general sense. *St. Louis & S. F. R. Co. v. Cooksey*, 69 S. W. 259, 260, 70 Ark. 481.

A marine policy on a barge "while running on the Hudson and East rivers" was intended to describe the business of the barge employed upon these waters, and includes the time required for loading and unloading, as well as the time when the barge is actually in motion. "The term 'running' was evidently employed in the sense ordinarily given it, as it is applied to the business of navigation, and for that reason it could not have been intended that it should be restricted to risks encountered only when the barge was in motion, but it was equally within the protection intended to be offered by the policy while it was lying at the wharves it was obliged to resort to for the purpose of receiving and discharging its cargo. The term 'running,' as it was used by the defendant, must have been designed to include all that ordinarily would be comprehended by the business of a vessel in active employment. It described the condition of the vessel commercially engaged, and it was used by way of contrasting the difference between vessels laid up and out of use and those making trips upon the water." *St. Nicholas Ins. Co. v. Merchants' Mut. Fire & Marine Ins. Co. (N. Y.)* 11 Hun, 108, 113.

# **RUNNING ACCOUNT.**

An account with a bank for money loaned, checks paid, etc., which during the time makes monthly statements, striking the balance due each month, which is carried forward and charged, constitutes a "running account," and is in effect but one transaction. *Pickett v. Merchants' Nat. Bank of Memphis*, 32 Ark. 346, 355.

"Running accounts," as used in Rev. St. 1838, p. 447, providing that the statute of limitations shall not operate as a bar to an action founded on running accounts between merchant and merchant, means mutual accounts and reciprocal demands between the parties, which accounts and demands remain open and unsettled between merchant and merchant. *Brackenridge v. Baltzell*, 1 Ind. (1 Cart.) 333, 335.

"Running account," as the term is used to define accounts against which the statute of limitations does not begin to run until the date of the last item, are accounts with reference to cases of reciprocity and mutuality of dealings between the parties, and not accounts where the demands are all on one side; and hence it cannot be contended that claims against the Interior Department for pensions, until paid or sued for, were running accounts. *Leonard v. United States* (U. S.) 18 Ct. Cl. 382, 385.

Where defendant gave to plaintiffs the following guaranty: "In consideration of \$100 \* \* \* I do hereby become bound to Picker Bros., \* \* \* and agree to pay them for all such goods as they may hereafter sell \* \* \* to —, not exceeding on the aggregate \$182; the same to be a running account for an indefinite time, and such deliveries to be at such time as said — shall desire," the parties intended a running account, and the amount specified was a limitation only on the extent of the defendant's responsibility. "A running account necessarily contemplates continuous dealing, and this intention is further emphasized by the provision that the account shall be for an indefinite period." There is authority for the proposition that the term "running account" means, as a matter of law, "mutual accounts." *Brackenridge v. Baltzell*, 1 Ind. (1 Cart.) 333. "However this may be, we think that in this case the defendant plainly intended to guaranty the balance of account to the amount specified in his undertaking." *Picker v. Fizzle*, 51 N. Y. Supp. 205, 206, 28 App. Div. 519.

#### RUNNING ALONG.

Where a deed mentions a stream as the boundary in general terms, or the land is described as bounded or "running along" a river, the stream will be held to be the monument, and the thread of the stream the boundary; but, if the land is described as bounding on the bank or shore of the stream, then the low-water mark on the bank will be the boundary, the particular reference to the bank excluding the stream. *Brophy v. Richeson*, 36 N. E. 424, 425, 137 Ind. 114.

Where the public have only a right of way over a street, and a conveyance is made of the abutting land, in which it is described as running along the highway, the phrase "running along" means that the boundary line is the center of the highway. *Firmstone v. Spaeter*, 25 Atl. 41, 150 Pa. 616, 30 Am. St. Rep. 851.

#### RUNNING AT LARGE.

See "At Large."

#### RUNNING CONNECTIONS.

The provision in the charter of the Northern Pacific Railroad Company (Act

Cong. July 2, 1864) requiring the company to permit other companies to form "running connections" with it includes only such arrangements as to the arrival and departure of freight and passenger trains, and as to the stations, platforms, and other facilities, as will enable the companies desiring to make connections to do so without serious inconvenience, and does not impose any obligation upon the company to carry freight in the cars in which it may be tendered by a connecting line, when its own cars are not in use and the freight would not be injured by transfer to another car. *Oregon Short Line & U. N. Ry. Co. v. Northern Pac. R. Co.* (U. S.) 51 Fed. 465, 475; *Id.*, 61 Fed. 158, 163, 9 C. C. A. 409.

#### RUNNING DAYS.

Libelants executed to the respondents a charter party of a vessel for a voyage from New York to Rio Janeiro, by which 45 running days were allowed for loading and discharging, and if the vessel was longer delayed the defendants were to pay damages at so much per day, providing the detention should happen by default of the respondents. Held, that the term "running days" was employed to exclude the idea of working days only, and threw on the respondents all risks of detention by intervening Sundays and holidays, as well as by ordinary interruptions incident to the business. *Davis v. Prendergast* (U. S.) 7 Fed. Cas. 161, 162.

"Running days," as used in a charter party, providing that the vessel shall be allowed 25 running days for loading ship at Honduras for every 100 tons of mahogany, and 15 days for discharging at the destined port, means consecutive days, and in the absence of a custom includes Sunday. *Brown v. Johnson*, 10 Mees. & W. 331, 334.

A charter party provided that 12 running days for each 100 register tons should be allowed to the charterers for loading the ship, but that in no case should the charterers have less than 30 or more than 80 running days in all, Sundays and holidays excepted. Held, that 12 running days should be computed as 12 days, one immediately following the other, which included Sundays and holidays. *Crowell v. Barrada*, 82 Mass. (16 Gray) 471, 472.

Where loading or unloading is required by charter party to be within a certain number of days generally, or so many working days, they do not include Sundays or custom house holidays; but the rule is otherwise where the words are "running days." *Field v. Chase* (N. Y.) *Lalor's Supp.* 50, 52.

#### RUNNING LEASE.

Where a lease provided that the tenancy should not be confined to any portion of the land granted, but allowed the tenant the



use of all the land he could clear in his lifetime, it is what in the old books is called a "running lease," as distinguished from one confined to a particular division, circumscribed by metes and bounds, within a larger tract. *Cowan v. Hatcher* (Tenn.) 69 S. W. 689, 691.

### RUNNING LIGHT.

A railroad engine is said to be "running light" when it is not drawing cars. *Galveston, H. & S. A. Ry. Co. v. Nicholson* (Tex.) 57 S. W. 693, 694.

### RUNNING POLICY.

An open or running policy of insurance is defined by 2 Bouv. Law Dict. p. 430, as a policy on which the value is to be proved by the assured. However, by an open policy is sometimes meant in the United States one in which an aggregate amount is expressed in the body of the policy, and the specific amounts and subjects are to be indorsed from time to time. *Corporation of London Assurance v. Paterson*, 32 S. E. 650, 655, 106 Ga. 538.

A running policy is one which contemplates successive insurances, and which provides that the object of the policy may be from time to time defined, especially as to the subject of insurance, by additional statements or indorsements. *Civ. Code Cal.* 1903, § 2597; *Rev. Codes N. D.* 1899, § 4498; *Civ. Code S. D.* 1903, § 1848.

### RUNNING STREAM.

To constitute a running stream of water course, for the obstruction of which an action will lie, there must be a stream usually flowing in a particular direction, though it need not flow continually. It may sometimes be dry. It must flow in a definite channel, having a bed, sides, or banks, and must usually discharge itself into some other stream or body of water. It must be something more than a mere surface drainage over the entire face of a tract of land occasioned by unusual freshets or other extraordinary cause. It does not include the water flowing in hollows or ravines in land, which is the mere surface water from rain or melting snow, and is discharged through them from higher to lower land, but which at other times are destitute of water. Such hollows or ravines are not in legal contemplation water courses for the obstruction of which an action will lie. *Hebron Gravel Road Co. v. Harvey*, 90 Ind. 192, 196, 46 Am. Rep. 199.

### RUNNING SWITCH.

A "running switch" is effected by cutting off a car while a train is in motion, and causing it, while detached from the engine, to

pass on a side track; the locomotion resulting from the momentum acquired by the car while in the train. *Jeffrey v. Keokuk & D. M. R. Co.*, 1 N. W. 765, 767, 51 Iowa, 439; *Pennsylvania R. Co. v. State*, 61 Md. 108, 115.

To make a "running switch," a train approaches with considerable speed, and while so approaching a car to be left is disconnected; the forward part of the train then passes rapidly over the switch, the rear part is somewhat checked, and the intermediate car to be left is switched off; and the switch is replaced in season for the rear part of the train to unite with the front part thereof without stopping. *Brown v. New York Cent. R.*, 32 N. Y. 597, note, 88 Am. Dec. 353.

A "running switch" consists either in detaching the portion of the train to be switched off while the cars are in motion, or when the locomotive, without being coupled, backs up to a car or a portion of a train with considerable speed, and, giving it a parting kick, sends it off in another desired direction. *Baltimore & O. R. Co. v. Kean*, 5 Atl. 325, 328, 65 Md. 394.

The term "running switch," in railroad-ing, means the operation by which, when an engine and cars are in motion, the speed of the one is increased or the other decreased in such a manner that a switch may be thrown and one or the other shunted onto another track, while the other remains on the same track. *Baker v. Kansas City, Ft. S. & M. R. Co.*, 48 S. W. 838, 842, 147 Mo. 140.

A running or flying switch consists in kicking cars forward, in breaking or making up trains, by moving them forward at a rapid speed detached from the engine or from a portion of the train, and then by checking or increasing the speed of the engine, or of such portion of the train, allowing them to fly forward. *Chicago Junction Ry. Co. v. McGrath*, 68 N. E. 69, 70, 203 Ill. 511.

### RUNNING TO A HIGHWAY.

Where a farm is bounded along a highway, or upon a highway, or "running to a highway," there is reason to intend that the parties meant the middle of the highway; but this doctrine does not extend to a case where the courses and distances in a description of land bring it only to the north side of a road, and therefore the land does not extend in such cases to the middle of the highway. *Jackson v. Hathaway* (N. Y.) 15 Johns. 447, 453, 8 Am. Dec. 263; *Witter v. Harvey* (S. C.) 1 McCord, 67, 71, 10 Am. Dec. 650.

General words of description, bounding land "along a highway," or "upon a highway," or as "running to a highway," are expressive of an intention to convey to the middle of the highway; but when, from the description, it is manifest that the parties

intended to restrict the conveyance to the line of the highway or street, no part of the highway or street passes. *Anderson v. James*, 27 N. Y. Super. Ct. (4 Rob.) 35, 37.

## RUNNING WITH THE LAND.

See "Covenant Running with the Land."

## RUPTURE.

The word "rupture" means to break apart, or to separate the parts; and we understand by the expression "rupturing the ligaments," as stated in the notice given a city of injuries received, that the ligaments broke apart or separated. *City of Dallas v. Moore (Tex.)* 74 S. W. 95, 99.

## RURAL.

"Rural," as used in Laws 1847, c. 133, entitled "An act authorizing the incorporation of rural cemetery associations," does not require that the cemetery should hold and use land outside of city limits. The word "rural," it is true, commonly means the country, as separated from the city. The word was manifestly used as descriptive of the picturesque character of the place of burial, rather than as something beyond city boundaries; for there may be and often is, "rus in urbe." *People v. Pratt*, 14 N. Y. Supp. 804, 805, 60 Hun, 582.

"Rural property," as used in a Pennsylvania statute exempting rural property from assessments for street improvements, is to be determined from the character of the locality, the streets, lots, buildings, improvements, and the market value of the property, as also of the neighboring and surrounding properties. Whether the particular property in dispute is to be considered rural or city depends largely upon its surroundings and the character of the property in the neighborhood. If the buildings and improvements in the neighborhood are few and scattered, if they partake of the character of the country, rather than of the city or town, and are occupied by persons engaged in rural pursuits, the locality should be considered rural. On the other hand, if the houses and improvements partake of the character of the city or town, and are mainly occupied by persons engaged in city pursuits, the locality should be considered as city, and not rural. Land which has always been used for farm purposes, either for growing crops or for pasture, and has never been laid out into lots, in some senses, at least, is rural property. *City of McKeesport v. Soles*, 35 Atl. 927, 929, 178 Pa. 363.

## RURAL SERVITUDES.

The principal "rural servitudes" are those of passage, of way, of taking water, of the conducting of water or aqueduct, of watering, of pasturage, of burning brick or lime, and of taking earth or sand from the estate of another. Civ. Code La. 1900, art. 721.

## RUST.

"Rust," as used in bills of lading exempting the carrier from liability for loss or damage resulting from "rust," should be construed in its general sense, and includes the oxidation of zinc. The oxidation of iron produces one kind of rust; the oxidation of zinc, another. Both are equally and truly rust. The term "rust," though most commonly applied to the red or yellowish rust of iron, because iron is in much more familiar use than other metals, includes as part of its definition the oxidation of other metals, as well as of iron. *Wolff v. Vaderland (U. S.)* 18 Fed. 733, 738.

## RUSTICUM FORUM.

The decision by arbitrators is the decision of a tribunal of the parties' own choice and election. "It is a popular, cheap, convenient, and domestic mode of trial, which the courts have always regarded with liberal indulgence. They have never exacted from these unlettered tribunals—this 'rusticum forum'—the observance of technical rule and formality." *Underhill v. Van Cortlandt (N. Y.)* 2 Johns. Ch. 339. While this is true, courts, especially courts of equity, will in proper cases look into and examine the proceedings of arbitrators to a certain extent, and if it is found that in any given case the arbitrators have been guilty of corruption or fraud, partiality, misconduct, or gross or palpable mistake, or excess of power, in making their award, the court will set it aside and declare it null and void. *Dickinson v. Chesapeake & O. R. Co.*, 7 W. Va. 390, 429.

## RUSTICUM JUS.

The application of an equal division of damages, in the event of a collision caused by mutual fault, is said to be the "rusticum jus." Chancellor Kent applies to it that term; that is to say, it is an application of that sense of fair dealing and of justice imbedded in our nature, the conclusions of common sense, of a mind *abnormis sapiens*. *The Victory (U. S.)* 68 Fed. 395, 400, 15 C. C. A. 490.

## S

**SABBATH.**

"Sabbath" and "Sunday" are not strictly synonymous terms—the one signifying Saturday, the seventh day of the week, the Jewish Sabbath, and the other the first day of the week, commonly called the Lord's Day. But by common usage the terms are used indiscriminately to denote the Christian Sabbath; that is, Sunday. *State v. Drake*, 64 N. C. 589, 591.

"Sabbath day" is synonymous with "Sunday" in the legislation of Georgia. *Gunn v. State*, 15 S. E. 458, 459, 89 Ga. 341.

**SABBATH BREAKING.**

The term "Sabbath breaking," in Code, art. 57, §. 11, limiting all actions or prosecutions for Sabbath breaking to one month after the fact, does not apply to the offense of selling lager beer on Sunday. *State v. Popp*, 45 Md. 432, 433.

"Sabbath breaking," is a misdemeanor created by Code, c. 149, pp. 694, 695, §§ 16, 17, providing that if a person on a Sabbath day be found laboring at any trade or calling, or employ his minor children or servants in labor or other business, except in household or other work of necessity or charity, he shall be fined not less than \$5 for each offense; and section 17, providing that no forfeiture shall be incurred under the preceding section for the transportation on Sunday of the mail, or of passengers or their baggage, nor be incurred by any person who conscientiously believes that the seventh day of the week ought to be observed as the Sabbath, and actually refrains from all secular business on that day, provided he does not compel an apprentice or servant not of his belief to do secular work or business on Sunday, or does not on that day disturb any other person. *State v. Baltimore & Ohio R. Co.*, 15 W. Va. 362, 381, 36 Am. Rep. 803.

**SABBATH NIGHT.**

The "Sabbath night" includes the period between midnight preceding the Sabbath and the dawn of Sabbath morning, and is not confined to the period of night or darkness following the Sabbath day. *Kroer v. People*, 78 Ill. 294, 295.

**SACK.**

"Sack," as used in a publication stating that a certain company would donate a large sum of money to corrupt voters, and that a certain person is to have charge of the sack,

signifies a fund in hand to be used for purposes of corruption. *Edwards v. San Jose Printing & Publishing Soc.*, 34 Pac. 128, 129, 99 Cal. 431, 37 Am. St. Rep. 70.

**SACRED THINGS.**

"Sacred things," in the classification of the Spanish civil law, were things which were established for the service of God, and as a consequence of such establishment the dominion of them was not in man, and they could not be counted property. Burial places were religious. Religion was deemed to occupy churches and cemeteries upon their consecration, and could not be separated from them at any time. *Sullivan v. Richardson*, 14 South. 692, 708, 33 Fla. 1.

**SACRIFICE.**

See "Voluntary Sacrifice."

The term "sacrifice," as known to the maritime law as an element justifying general average, is used in the sense of giving up or suffering to be lost for the sake of something else; not in the sense of an immolation. Damages by water poured upon a cargo to extinguish fire is a sacrifice. There was to be sure no manual selection; no separation of the scapegoat from the remainder of the cargo; no particular design to destroy the particular subject. But that is not essential. It suffices if there exists the general design to sacrifice that which would naturally be lost in consequence of the act rendered imperative by the impending peril. The cargo so necessarily destroyed by the act of pouring water upon it for the purpose of extinguishing the fire is in every equitable sense selected for sacrifice. *The Roanoke* (U. S.) 46 Fed. 297, 298.

**SADDLERY.**

"Saddlery," whatever else it may or may not mean, ought to be applied to the trappings of a well horse, a going horse, and not a sick one; and therefore the term, as used in Tariff Act July 24, 1897, c. 11, § 1, Schedule N, par. 447, 30 Stat. 193 [U. S. Comp. St. 1901, p. 1677], fixing a tax on importations of "saddlery," does not include woolen bands intended for use of veterinary surgeons to be applied to lame legs. *Vell v. United States* (U. S.) 113 Fed. 856.

**SÆVITIA.**

See "Cruel."

## SAFE.

## See "Reasonably Safe."

Webster defines "safe" to mean free from danger of any kind, as safe from enemies; safe from disease. *Louisville & N. R. Co. v. Brownlee*, 77 Ky. (14 Bush) 590, 595 (quoting *Webst. Dict.*).

"Safe," as used in *Rev. St. c. 18, § 52*, requiring cities and towns to keep their ways "safe" and convenient for travelers, means reasonably, not absolutely, safe. *Morgan v. City of Lewiston*, 40 Atl. 545, 546, 91 Me. 566.

*Pub. St. c. 65, § 1*, requiring towns to keep their highways so that they will be "safe and convenient" at all seasons of the year, does not mean that they shall be absolutely safe or free from defects, but reasonably so; that is to say, when the traveled way is without obstruction or structural defects which endanger the safety of travelers, and is sufficiently level and smooth to enable persons by the exercise of ordinary care to travel with safety and convenience, it is safe and convenient within the meaning of the statute, and the town has discharged its full duty in the premises. The mere fact that a highway is slippery from the presence of ice or snow thereon so that a person may be liable to slip and fall upon it while in the exercise of ordinary care does not constitute a defect under the statute so as to render the town liable for an injury sustained unless notice shall have been given. *McCloskey v. Moles*, 33 Atl. 225, 226, 19 R. I. 297.

"Safe and convenient," as applied to roads, do not mean entirely safe and entirely convenient, but are to be construed by the jury in a peculiar sense, according to their knowledge and experience in the ordinary transactions of men. *Church v. Inhabitants of Cherryfield*, 33 Me. 460.

"Safe," as used in the statement that employers are bound to furnish safe machinery, safe appliances, safe places to work, etc., does not have an absolute or unqualified meaning, since they would operate to make an employer an absolute insurer of the safety of his employes. The word "safe," as so used, means merely to require the exercise of care with regard to safety. *St. Louis, I. M. & S. Ry. Co. v. Barnett*, 45 S. W. 550, 551, 65 Ark. 255.

A notice of a school meeting in a quiet, rural district, posted on a board six feet long and ten inches wide, fastened in or against the roadside wall, facing the road at the south end of the district, is posted in a "safe and public place," within the requirement of *Pub. St. c. 52, § 5*, notwithstanding the board, being movable, might be thrown down or carried away. *Seabury v. Howland*, 8 Atl. 341, 343, 15 R. I. 446.

"We find, from a review of the authorities, that the word 'safe' and 'care' and 'safe place' are frequently used interchangeably with 'reasonably safe' and 'reasonable care.' 'Safe' and 'unsafe' are words frequently used in comparison by courts in discussing the question of a reasonably safe place, and evidently without any intention of changing the well-established rule of reasonable care or a reasonably safe place." *Gray v. Washington Water Power Co.*, 71 Pac. 206, 208, 30 Wash. 665.

The words "safe and suitable," as used with reference to the duty of the employer to furnish his employé with safe and suitable appliances, mean nothing more than reasonably safe and suitable. *Wall v. Marshutz & Cantrell*, 71 Pac. 692, 694, 138 Cal. 522.

## SAFE AND CLOSE CUSTODY.

To suffer a prisoner to have greater liberty than the law allows is an escape, and prisoners are to be kept "in salva et arcta custodia"; but the question remains what is a safe and close custody. Lord Coke says "that in contemplation of law it is imprisonment where a party is restrained by force or against his will; therefore he that is in the stocks or under lawful arrest is said to be in prison, though he be not in 'infra parietes carceris,' for there may be a prison in law as well as in deed." 2 Inst. 589. There may be an imprisonment either by physical restraint, or by superior force acting as a moral restraint upon the party. Thus a person is not less imprisoned by being in the presence of an officer who has arrested him and restrains the liberty of his action than he would be by a personal detention by imposition of hands or by the application of fetters. Nevertheless there must be an actual or constructive custody or restraint. For example, if a woman is warden of the prison, and marries a person there imprisoned, it is an escape, for the prisoner cannot be imprisoned without a keeper, and he cannot be in the custody of his wife; or if a sheriff be arrested and committed to the county jail it is an escape, for he cannot be imprisoned in a jail of which he is the custodian. This restraint may be exercised by another who is a prisoner, provided that he has the proper authority. It is sufficient if there be a virtual custody by some person having authority from the sheriff, and that this person is himself a prisoner does not affect the case. Under these principles the safe and close custody required from the jailer does not prohibit the jailer from allowing prisoners in execution for debt the liberty of all or of any of the rooms within the walls of the prison. It also follows that where a prisoner is permitted to act, not merely as a turnkey, but to have possession and custody and perform all the duties of

the deputy or an assistant, without any restraint whatever, he cannot be justly deemed in custody, and such proceeding constitutes an escape as to him. *Steele v. Field* (U. S.) 22 Fed. Cas. 1210, 1221.

### SAFE BERTH.

A "safe berth" for anchorage, which a later vessel is required to allow to one previously anchored, means a berth in which, taking into consideration all the exigencies likely to arise, there should be no danger of collision. *The Juniata* (U. S.) 124 Fed. 861, 863.

### SAFE BILLS.

An award of referees for a certain amount of money, payable in "good and safe sterling bills of exchange on England or Holland," means "such bills as would be honored and paid in either of those places by the drawee on using proper diligence and legal means." *Warder v. Whitall*, 1 N. J. Law (Coxe) 84.

### SAFE DISTANCE.

"Safe distance," as used in Rev. St. c. 17, § 23, providing that persons engaged in blasting rocks shall before each explosion give seasonable notice thereof, so that all persons or teams approaching shall have time to retire to a safe distance from the place of the explosion, does not necessarily or probably mean absolutely beyond all sound of the explosion. *Wadsworth v. Marshall*, 34 Atl. 30, 32, 88 Me. 263, 32 L. R. A. 588.

### SAFE-KEEPING.

Where an instrument signed by a depositary, acknowledging that another person has deposited with him for "safe-keeping" a certain number of dollars in gold, which the depositary is to return whenever called for, such phrase implies that there is a special, and not a general, deposit. *Wright v. Paine*, 62 Ala. 340, 344, 34 Am. Rep. 24.

### SAFE MANNER.

A condition in a lease of a coal mine, requiring the lessee to work the mine in a sound, safe, and workmanlike manner, is broken by allowing the mine to fill with water and remain in that condition for months, if the result is injurious to the mine. *Consolidated Coal Co. of St. Louis v. Schaefer*, 25 N. E. 788, 135 Ill. 210.

### SAFE PLACE TO WORK.

What is meant by a "safe place to work" has no reference to the patent or obvious

safety or unsafety of the place, because, in the nature of things, many kinds of labor have to be performed under conditions that are relatively unsafe and oftentimes dangerous. *Harff v. Green*, 67 S. W. 576, 577, 168 Mo. 308; *Fugler v. Bothe*, 22 S. W. 1113, 1119, 117 Mo. 475.

The phrase "safe place to work," within the rule requiring a master to furnish a servant a safe place to work, is necessarily relative, and does not mean a place absolutely free from danger, but means a place that is reasonably safe. *Louisville, E. & St. L. Connecting R. Co. v. Hanning*, 31 N. E. 187, 188, 131 Ind. 528, 31 Am. St. Rep. 443; *Chicago, St. L. & P. R. Co. v. Champion*, 36 N. E. 221, 228, 9 Ind. App. 510, 53 Am. St. Rep. 357.

The duty to furnish a safe place to work, which an express company owes to a servant employed to ride in one of its cars to protect it from robbers, extends only to the construction and equipment of the car; and loading express matter by the express messenger in a negligent and dangerous manner is not a breach of this duty. *Wells, Fargo & Co. v. Page*, 68 S. W. 528, 29 Tex. Civ. App. 489.

### SAFE PORT.

Where it was specified in a charter party that, if the charterers did not have sufficient cargo to load at Kingston, they were to have the privilege of sending the vessel to a second "safe port," the words implied a port which the vessel could enter and depart from without legal restraint and without incurring more than the ordinary perils of the sea. *Atkins v. Fibre Disintegrating Co.* (U. S.) 2 Fed. Cas. 78, 79.

### SAFE RATE OF SPEED.

A "safe rate of speed" of a railroad train is not to be determined by that which had been practiced before with the tacit consent of the community and without accident. No rate could be established consistent with the idea of railroad travel that would be absolutely safe, though it would be as near so as human wisdom and skill could make it. A safe rate of speed on one railroad line is no definite criterion for another, unless the latter is in the same condition as the former. What would be a safe speed on one railroad line might be a very dangerous speed on some others. The alignment and grades of a road, as well as the roadbed, superstructure, and rolling stock, are all to be considered with reference to their perfectness in establishing that highest speed with which it would be safe to run cars over the road. *Cleveland, C., C. & I. Ry. Co. v. Newell*, 75 Ind. 542, 544.

**SAFELY.**

A declaration against a cab proprietor, which stated that plaintiff hired the vehicle, and that defendant undertook to convey him and his luggage "safely and securely" from, etc., meant "safely and securely" with reference to the degree of care which, under the circumstances, the law required of the defendant; that is, that he should use such a reasonable degree of care that the plaintiff should incur no damage or loss through the defendant's default or negligence, and did not import absolute assurance. *Ross v. Hill*, 2 C. B. 877, 890.

A charter party requiring the charterers to order a vessel to a safe port, or as near thereunto as she can "safely get and always lay and discharge afloat," means that she must be ordered to a port where she can safely enter with her cargo, or in which at least there is a safe anchorage, where she can lie and discharge afloat; that is, a place which is a reasonably safe anchorage or a place where it is reasonably safe for the vessel to lie and discharge. Hence a refusal to go to a port which was not so reasonably safe is not a breach of the charter party, though vessels had discharged afloat there. *Meissner v. Brum*, 128 U. S. 474, 484, 9 Sup. Ct. 139, 142, 32 L. Ed. 496.

**SAFELY DELIVERED.**

A salvage contract, by the terms of which no payment for the service rendered was to be made unless the vessel was "safely delivered" in port, means delivered in a safe place, with no impending dangers. "Safely," in such connection, does not mean that the ship is intact, without injury or damage resulting from her voyage. *The Thornley* (U. S.) 98 Fed. 735, 742, 39 C. C. A. 248.

**SAFELY KEEP.**

A bond providing that a bank cashier shall "safely and securely keep" all moneys deposited, etc., should be construed to indicate a contract of bailment, and not to render the cashier and his sureties liable for loss by robbery. *Planters' & Merchants' Bank of Huntsville v. Hill* (Ala.) 1 Stew. 201, 208, 18 Am. Dec. 39.

Comp. Laws 1888, p. 281, § 90, providing that the register of deeds shall have custody of and "safely keep" and preserve all the books, records, deeds, maps, and papers deposited or kept in his office, includes the duty of requiring inspection of such instruments by persons wishing to examine the same, to be made in the presence of the register of deeds. *Cormack v. Wolcott*, 15 Pac. 245, 246, 37 Kan. 391.

**SAFELY PROMISE.**

"Safely," as used in a letter representing that the writer could safely promise that the dealings of the parties, if the other party wished to continue them, would be more satisfactory than the previous season, was apparently used to express inferentially the writer's opinion that his financial ability and prospects justified him in making the promise; he not having promptly paid for goods purchased the preceding season. *Syracuse Knitting Co. v. Blanchard*, 43 Atl. 637, 638, 69 N. H. 447.

**SAFETY.**

See "Personal Safety."

"Safety," as used in a policy of marine insurance from New York to Bremen, with liberty to enter a Dutch port when informed on arriving at that point that it may be done with safety, is general in its nature, and comprehends freedom from danger, not only from the Dutch ports being blockaded and from British cruisers, but likewise from French or Dutch decrees which might operate on the vessel before or after her arrival in such port. *Duerhagen v. United States Ins. Co. (Pa.)* 2 Serg. & R. 309, 314.

**SAFETY GATES.**

"Safety gates" at railroad crossings are something more than warning signals. They are physical hindrances in the way of those seeking to cross the railroad tracks. They substantially differ in both their nature and their office from mere signals. *West Jersey & S. R. Co. v. City of Bridgeton*, 44 Atl. 848, 849, 64 N. J. Law, 189.

**SAGO.**

Sago flour is the first and only form in which the product of the sago palm is known in this country, and is entitled to free entry under Tariff Act July 24, 1897, c. 11, § 2, Free List, par. 652, 30 Stat. 201 [U. S. Comp. St. 1901, p. 1687], as "sago, crude." *Littlejohn v. United States* (U. S.) 119 Fed. 483, 484.

**SAID.**

The word "said" is often used in wills and deeds, etc., to refer to some antecedent provision. *Shattuck v. Balcom*, 49 N. E. 87, 90, 170 Mass. 245.

The word "said," before the word "operation," confines the meaning of the latter to some act antecedently charged. *State v. Stevenson*, 35 Atl. 470, 471, 68 Vt. 529.

"Said" is a word of reference to a name, and it signifies the same persons, etc., be-

fore mentioned, in order to preserve their identity and to exclude the idea of a difference; and hence the use of such word in a declaration as referring to persons before mentioned cannot be held to make a variance. *Antipoea Baptist Church v. Mulford*, 8 N. J. Law (3 Halst.) 182, 190.

"Said proceeds," as used in a mortgage, refers to the word "proceeds" previously used; the word "said" denoting that the word "proceeds," which is limited by it, means the same as the previous word "proceeds," which is referred to by it. *Iowa College v. Fenno*, 25 N. W. 152, 154, 67 Iowa, 244.

A will devised certain property to M. and other property to W., and then provided that if M. should have lawful issue the said property should be equally divided between her lawful issue, and that if she should not have such issue a certain portion of the property devised to her should go to W. Held, that the words "the said property" did not comprise the property devised to W. *Peppercorn v. Peacock*, 3 Man. & G. 356.

Where the first count of an indictment charged the defendant with having assaulted E. R., an infant above the age of 10 and under the age of 12 years, and the second count charged defendant with an attempted assault on the said E. R., the word "said" did not carry with it the averment as to the age, and did not save the second count from being bad on account of omitting the age. *Regina v. Martin*, 9 Car. & P. 215.

As used in Acts 1857, No. 171, providing, first, that certain described territory should be organized into a county, to be known and called B. county, and, second, that the act should be submitted to a vote of the electors of S., M., and A. counties at the township meetings to be held in said county on a certain day, by "said county" is meant the territory included in the first section, and therein called B. county. *People v. Burns*, 5 Mich. 114, 117.

A prayer for relief in a pleading naming no defendants, but reciting merely "said defendant hereinafter named," cannot be construed to include a defendant who had not been previously named in the bill. The words "hereinafter named" ought to be construed as referring only to those previously named, as indicated by the word "said." To construe them as including more is to deny all force to the word "said." *Wheeler & Wilson Mfg. Co. v. Filler*, 28 Atl. 13, 14, 52 N. J. Eq. (7 Dick.) 164.

Where a name has once been properly set out in an indictment, the subsequent reference to it by using the word "said" sufficiently designates the name as set out in the first instance, though there is a variance in

the latter name by a change in the middle initial. *Cubine v. State*, 73 S. W. 396, 397, 44 Tex. Cr. R. 596.

Comp. St. c. 77, § 25, requires the board of education of the city of Omaha to report to the city council an estimate of the amount of funds required for the support of the schools, etc., and declares that the city council is authorized and required to levy and collect "said amount" the same as other taxes. Held, that the term "said amount" referred back to the term "amount required," which meant the necessary amount, and therefore the statute authorized the city council to levy the necessary or required amount for the support of schools, etc., and collect the same in the same manner as other taxes. *State v. City of Omaha*, 58 N. W. 442, 443, 39 Neb. 745.

A grant of one-half of a dam, with the privileges thereunto appertaining "in said proportion," means, among other things, the right to use one-half of the water. *Richards v. Koenig*, 24 Wis. 360, 364.

The provision of a charter, requiring a railroad company to pay an annual tax of one-half of 1 per cent. "upon the cost of said road" in order to secure exemption from other taxation, includes not only the road then building or authorized, but also embraces extensions made under supplements to the charter. *State Board of Assessors v. Morris & E. R. Co.*, 7 Atl. 826, 835, 49 N. J. Law (20 Vroom) 193.

"Said streets," as used in a deed prohibiting the erecting of buildings within "eight feet of said streets" therein mentioned, "has reference to the line of each street as existing at the date of the deed, and is intended to establish a uniform rule, which cannot be affected by the subsequent widening or narrowing of the street by public authority, or by the fact whether a building is erected before or after such alteration of the line." *Tobey v. Moore*, 130 Mass. 448, 451.

#### As referring to next antecedent.

"Said," as used in an entry stating that David Jamison enters 1,000 acres, etc., beginning at Thomas Jamison's second entry, etc., and also 1,000 acres, beginning at "said" Jamison's first entry, etc., should be construed to refer to Thomas Jamison's entry, rather than the entry of David Jamison; the term "said" being a relative word, and to be understood as relating to the next antecedent. *Ellis v. Horine's Devises*, 8 Ky. (1 A. K. Marsh.) 417.

An indictment charging theft from a certain "Mack Brown, with the intent to deprive the said Mack Brown of the value of the same, and appropriate them to the use and benefit of him, the said Mack Brown"

should be construed to mean the Mack Brown named in the indictment as defendant, and not to refer to the person of such name from whom the property was alleged to have been stolen, notwithstanding the latter person was the next preceding substantive. *Brown v. State*, 13 S. W. 150, 151, 28 Tex. App. 379.

The word "said" is often used as a word of reference to what has been already spoken of or specified; and, if there is a question as to which of the antecedent things or propositions specified is referred to, it is generally held to refer to the last of such antecedent propositions or things. *Hinrichsen v. Hinrichsen*, 50 N. E. 135, 136, 172 Ill. 462.

The word "said" in an indictment will be referred to the next antecedent only when the plain meaning requires it. *Wilkinson v. State*, 10 Ind. 372, 373.

Where a particular defendant is last named in a paragraph of a complaint, and in a succeeding paragraph the words "said defendant" are used, without any discrimination, such words will be construed to refer to the defendant last named. *Carver v. Carver*, 97 Ind. 497, 502.

The words "said" and "such," when used by way of reference to a person or thing, shall apply to the same person or thing last mentioned. V. S. 1894, 15.

The words "said" and "such," when used by way of reference to any person or thing, shall apply to the person or thing last mentioned. Pub. St. N. H. 1901, p. 63, c. 2, § 14.

#### As qualifying a representation.

"Said to contain," as used in a conveyance of real estate of a certain description said to contain a certain number of acres, "should be construed to qualify the representation of quantity in such a manner that, if made in good faith, neither party should be entitled to any relief on account of a deficiency or surplus." *Stebbins v. Eddy* (U. S.) 22 Fed. Cas. 1192, 1194.

## SAIL

See "About to Sail"; "Final Sailing"; "Under Sail."  
All sailing, see "All."

An insurance policy requiring the vessel "to sail" by a certain date means to sail on the voyage. *Moir v. Royal Exch. Assur. Co.*, 6 Taunt. 241, 243.

A provision in a charter party requiring freight to be paid when the vessel had sailed construed to require the vessel to actually start on its voyage, and not to be satisfied by leaving the harbor for the purpose of anchoring in the roadstead and lying there until the crew should be completed and the

vessel prepared for sailing. *Thompson v. Gillespy*, 5 El. & Bl. 209, 210.

The least locomotion of a vessel with readiness of equipment and clearance satisfies a warranty "to sail," though the vessel be afterwards detained or drawn back. *Union Ins. Co. v. Tyssen* (N. Y.) 3 Hill, 118, 126.

A ship will be deemed "to have sailed" when she quits her moorings and removes, though only to a short distance, being perfectly ready to proceed upon her voyage, and is by some subsequent occurrence detained; but it is otherwise if, at the time when she quits her moorings and hoists her sails, she is not in a condition for beginning her sea voyage. *Pittigrew v. Pringle*, 3 Barn. & Adol. 514.

"Sail," as used in a policy of insurance by which the time of clearing at the custom house should be deemed the time of sailing, provided the ship was then ready for sea, did not mean that the vessel could clear without being ready for sea, and become ready afterwards; and the vessel having cleared from Dublin on the 31st of August, and dropped down the Liffey on the 1st of September with an incomplete crew to a place within the port of Dublin, where she lay at anchor the rest of the day, during which the remainder of the crew came on board, and on the 2d of September the vessel proceeded, she did not actually sail until after the 1st of September. *Graham v. Barras*, 5 Barn. & Adol. 1011.

The word "sailed," in a contract to pay a certain sum on a ship being loaded and sailed, is not satisfied by the vessel raising her anchor and going outside the bar with the captain on board, without any intention to return into port, but before the proper clearance papers had been obtained, and when there is no present intention to commence the voyage. *Hudson v. Bilton*, 6 El. & Bl. 565, 569.

Goods were insured at and from Demerara to London, in ship or ships warranted to sail from Demerara on or before the 1st of August, 1823. Small ships take in and discharge the whole of their cargoes in the river of Demerara, but there is a shoal off the coast about 10 miles out at sea, and large ships usually discharge and take in part of their cargoes on the outside of the shoal. The goods covered by the policy were laden on board a small vessel that completed her cargo in the river, and on the 1st of August, the captain having obtained his clearances, set sail, proceeded down the river and about two miles out to sea, and then anchored; the tide being low. On the 3d of August, he crossed the shoal, and on the 8th the vessel was lost by perils of the sea. Held, that the vessel sailed from Demerara on the 1st of August within the meaning of the policy, and that



the warranty was thereby satisfied. *Lang v. Anderson*, 3 Barn. & C. 495.

The words "to sail on or before a given date" by common usage import the same as the words "conditioned to sail" or "warranted to sail"; and where, in a memorandum of charter, it was agreed that a vessel should proceed to Trieste, and there load and proceed to a port in the United Kingdom, the vessel to "sail on or before the 4th of February next," the sailing on or before February 4th was a condition precedent. *Glaholm v. Hays*, 2 Man. & G. 257, 267.

A vessel was chartered from the owner and captain for a season in consideration of a certain sum and a share of the earnings. The owner and captain were to place the vessel at the disposal of the charterers, etc., and the captain was to "sail her himself," attend to the collection of freights, etc. Held, that the phrase "sail her himself" meant, not only that he was to command her, but that he was to employ the crew as the agent of the owner, and that hence the owner was liable to seamen employed by the captain for their wages. *Sheriffs v. Pugh*, 22 Wis. 273, 278, 94 Am. Dec. 600.

#### SAIL ON SHARES.

A statement that the master "sails a vessel on shares" implies that he fully controls the management of the vessel for the time being. *Marshall v. Boardman*, 35 Atl. 1024, 1025, 89 Me. 87, 56 Am. St. Rep. 392.

#### SAIL VESSELS.

"Sail vessels," as used in Rev. St. § 4233, rule 8 [U. S. Comp. St. 1901, p. 2895], requiring sail vessels to carry colored lights, etc., does not include barges that have neither sails nor masts. *United States v. Miller* (U. S.) 26 Fed. 95, 98.

In the rules for preventing collisions at sea every steam vessel which is under sail and not under steam is to be considered a sailing vessel, and every vessel under steam, whether under sail or not, is to be considered a steam vessel. The words "steam vessel" shall include any vessel propelled by machinery. U. S. Comp. St. 1901, pp. 2863, 2876, 2886, 2893.

#### SAIL WITH CONVOY.

A "convoy" is an association for a hostile object. In undertaking it, a nation spreads over the merchant vessel an immunity from search which belongs only to a national ship; and by joining a convoy every individual ship puts off her pacific character, and undertakes for the discharge of duties which belong only to the military marine, and adds to the numerical, if not to

the real, strength of the convoy. *The Atlanta*, 16 U. S. (3 Wheat.) 409, 423, 4 L. Ed. 425.

A warranty in a policy of insurance to "sail with convoy" meant only that it would leave the port and sail with the convoy without any willful default in the master. Therefore, if by default of the master the ship is separated and taken, the insurers are not liable. *Jeffries v. Legandra*, 2 Salk. 443. (Note. In the report of this case in 3 Lev. it is said that the words "to depart with convoy" extend to sail with convoy for the whole voyage, and the same was ruled accordingly in *Lilly v. Ewer*, Doug. 73, 74.)

A warranty in a policy of insurance to "sail with convoy and arrive" does not mean that the ship shall arrive in the company of the convoy, but only that she herself shall arrive. *Simond v. Boydell*, Doug. 268, 271.

#### SAILOR.

The words "pensioner," "soldier," and "sailor," as used in the chapter relating to state and military aid and soldiers' relief, shall be held to include a commissioned officer. Rev. Laws Mass. 1902, p. 702, c. 79, § 4.

The word "sailor," as used in the chapter relating to state and military aid and soldiers' relief shall be held to include a marine. Rev. Laws Mass. 1902, p. 702, c. 79, § 4.

#### SALABLE UNDERWOOD.

Firs and larches planted with oaks for the purpose of sheltering the latter, and cut from time to time as the oaks grew larger and required more space, but, when once cut, not growing again, are not "salable underwood" within St. 43 Eliz.; the primary object of planting them being to protect the oaks, and not to derive a profit from them per se by sale. *Rex v. Inhabitants of Ferrybridge*, 1 Barn. & C. 375.

#### SALARY.

See "Annual Salary"; "Fixed Salary"; "Stated Salary."

Worcester defines "salary" to mean an annual or periodical payment for services; a stipulated periodical recompense; a stipend; wages. *School Com'rs of City of Indianapolis v. Wasson*, 74 Ind. 133, 142 (quoting Worcester Dict.).

Webster defines the word "salary" to be the recompense or consideration stipulated to be paid to a person for services; annual or periodical wages or pay; hire. School

Com'rs of City of Indianapolis v. Wasson, 74 Ind. 133, 142 (quoting Webst. Dict.).

Salary is a fixed compensation, which is paid at stated times. *Dane v. Smith*, 54 Ala. 47, 50.

A reward or recompense for services performed. The term is usually applied to the reward paid to a public officer for the performance of his official duties. *Fidelity Ins. Co. v. Shenandoah Iron Co.*, 42 Fed. 372, 376; *Fidelity Ins., Trust & Safe Deposit Co. v. Shenandoah Valley R. Co.*, 9 S. E. 759, 762, 86 Va. 1, 19 Am. St. Rep. 858.

The term "salary" means a reward or recompense paid for personal services. As applied to a public officer, it means the compensation paid him for his personal services in the discharge of the duties of his office. It does not include money paid out to others as expenses in performing the duties of the office. *Windmiller v. People*, 78 Ill. App. 273, 276.

The recompense or consideration stipulated to be paid to a person for services, usually a fixed sum to be paid by the year, as to governors, magistrates, clergymen, instructors of seminaries, or other officers, civil or ecclesiastical. *People v. Myers*, 11 N. Y. Supp. 217, 218, 25 Abb. N. C. 368 (citing Webst. Dict.).

"Salary" signifies the periodical compensation due to men in official and other situations. The word is derived from "salarium," which is from the word "sal" (salt); that being an article in which the Roman soldiers were paid. *Cowdin v. Huff*, 10 Ind. 83, 85; *Martin v. Santa Barbara County*, 38 Pac. 687, 688, 105 Cal. 208. See, also, *Indianapolis School Com'rs v. Wasson*, 74 Ind. 133, 142.

"Salaries" are the rewards paid to public officers out of public funds for official services rendered to the public. In the ordinary and popular sense, a salary is a certain fixed and periodical remuneration for services. *Commonwealth v. Bailey*, 3 Ky. Law Rep. 110, 114 (quoting Stormouth, Dict.).

Tomlinson, in his Law Dictionary, defines "salary" to be a recompense or consideration made to a person for his pains and industry in another man's business, and according to such definition the compensation of \$100 given to a superior court judge for services in holding special courts, to be paid by the commissioners of the county in which the courts are held, is a part of his salary. *Buxton v. Rutherford County Com'rs*, 82 N. C. 91, 95.

"Salary" is a compensation for services rendered. It is the periodical payment of a certain value, in money, for work and labor done. The provision of the Declara-

tion of Rights, commanding the Legislature to secure to the chancellor and judges their salaries, must have been predicated on the capacity of the state to effect the security required. If no revenue could be raised in money, no "salary" could be paid in money; and if the money or the circulating medium of the country had no value, or a value continually fluctuating, and which it was impossible to ascertain, it would be impossible to fix and secure a salary of any value to any officer. A salary, given to or which has become legally vested in a chancellor or judge, cannot, during the continuance of his commission, be in any way constitutionally withheld or diminished. *In re Chancellor (Md.)* 1 Bland, 595, 596.

#### As annual compensation.

Salaries are the per annum compensation to men in official and some other situations. *Seller v. State*, 65 N. E. 922, 927, 160 Ind. 605.

"Salary" is defined to be a periodical allowance made as compensation to a person for his official and professional services, or for his regular work. "Salary" is regarded as a per annum compensation. A public officer paid by fees is not the recipient of a salary. *Henderson v. Koenig*, 68 S. W. 72, 75, 168 Mo. 356, 57 L. R. A. 639.

"Salary," as used in an amended city charter giving the mayor a salary, no compensation having been previously given, means a per annum compensation which is apportionable. *City of Montpellier v. Senter*, 47 Atl. 392, 393, 72 Vt. 112.

"Salary," as used in a statute providing that certain officials whose compensation was fixed at a salary and not by commission should have power, etc., means a fixed sum which is received as compensation for a certain length of time; and, though the time or service for which he is to receive the fixed sum is not expressly stated, the fact that he was elected annually is sufficient to make his compensation a salary. *Castle v. Lawlor*, 47 Conn. 340, 344.

#### As equivalent to compensation.

See, also, "Compensation."

While the term "salary" in its original and strict sense signifies a fixed compensation, it is frequently used in our Constitution and laws as the equivalent of "compensation." *Martin v. Santa Barbara County*, 38 Pac. 687, 688, 105 Cal. 208 (citing *Kirkwood v. Soto*, 87 Cal. 394, 396, 25 Pac. 488).

#### Clerk hire.

"Salary," as used in Sp. Laws 1878, c. 216, fixing the salaries of certain offices in Ramsey county, includes necessary clerk

hire. *Beaumont v. Ramsey County*, 19 N. W. 727, 728, 32 Minn. 103.

"Salary," as used in Laws 1871, c. 90, relating to the salary of the county auditor, includes all the compensation which a county auditor is entitled to receive under the provisions of the act, including an allowance for clerk hire. *Bruce v. Dodge County Com'rs*, 20 Minn. 388, 389 (3 Gil. 339, 340).

The word "salary," as used in an order of the county board fixing the compensation of the county clerk, means a compensation for his personal services as an official, and does not include a sum advanced him or moneys paid out by him for clerk hire. *People v. Adams*, 65 Ill. App. 283, 286.

#### Commissions.

"Salary," as used in Act April 15, 1945, providing that the wages of any laborer or the salary of any person in public or private employment shall not be liable to attachment in the hands of the employer, does not include a factor's or broker's commissions. *Hamberger v. Corr*, 27 Atl. 681, 682, 157 Pa. 133, 37 Am. St. Rep. 719.

#### As compensation for personal services.

"Salary," as used in Laws 1895, p. 77, § 4, providing that the sheriffs of the several counties shall receive an annual salary, means the compensation prescribed to be paid to a public officer for the personal discharge of the duties enjoined upon him by law. *Houser v. Umatilla County*, 49 Pac. 867, 868, 30 Or. 486 (citing *Jackson v. Siglin*, 10 Or. 93; *Pugh v. Good*, 19 Or. 85, 23 Pac. 827; *Marion County v. Lear*, 108 Ill. 343).

#### Compensation in profits.

The term "salary," as used in Rev. Civ. Code, art. 3191, authorizing preferences to be granted by an insolvent to the salaries of clerks, secretaries, and other persons of that kind, meant regular particular liquidated sums paid to persons for services rendered, and did not include profits which a person contracted to receive in consideration for his services in selling goods for another; he being also compelled to bear one-half the losses. *Brierre v. His Creditors*, 9 South. 640, 641, 43 La. Ann. 423.

"Salary," as used in Rev. Civ. Code, art. 3191, granting a privilege in cases of insolvency in favor of the salaries of clerks, secretaries, and other persons of that kind, does not include the remuneration of a person engaged under a contract to make sales of goods dealt in by a firm in a particular state, with the agreement that he shall receive one-half the profits and bear one-half the losses of the business done. *Brierre v. His Creditors*, 9 South. 640, 641, 43 La. Ann. 423.

#### Contract of employment implied.

In a vote of a school board in a city which employed from 40 to 45 permanent janitors, by which a certain person was employed as substitute janitor at a "salary" of \$9 a week, the word "salary" implied a contract of employment, whether the substitute janitor actually worked or not. *Davis v. City of Fall River*, 29 N. E. 202, 203, 155 Mass. 96.

#### Fees distinguished.

"Salary" denotes a recompense or consideration to be paid a public officer for continuous, as contradistinguished from particular, services, and may be denominated annual or periodical wages or pay. *Cowdin v. Huff*, 10 Ind. 83. So that "salary" and "wages" are often treated as synonymous; but the terms "salary" and "fees" are not held to be synonymous, since fees indicate compensation or recompense for particular acts or services. *Landis v. Lincoln County*, 50 Pac. 530, 31 Or. 424.

Salary is strictly an agreed compensation for service payable at regular intervals; but a more liberal meaning is frequently given to the word, and its synonyms are "stipend," "hire," "wages," "pay," and "allowance." Hence, where a warrant was issued for the salary of the treasurer, who was paid in fees and commissions, it will be held to have been used in such sense, and the warrant was not, therefore, illegal. *San Juan County Com'rs v. Oliver*, 44 Pac. 362, 363, 7 Colo. App. 515.

#### As fixed by time of service.

Salary is sometimes used to denote compensation paid for a particular service; but as used in Const. art. 11, § 8, providing that the Legislature shall fix the compensation by salaries of all county officers, it meant a payment depending on the time, and not on the amount, of the service rendered by the officer. *Cox v. Holmes*, 44 Pac. 262, 14 Wash. 255 (citing *Thompson v. Phillips*, 12 Ohio St. 617; *State v. Barnes*, 3 South. 433, 24 Fla. 29).

The salary of a county auditor includes all the compensation which a county auditor is entitled to receive, as used in Laws 1871, c. 90, providing that the salary of the county auditor shall be regulated by the value of taxable property in their respective counties, etc. *Bruce v. Dodge County Com'rs*, 20 Minn. 388, 389 (Gil. 339, 341).

Salary is a fixed annual or periodical payment for services, depending upon the time, and not upon the amount, of service rendered. *Thompson v. Phillips*, 12 Ohio St. 617; *Landis v. Lincoln County*, 31 Or. 424, 427, 50 Pac. 530; *Dane v. Smith*, 54 Ala. 47, 49; *State v. Barnes*, 24 Fla. 29, 33, 8

South. 433; *Castle v. Lawlor*, 47 Conn. 340, 345; *Commonwealth v. Butler*, 99 Pa. 535, 542.

It is payable in sickness as well as in health, and for duties more onerous in some instances than others; so that a sum payable to district judges in case they hold a certain term of court, and which is not paid unless the term is held by them, is not a part of their salary. *Benedict v. United States*, 20 Sup. Ct. 458, 459, 176 U. S. 357, 44 L. Ed. 503.

"Salary" is defined to mean annual or periodical recompense or pay, and applies in ordinary language to those holding official positions. It depends on holding title to the office, and not on the services rendered. *Cane v. Mayor*, 34 N. Y. Supp. 675 (citing *Sullivan v. Gilroy*, 55 Hun, 285, 8 N. Y. Supp. 401; *Gorden v. Jennings*, 9 Q. B. Div. 45).

#### As fixing time of employment.

"Salary," as used in a telegram to "come on at once at a salary of two thousand, conditional only upon satisfactory discharge of business," may indicate an intent to fix the time of employment at a single year or at a term of years; one construction being just as consistent as the other, as used in a telegram. *Palmer v. Marquette & P. Rolling Mill Co.*, 32 Mich. 274, 276.

#### Per diem.

"Salary," as used in Laws 1870, c. 408, § 9, providing that Justices of the Supreme Court shall receive, in addition to a stated salary, a per diem allowance of \$5 per day for their reasonable expenses when absent from home and engaged in holding any general or special term, does not include the per diem. *People v. Wemple*, 5 N. Y. Supp. 495, 497, 52 Hun, 414.

Compensation of a public officer, fixed by a provision that each member of the board, who is present during the entire session of any regular meeting and not otherwise, shall be entitled to receive \$5 for his attendance, is not "salary," within the meaning of Const. art. 2, § 20, providing that the General Assembly shall fix the term of office and compensation of all officers, but that no change therein shall affect the salary of any officer during his existing term. *Gobrecht v. City of Cincinnati*, 36 N. E. 782, 51 Ohio St. 68, 23 L. R. A. 609.

#### As prospective scale of salary.

The words "salary or compensation," in Greater New York Charter, § 283, providing that the salary or compensation of officers who become members of the police force through consolidation shall not be decreased as the same is lawfully fixed at the time this charter takes effect and immediately

prior thereto, is not synonymous with the phrase "prospective scale of salary," and therefore does not assure to a police officer his prospective scale of compensation according to the grading of a force to which he belonged at the time he became a member of the municipal force, but only preserved his right to the pay which he is actually receiving when transferred to the municipal force. *People v. York*, 60 N. Y. Supp. 795, 796, 29 Misc. Rep. 158.

#### Repayment of money expended.

The term "salary," of itself, imports a compensation for personal services, and not the repayment of moneys expended in the discharge of the duties of an office. *Sniffen v. City of New York*, 6 N. Y. Super. Ct. (4 Sandf.) 193, 196.

"Salary," as defined by Webster, is fixed regular wages, as by the year, quarter, or month, and when used in connection with a public officer, must be taken to embrace the fixed, regular wages by the year, quarter, or month, as established by public authority for such public officer as his compensation of wages earned by such officer by the discharge of the duties of his office; and, where an officer's compensation is fixed by statute as a certain specified salary, such officer cannot claim payment of traveling expenses incurred in traveling from place to place in discharge of the duties of his office. *Houser v. Orangeburg County*, 37 S. E. 831, 832, 59 S. C. 265.

#### Wages distinguished.

Webster defines "wages" to be hire or reward, that which is paid or stipulated for services, but chiefly for services for manual labor. We speak of servants' wages, laborers' wages, etc., but we never apply the word to rewards given to men in office, which are called fees or salary. *People v. Myers*, 11 N. Y. Supp. 217, 218, 25 Abb. N. C. 368; *Cane v. City of New York*, 34 N. Y. Supp. 675.

Salary is the compensation given to a hired person for service, and is a synonymous, convertible term with "wages," though use and acceptance have given to the word "salary" a significance somewhat different from the word "wages," in this: that the former is understood to relate to position or office—to be the compensation given for official or other services as distinguished from wages, the compensation for labor. *Bell v. Indian Live Stock Co. (Tex.)* 11 S. W. 344, 346, 3 L. R. A. 642.

"Salary," as used in Laws 1888, c. 119, providing that no honorably discharged Union soldier or sailor receiving a salary shall be removed, except for cause shown, denotes a higher degree of employment, and is suggestive of a larger compensation for

more important services, than "wages," which indicates inconsiderable pay. *Meyers v. City of New York*, 23 N. Y. Supp. 484, 486, 69 Hun, 291; *People v. Brookfield*, 34 N. Y. Supp. 674, 13 Misc. Rep. 566. So that a laborer working for \$2 per day will not be held to be receiving a salary, within the provisions of Laws 1892, c. 577, providing that no person receiving a salary shall be discharged, except for cause shown after hearing had. *People v. Brookfield*, 34 N. Y. Supp. 674, 13 Misc. Rep. 566 (citing *Meyers v. City of New York*, 69 Hun, 291, 23 N. Y. Supp. 484).

Salaries of public officers are not exempt from garnishment under statutes exempting wages. *McLellan v. Young*, 54 Ga. 399, 400, 21 Am. Rep. 276.

The salary of a public officer is in no fair sense of the word "wages." *People v. Myers*, 11 N. Y. Supp. 217, 218, 25 Abb. N. C. 368.

#### Wages synonymous.

According to most lexicographers, the words "wages" and "salary" are synonymous. They both mean one and the same thing—a sum of money periodically paid for services rendered. *Commonwealth v. Butler*, 99 Pa. 535, 542; *Morse v. Robertson*, 9 Hawaii, 195, 197.

There is no substantial difference, says Mr. Freeman in his work on Executions, between the term "wages" and "salary," when they are applied to the subject here under consideration. The former term is commonly used to denote the compensation of laborers, and the latter that of other persons of more permanent employment and more elevated stations. The term "earnings" is more comprehensive than either of the others. It implies, as they do, that the sum due shall be claimed for the personal services of the claimant, and that it shall not include, to any substantial extent, recompense for materials furnished; but earnings need not result from work done under the direction of another, nor from manual labor. *Dayton v. Ewart*, 72 Pac. 420, 421, 28 Mont. 153, 98 Am. St. Rep. 549.

"Salary," as used in Const. art. 2, § 8, providing that members of the General Assembly shall receive such salary as shall be fixed by law, and no other compensation whatever, should be construed as synonymous with "wages." *Commonwealth v. Butler*, 99 Pa. 535, 542.

"Salary" is synonymous with "wages," and means the sum of money periodically paid for services rendered, and it is immaterial how the value of these services is ascertained. *White v. Hayden*, 59 Pac. 118, 121, 126 Cal. 621.

## SALE.

See "Absolute Sale"; "Bargain and Sale"; "Bill of Sale"; "Cash Sale"; "Certificate of Sale"; "Conditional Sale"; "Contract of Sale"; "Executed Sale"; "Execution Sale"; "Fair Sale"; "Forced Sale"; "Gross Sales"; "Intended for Sale"; "Judicial Sale"; "Net Sales"; "Notice of Sale"; "Order of Sale"; "Positive Sale"; "Private Sale"; "Sheriff's Sale"; "Tax Sale"; "Valid Sale." See, also, "Sold."

Expose for sale, see "Expose."

A sale, as defined by Blackstone, is a transmutation of property from one man to another in consideration of some price or recompense in value. *Barrow v. Window*, 71 Ill. 214, 217; *People v. Law & Order Club*, 67 N. E. 855, 857, 203 Ill. 127, 62 L. R. A. 884; *Butler v. Thomson*, 92 U. S. 412, 414, 23 L. Ed. 684; *Buffum v. Merry* (U. S.) 4 Fed. Cas. 604, 605; *Iowa v. McFarland*, 4 Sup. Ct. 210, 219, 110 U. S. 471, 28 L. Ed. 198; *Cain v. Ligon*, 71 Ga. 692, 694, 51 Am. Rep. 281; *Ott v. Sweatman*, 31 Atl. 102, 109, 166 Pa. 217; *Commonwealth v. Williams*, 72 Mass. (6 Gray) 1, 9; *State v. Hopkins*, 49 N. C. 305, 307; *Madison Ave. Baptist Church v. Baptist Church in Oliver St.*, 46 N. Y. 131, 139.

A sale is a transfer of the absolute or general property in a thing for money or anything of value. Where the property purporting to be sold is so separated as to be fully identified and distinguished from other property of like kind, and the price is certain, or by the terms of the agreement can be ascertained by measurement and inspection, the payment of any part of the price as earnest money, or by note in lieu of it, or the delivery of the property, postponing the settlement until the quantity can be definitely determined, makes the sale complete. *Albemarle Lumber Co. v. Wilcox*, 105 N. C. 34, 38, 10 S. E. 871.

A sale is a contract for the transfer of property from one person to another for a valuable consideration. *Micks v. Stevenson*, 51 N. E. 492, 493, 22 Ind. App. 475 (citing 2 Kent, Comm. 468); *Cain v. Ligon*, 71 Ga. 692, 694, 51 Am. Rep. 281; *Iowa v. McFarland*, 4 Sup. Ct. 210, 219, 110 U. S. 471, 28 L. Ed. 198; *Butler v. Thomson*, 92 U. S. 412, 414, 23 L. Ed. 684; *Ott v. Sweatman*, 31 Atl. 102, 109, 166 Pa. 217; *Id.*, 15 Pa. Co. Ct. R. 97, 113; *Schermerhorn v. Talman*, 14 N. Y. (4 Kern.) 93, 117; *Edwards v. Farmers' Fire Ins. & Loan Co.* (N. Y.) 21 Wend. 467, 493, 494; *Western Massachusetts Ins. Co. v. Riker*, 10 Mich. 279, 281; *Vincent v. Walker*, 9 South. 382, 384, 93 Ala. 165; *Roberson v. State*, 14 South. 554, 555, 100 Ala. 37; *Bennett v. Sims* (S. C.) Rice, 421, 423; *State v. Peo* (Del.) 42 Atl. 622, 623, 1 Pennewill, 525. That is, for current money of the United

States. *United States v. Ash* (U. S.) 75 Fed. 651, 652. This is its popular, as well as its legal, signification. There must be parties standing to each other in the relation of buyer and seller, their minds must assent to the same proposition, and money must be paid or promised. *Ward v. State*, 45 Ark. 351, 353.

A sale is the transmutation of property for a pecuniary consideration. *Williamson v. Berry*, 49 U. S. (8 How.) 495, 544, 12 L. Ed. 1170; *Darnall v. Morehouse* (N. Y.) 36 How. Prac. 511, 521.

The usual and ordinary definition of the word "sale" is the transfer of the absolute or general property in a thing for a price in money. *Cone v. Iverson*, 33 Pac. 31, 33, 4 Wyo. 203; *De Bary v. Souer* (U. S.) 101 Fed. 425, 427, 41 C. C. A. 417; *Allen v. Maury*, 66 Ala. 10, 17; *Foley v. Felrath*, 98 Ala. 176, 180, 13 South. 405, 486, 39 Am. St. Rep. 39; *Wittkowsky v. Wasson*, 71 N. C. 451, 455; *Williamson v. Berry*, 49 U. S. (8 How.) 495, 544, 12 L. Ed. 1170; *State v. Wingfield*, 22 S. W. 363, 365, 115 Mo. 428, 37 Am. St. Rep. 406; *Peycke Bros. v. Aherns*, 72 S. W. 151, 152, 98 Mo. App. 456; *Cain v. Ligon*, 71 Ga. 692, 694, 51 Am. Rep. 281; *Krnavek v. State*, 41 S. W. 612, 614, 38 Tex. Cr. R. 44; *People v. Law & Order Club*, 67 N. E. 855, 857, 203 Ill. 127, 62 L. R. A. 884; *Ross v. Portland Coffee & Spice Co.*, 71 Pac. 184, 186, 30 Wash. 647; *State v. Peo* (Del.) 42 Atl. 622, 623, 1 Pennewill, 525.

The word "sale" has a fixed legal signification, and means an exchange of goods or property for money paid or to be paid. *Meyer v. Rousseau*, 2 S. W. 112, 113, 47 Ark. 460; *Cooper v. State*, 37 Ark. 412, 418; *Hatfield v. State*, 36 N. E. 664, 9 Ind. App. 296.

A sale is a contract, an agreement, a meeting of the minds of two or more persons founded on a money consideration, by which absolute or general property in the subject of the sale is transferred from the seller to the buyer. *White v. Treat* (U. S.) 100 Fed. 290, 291.

"The word 'sale' is defined to be an agreement by which one of the contracting parties, called the 'seller,' gives a thing and passes a title to it in exchange for a certain price in current money to the other party, who is called the 'buyer,' or 'purchaser,' who on his part agrees to pay such price. Anything short of passing a title is but an agreement to sell." *Eldridge v. Kuehl*, 27 Iowa, 160, 173.

"A sale, in the ordinary sense of the word, is a transfer of property for a fixed price in money or its equivalent." *Iowa v. McFarland*, 4 Sup. Ct. 210, 214, 110 U. S. 471, 28 L. Ed. 198.

By the common law a sale of personal property is usually termed a "bargain and sale." *State v. Wingfield*, 22 S. W. 363, 365, 115 Mo. 428, 37 Am. St. Rep. 406.

In *Benj. Sales*, § 1, it is said: "To constitute a valid sale, there must be a concurrence of the following elements, viz.: (1) Parties competent to contract; (2) mutual consent; (3) a thing, the absolute or general property in which is transferred from the seller to the buyer; and (4) a price in money paid or promised." *Matthews v. Freker*, 57 S. W. 262, 265, 68 Ark. 190; *Keaton v. State* (Tex.) 36 S. W. 440; *Butler v. Thomson*, 92 U. S. 412, 414, 23 L. Ed. 684; *Martin v. State*, 59 Ala. 34, 36.

A sale is an executed contract by which the right of property is transferred from the seller to the buyer. *Cleu v. McPherson*, 14 N. Y. Super. Ct. (1 Bosw.) 480, 487.

"Sale" is a word of precise legal import. It means at all times a contract between parties to give and to pass rights of property for money, which the buyer pays or promises to pay to the seller for the thing bought and sold. *Williamson v. Berry*, 49 U. S. (8 How.) 495, 544, 12 L. Ed. 1170; *Union Stockyards & Transit Co. v. Western Land & Cattle Co.* (U. S.) 59 Fed. 49, 53, 7 C. C. A. 600; *Homan v. State* (Tex.) 51 S. W. 237, 238; *Huthmacher v. Harris' Adm'rs*, 38 Pa. (2 Wright) 491, 498, 80 Am. Dec. 502; *Mensingher v. Steiner-Medinger Co.* (Neb.) 94 N. W. 633, 634; *Coombs v. Steere*, 8 Ill. App. (8 Bradw.) 147, 150.

A sale is the passing of the title and possession of any property for money which the buyer pays or promises to pay. *People v. Law & Order Club*, 67 N. E. 855, 857, 203 Ill. 127, 62 L. R. A. 884 (citing *Krnavek v. State*, 38 Tex. Cr. R. 44, 41 S. W. 612).

A sale is a transfer of property from one person to another in consideration of a sum of money to be paid by the vendee to the vendor. It is a transfer of the absolute or general property of a thing for a price in money. *Goodwin v. Kerr*, 80 Mo. 276, 281 (citing *Benj. Sales*, 1).

A sale is a mutual agreement, constituted by an offer to sell on terms by one side and an acceptance by the other, and the acceptance must be responsive to the very terms stated in the offer. *Jackson v. Butler*, 51 S. W. 1095, 1097, 21 Tex. Civ. App. 379.

A sale of a chattel is a transfer of the property in it for a consideration. It is ordinarily effected by the delivery of the thing sold to the buyer and the delivery of the price or a security therefor to the seller. The transfer of the property in the thing is effected by the transfer of the thing itself to the possession of the purchaser. *Steph-*

*ens v. Gifford*, 20 Atl. 542, 543, 137 Pa. 219, 21 Am. St. Rep. 868.

"Sale" is defined by statute in South Dakota as a contract by which, for a pecuniary consideration called the "price," one transfers to another an interest in property. The word itself implies the transfer of an interest in the subject of the contract. *Brooke v. Eastman* (S. D.) 96 N. W. 699, 701.

The word "sale," as used in Acts 1879, c. 166, prohibiting the sale of cotton between sunset and sunrise, must be construed to include everything necessary to its consummation; the offer to sell being the initial move, and a deposit for a sale being an offer to sell. *Truss v. State*, 81 Tenn. (13 Lea) 311, 313.

A sale is a contract by which for a pecuniary consideration, called a "price," one transfers to another an interest in property. Civ. Code Cal. 1903, § 1721; Rev. Codes N. D. 1899, § 3948; Civ. Code S. D. 1903, § 1299.

The taking of orders or the making of agreements or contracts by any person, firm, or corporation, or by any agent or representative thereof, for the future delivery of buckwheat flour, shall be deemed a "sale," within the meaning of the act to prohibit and prevent adulteration, fraud, and deception in the manufacture of buckwheat flour. Comp. Laws Mich. 1897, § 4999.

#### Actual transfer of property.

The word "sale" imports an actual transfer of title, and though it may be used to signify a mere contract to sell, yet in strictness it denotes only an actual transmission of property. *Marts v. Cumberland Mut. Fire Ins. Co.*, 44 N. J. Law (15 Vroom) 478, 481.

"It is essential to a sale that there should be a transfer of the absolute or general property in the thing sold. A mere transfer of a special property is not a sale of the thing," and therefore a contract for the payment of the price of property in installments, title not to pass until the last installment is paid, does not constitute a sale. *Mansfield v. Strauss*, 68 N. Y. Supp. 682, 683.

A "sale," in the legal import of the word, implies a transferring of property from the seller to the buyer for a price, and includes, not only the idea of divesting the seller of title, but that of vesting it in the buyer. In this sense the sale can be only to the party who, on the sale and by reason of it, becomes the owner of the thing sold. *State v. Wentworth*, 35 N. H. 442, 443.

#### Mutual assent.

To the completion of a contract of sale there must be the mutual assent of the par-

ties to its terms. Such mutual assent cannot exist unless the terms are definite. The thing sold must be ascertained. Until the specific thing is agreed on the agreement can only be executory. *Wittkowsky v. Wasson*, 71 N. C. 451, 455.

In addition to the necessity for a price, there must be the assent of the parties that the transaction shall be a sale. This must be an express agreement, or such an implication must follow from the nature of the transaction itself. The mere transfer of possession, without the agreement, express or implied, that such transfer is a sale on the one hand and a purchase on the other, will not be a sale, or have the effect to transfer the title. *Borland v. Nevada Bank of San Francisco*, 33 Pac. 737, 738, 99 Cal. 89, 37 Am. St. Rep. 32.

The word "sale" necessarily imports concurrence or agreement. It shows a contract between parties. *Thornton v. Kelly*, 11 R. I. 498, 500.

#### Clear and unincumbered title.

A "sale" ordinarily implies that the vendee shall have a clear and unincumbered title; and, unless it is otherwise agreed, a mortgage, judgment, or other incumbrance should be discharged by the vendor. *McNeil v. Miller*, 2 S. E. 335, 337, 29 W. Va. 480.

#### Consideration.

Under a complaint charging the defendant with the offense of selling intoxicating liquor to a minor without proper authority, proof of a gift of such liquor to the minor will not support a conviction, since the "selling" of intoxicating liquor is one offense, and the "giving" of it to him another. *Birr v. People*, 113 Ill. 645, 649.

A sale of intoxicating liquor is a delivery upon compensation made or stipulated to be made. There must be an agreement to pay, to make it a sale; otherwise, it is a mere gratuity. *Commonwealth v. Packard*, 71 Mass. (5 Gray) 101, 103.

The word "sale," in Const. art. 16, § 20, providing that the Legislature shall enact a law whereby the qualified voters of any county, etc., may from time to time determine whether the sale of intoxicating liquors shall be prohibited within the prescribed limits, means the transfer for valuable consideration, and cannot be held to include a gift, which signifies a gratuitous transfer without any equivalent. *Holley v. State*, 14 Tex. App. 505, 512.

Where a trust deed, executed in consideration of an absolute transfer of an interest in certain property to the trustee, stated that, though the conveyance was "absolute and unconditional," yet it was on the conditions and for the trusts afterwards mention-

ed, and then prescribed that, in case the beneficiary survived the trustee, the latter's heirs should "sell and convey" the property to the beneficiary, the word "sell" did not imply a valuable consideration other than what had passed. *Smith v. Baxter*, 49 Atl. 1130, 62 N. J. Eq. 209.

Among the requisites to the validity of a sale is mentioned the price paid or to be paid. *Madison Ave. Baptist Church v. Baptist Church in Oliver St.*, 46 N. Y. 131, 139.

#### Same—Money.

To sell property is, in the strict signification of the word "sell," to transfer it from one to another in consideration of a price paid or agreed to be paid in current money. *Commonwealth v. Davis*, 75 Ky. (12 Bush) 240, 241. When the consideration is not in money, there must be a fixed money price. *Mensinger v. Steiner-Medinger Co.* (Neb.) 94 N. W. 633, 634 (citing *Schenck v. Saunders*, 79 Mass. [13 Gray] 37, 41).

In *Benj. Sales*, § 1, it was said that "sale" may be defined to be the transfer of the absolute or general property in a thing for a price in money, and in section 2 it is observed, in considering the price, that it must be in money paid or promised, accordingly as the agreement may be for cash or a credit sale, but, if any other consideration than money is given, it is not a sale. *Coulter v. Portland Trust Co.*, 26 Pac. 565, 568, 20 Or. 469.

A delivery of intoxicating liquors as payment for a service performed is a sale, within the meaning of the statute prohibiting the unlawful sale of such liquor. *Mason v. Lothrop*, 73 Mass. (7 Gray) 354, 358.

In a general and popular sense, the sale of an article signifies the transfer of its possession from one person to another for a consideration of value, without reference to the mode in which this consideration is paid; and it was in this sense that the Legislature used the word in the statute restricting the sale of intoxicating liquor. The legal distinction between a sale and an exchange is purely an artificial one, the rules of law are the same as applied to both, and obtaining liquor by barter is a sale within the provisions of the statute. *Howard v. Harris*, 90 Mass. (8 Allen) 297, 299.

The payment of employes in tobacco at cost price is technically a sale, within *Rev. St. 3244* [U. S. Comp. St. 1901, p. 2096], requiring a special tax to be paid on sale of tobacco. *United States v. Vinson* (U. S.) 8 Fed. 507.

Every transfer of property for an equivalent is practically and essentially a sale, and money's worth is a valuable consideration for a sale, as much as the money itself. *Huff v. Hall*, 23 N. W. 88, 89, 56 Mich. 456.

Where an agent has a power of attorney to sell real estate, he is not authorized under it to make a rate of part money and part something else. *Hampton v. Moorhead*, 17 N. W. 202, 203, 62 Iowa, 91.

The word "sale," as used in the Georgia local option act relating to the offense of selling intoxicating liquor, means a contract between parties to give and to pass rights of property for money, which the buyer pays or promises to pay to the seller for the thing bought and sold, and applies to a transfer of the title of intoxicating liquors pursuant to a contract between the parties to pass the right of property to the seller for the thing bought and sold. We do not rule that there can be no sale except for money. *Cunningham v. State*, 31 S. E. 585, 586, 105 Ga. 676.

The statutory authority to county commissioners to order an election to determine whether or not the sale of intoxicating liquors shall be prohibited in a county is not an authority to order an election to determine whether or not the sale, exchange, or barter of such liquor shall be prohibited. The term "exchange or barter" of such liquor, used in the order, is not synonymous with "sale." *Ex parte Beaty*, 1 S. W. 451, 452, 21 Tex. App. 426.

A sale is a contract between two parties to give and pass rights of property for money, which the buyer pays or promises to pay according as the agreement may be for a cash or credit sale; but, if any other consideration than money be given, it is not a sale. The idea of a consideration of money or its equivalent is a necessary element of sale, as opposed to a barter and exchange or gift; and the contract cannot be construed to include a grant of land to a railroad company in aid of the construction of its road. *Northern Pac. R. Co. v. Sanders* (U. S.) 47 Fed. 604, 606.

To sell is to transfer property from one to another in consideration of a price paid or agreed to be paid in current money. *Labaree v. Klosterman*, 49 N. W. 1102, 1106, 33 Neb. 150; *Madison Ave. Baptist Church v. Baptist Church in Oliver St.*, 46 N. Y. 131, 139.

"Sell and convey," as used in a power to sell and convey, means, in the absence of evidence to the contrary, to "sell and convey for cash." *Mora v. Murphy*, 23 Pac. 63, 83 Cal. 12.

"Sell," as used in Act Feb. 3, 1875, p. 129, § 1, providing that any person who shall sell, barter, or exchange, or otherwise dispose of, any property upon which a lien shall exist by virtue of a mortgage or deed of trust, or by contract of parties, or by operation of law, without the consent of the person in whose favor such lien exists, shall be punished, etc., means an exchange of goods



or property for money paid or to be paid. *Cooper v. State*, 37 Ark. 412, 415.

"Sell" means transfer of property in exchange for money or security for money. *Brown v. Fitz*, 13 N. H. 283, 284.

"Sell," as the word is used when speaking of the selling of property, means to transfer from one to another in consideration of a price paid or agreed to be paid in current money. *Commonwealth v. Davis*, 75 Ky. (12 Bush) 240, 241.

Where the power conferred on an agent was to bargain, sell, and convey land, the agency was clearly special, and was confined to selling and conveying the land; there being no directions or instructions beyond the selling and conveying, and the doing of such things as might be necessary to carry out the power. Under this power the agent had no right to sell and convey for any other consideration than for money. *Lumpkin v. Wilson*, 52 Tenn. (5 Heisk.) 555, 558.

#### **Delivery.**

A delivery is one of the elements of a sale. *Commonwealth v. Williams*, 72 Mass. (6 Gray) 1, 9.

In ordinary parlance, when we speak of a "sale" of goods, the term imports a delivery, and an affidavit in attachment averring the sale of goods is not insufficient on the ground that no delivery was averred. *Hamilton v. Steck*, 5 N. Y. Supp. 831, 832.

A sale is defined to be a transportation of property from one man to another in consideration of some price or recompense in value. A delivery is an inseparable incident to all sales. *Parker v. Donaldson* (Pa.) 2 Watts & S. 9, 19.

A sale is an executed contract, to constitute which delivery in fact or in law is indispensable; and it cannot be given of a thing which has not fully come into existence. Where a customer, for instance, orders a coach to be made for him, the order cannot be executed by delivery of an unfinished coach, which is no coach at all; and until the work is finished and delivered it remains at the risk of the manufacturer. The vendee of a manufactured article, to be delivered when completed, electing to take it in its unfinished state, makes a new contract; and, possession being delivered thereunder, the title is complete as against the creditors of the vendor, whose executions at the time of such delivery had not been left with the sheriff. *Clemens v. Davis*, 7 Pa. (7 Barr) 263, 264.

A sale imposes an obligation to deliver a commodity and receive money for it, and, if not discharged, a liability to respond in damages for its breach results. Act 1874, relating to limited partnerships and providing that no association organized thereunder

shall incur a liability exceeding \$500 in amount, unless reduced to writing and signed by at least two of the managers, refers to contracts for the sale of goods, as well as to contracts for purchase. *Pittsburgh Melting Co. v. Reese*, 118 Pa. 355, 362, 12 Atl. 362.

A sale is not constituted by mere agreement to sell, but there must be a delivery, though payment need not actually be made. On the trial of an indictment for illicit traffic in liquors, proof of an agreement to sell is therefore insufficient; but there must be proof of an actual delivery of the liquors; though there need not be proof of payment, as a sale on credit is as much a violation of the law as a sale for cash. *Riley v. State*, 43 Miss. 397, 414.

Plaintiffs and defendants, competitors in the sale of saccharin, entered into a contract whereby plaintiffs became agents for defendants' article, which was patented, and were to receive 50 cents on each pound sold until such letters patent should expire, and, should the patent be infringed or defendants lose control of the market, they were to have the right to terminate the contract; but it should be again enforced on defendants being reinstated in such exclusive control. Defendants lost control of the market for a time, and during such period sold a number of pounds of the saccharin, the greater portion of which was not delivered until they had been reinstated in exclusive control. Held, that the word "sale," in the contract, did not refer only to an executed sale, and plaintiffs were not entitled to recover for such sales. *Fries v. Merck*, 60 N. E. 777, 778, 167 N. Y. 445.

Where, in a negotiation for the purchase of a yoke of oxen, the prospective buyer, having his arm over one of them, in the act of measuring him, said he would give the price demanded, and the seller replied that he might have them, the latter then borrowing them to haul a load of lumber to his home, 10 miles distant, engaging to put them to no other use, there was no delivery, and no completed sale, but only a contract for a sale. *Phillips v. Hunnewell* (4 Me.) 4 Greenl. 376, 379.

An absolute present sale of chattels is valid between the parties, without delivery of possession or payment of the price, and the seller is entitled to the price and the purchaser to the possession of the chattels; but as to subsequent purchasers without notice from the seller, or his creditors, the non-delivery of possession renders the sale *prima facie* void as a matter of law, calling on the purchaser to show clearly the sale to be bona fide. *Poling v. Flanagan*, 41 W. Va. 191, 193, 23 S. E. 685.

#### **Deed or conveyance.**

A sale of lands "is the actual transfer of title from the grantor to the grantee by

appropriate instrument of conveyance." *Ide v. Leiser*, 24 Pac. 695, 10 Mont. 5, 24 Am. St. Rep. 17.

A sale is the transfer of property from one to another, and in the case of lands a conveyance is the instrument by which such transfer or sale is made. There can be no perfect sale or alienation of land without a conveyance. An averment in a pleading, therefore, that lands were sold, is equivalent to an averment that they were sold by deed of conveyance, and a denial of the conveyance is in effect a denial of the averment of sale. *Stanton v. Henderson*, 1 Ind. (1 Cart.) 69, 71.

#### **Transfer of fee required.**

The word "sale," as used in Const. art. 10, § 8, declaring that provision shall be made for the sale of all the school and university lands after they shall have been appraised, and when any portion of such land shall be sold, and the purchase money shall not be paid at the time of the sale, the commissioners shall take a mortgage for the land sold for the sum remaining unpaid, is used in its restricted sense to denote a transaction where the fee to the land sold passes out of the state and becomes absolutely vested in the purchaser. The sale contemplated by the Constitution, and intended to be regulated by it, was a sale in the absolute sense of the term, where and by which the purchaser became completely vested with the legal title to the land sold; and when that took place, and the money was not all paid at the time, then the commissioners were to take security by way of a mortgage. *Smith v. Mariner*, 5 Wis. 551, 581, 68 Am. Dec. 73.

#### **As absolute sale.**

An allegation in a petition that defendant, contrary to the provisions of plaintiff's mortgage on certain sheep, "sold and disposed of all of such sheep," must be construed to mean that the sale was an absolute sale of the entire property in the sheep, as distinguished from the sale of the qualified, limited property therein which the mortgagors possessed. *Cone v. Iverson*, 35 Pac. 933, 935, 4 Wyo. 203.

#### **As conferring authority to execute necessary instruments.**

"Sell," as used in reference to the employment by an owner of a real estate agent or broker to sell lands, means to procure a purchaser for them, and does not confer authority to bind the owner to sell by a contract in writing. *Scull v. Brinton*, 37 Atl. 740, 55 N. J. Eq. 489; *Armstrong v. Lowe*, 18 Pac. 758, 76 Cal. 616.

"Sell," as generally used in instruments authorizing agents to sell realty, confers authority to execute the proper instruments re-

quired by law to carry such sale into effect. *Farnham v. Thompson*, 26 N. W. 9, 11, 34 Minn. 330, 57 Am. Rep. 59.

Authority to a real estate agent to sell land authorizes him to execute a contract of sale. *Carstens v. McReavy*, 25 Pac. 471, 472, 1 Wash. St. 359.

Authority given to an agent to make sale of land includes authority to execute a binding contract for such sale in the name of the principal. *Keim v. Lindley*, 80 Atl (N. J.) 1063, 1073.

In construing 2 Rev. Laws 1813, p. 212, § 11, providing that upon the application of a religious corporation it shall be lawful for the court to make an order for the sale of any real estate of such corporation, the court said: "It will be seen that the section referred to authorizes the court to make an order for the sale, and not for a sale and conveyance. A sale without a conveyance would be absolutely ineffectual to pass title to real property; and the use, therefore, of the word 'sale' only, in the statute, would seem to indicate that it was intended to give to the word a signification sufficiently broad to include conveyance. An agreement to sell always implies an agreement to convey as a necessary means of transfer to complete the sale, and an agreement to convey implies a sale agreed upon, which needs only a conveyance to consummate it." *Madison Ave. Baptist Church v. Baptist Church in Oliver St.*, 26 N. Y. Super. Ct. (3 Rob.) 570, 588.

#### **As conferring authority to receive purchase money.**

An authority to an agent to sell a certain farm gives only authority to sell, and raises no implication of authority to receive the purchase money. *Stewart v. Wood*, 63 Mo. 252, 255.

#### **As averment of commission of crime.**

"Sell" does not carry with it, in its ordinary meaning, the impression conveyed by the word "steal," so that a statement that, if he continues to "sell," etc., will not be held to imply stealing. *Grand v. Dreyfus*, 54 Pac. 389, 390, 122 Cal. 58.

"Take, drive, and sell," in their usual sense, denote innocent action, and hence, as used in a statement, standing alone, that "he took and drove off my ducks and sold them," without any averment, do not import the commission of a crime, so as to render the words slanderous per se. *Hinesley v. Sheets*, 48 N. E. 802, 803, 18 Ind. App. 612, 63 Am. St. Rep. 356.

#### **As applied to coin or currency.**

The word "sell," as applied to coin or bank notes, is to deliver in exchange for something else, and is equivalent to the

word "pass," "exchange," or "deliver." *State v. Watson*, 65 Mo. 115, 119.

"Sell," as used in Rev. St. § 5430 [U. S. Comp. St. 1901, p. 3671], making it an offense for any person, except under authority of the proper officer, to have in his possession any obligation or other security engraved and printed for a similitude of any obligation or other security issued under the authority of the United States, with intent to sell or otherwise use the same, is intended to cover the transfer of the imperfect obligations as they come from the plates, and not their passage or utterance as counterfeit instruments. *United States v. Barrett* (U. S.) 111 Fed. 369, 373.

#### **Abandonment distinguished.**

See "Abandon—Abandonment."

#### **Accord and satisfaction distinguished.**

A sale is defined to be an agreement by which one of two contracting parties, called the seller, gives the thing and passes the title to it for a certain price to a purchaser, and it differs from accord and satisfaction, because the thing given in accord and satisfaction is for the purpose of quieting a claim, and not for a price. *Frost v. Erath Cattle Co.*, 17 S. W. 52, 54, 81 Tex. 505, 26 Am. St. Rep. 831.

#### **Agreement to sell distinguished.**

The distinction between a sale, which transfers the ownership, and an agreement to sell and deliver at a day certain, which gives but an action for the breach of it, is a broad one. Every agreement for a subsequent delivery is essentially executory. *Strong, Deemer & Co. v. Dinniny*, 34 Atl. 919, 921, 175 Pa. 586.

A sale is the transfer of the absolute or general property in a thing for a price in money. If anything remains to be done by either party to the action before delivery, as, for example, to determine the price, quantity, or identity of the thing sold, the title does not vest in the purchaser, and the contract is merely executory. *Foley v. Felrath*, 13 South. 485, 486, 98 Ala. 176, 39 Am. St. Rep. 39; *Allen v. Maury*, 66 Ala. 10, 17.

When a sale is defined as a transfer of the absolute title to property for an agreed price, or as a meeting of minds by which a title passes from one and vests in another, the definition covers or includes the entire transaction, which, from being executory, has become executed by delivery or payment on performance of conditions, or separation or identification and appropriation of the thing sold, or other acts or events on which the transfer of title is, by the agreement of the parties, made to depend. In the *Century Dictionary* "sale" is defined as follows: "In law, a contract for the transfer

of property from one person to another for a valuable consideration. \* \* \* It is also often used as indicating a present transfer, as distinguished from a contract to transfer at a future time, which is sometimes termed an 'executory sale.'" *Barber Asphalt Pav. Co. v. Standard Asphalt Co.*, 58 N. Y. Supp. 405, 408, 39 App. Div. 617.

If the title passes, a sale is absolute and complete; if not, it is merely executory or an agreement to sell. In *Pars. Cont.* p. 435, it is said: "All that is necessary on the sale of a chattel is the agreement of the parties that the property in the subject-matter shall pass from the vendor to the vendee for a consideration given or promised by the vendee." *Newcomb v. Cabell*, 78 Ky. (10 Bush) 460, 468.

An agreement to sell does not become a sale, if any term in which the seller must co-operate, or which imposes a liability or duty on him, remains to be performed, such as weighing, measuring, inspecting, and transporting goods to another place, to be there delivered and received. Things not in esse, actual or potential, cannot be subject of sale. *Robinson v. Hirschfelder*, 59 Ala. 503, 506.

To constitute a sale the parties must mutually assent that the property, absolute or general, in the thing sold, shall pass from the vendor to the vendee. A contract which confers on the party proposing to buy a right to inspect, examine, and reweigh the cotton within a specified time, and, on payment or tender of the price within a specified time, to demand a transfer of the ownership and possession, and also confers on the seller a corresponding right to demand such inspection, examination, and reweighing within the prescribed time, is not a sale, but an executory agreement for a sale, and does not pass the title to the cotton to the purchaser. *Leigh v. Mobile & O. R. Co.*, 58 Ala. 165, 174.

The distinction between a sale, which transfers the ownership, and an agreement to sell and deliver at a day certain, which gives but an action for the breach of it, is a broad one. Every agreement for a subsequent delivery is essentially executory. *Strong, Deemer & Co. v. Dinniny*, 34 Atl. 919, 921, 175 Pa. 586.

#### **Assignment distinguished.**

The distinctions between an assignment and a sale are too marked to be misunderstood. Sales are transfers in the ordinary course of business. Assignments commonly grow out of the embarrassments or suspension of business. A sale is usually for a consideration actually paid or agreed to be paid and created or passing simultaneously. An assignment is in most cases for a consideration already executed, as for a precedent or subsisting debt. A voluntary as-

assignment for the benefit of creditors implies a trust and contemplates the intervention of the trustee. Hence a creditor, undertaking under an agreement with the assignor to sell the property and to apply the proceeds to the payment of his own and other debts of his assignor and refund the surplus, becomes a trustee, and the transaction amounts to a voluntary assignment. *Stout v. Watson*, 24 Pac. 230, 232, 19 Or. 251.

The essential elements of an assignment are that there shall be an ample transfer of the property of the debtor to another in trust for the payment of creditors, with either an express or an implied provision that the surplus, if any, shall be returned to the assignor. A mortgage is the transfer of the property of a debtor as security for the payment of one or more obligations, with a condition expressed or implied that on payment of the debt the title reverts to the mortgagor. A sale is an absolute transfer of the property to the vendee. Much of the language used in an instrument belonging to one of these classes will be found in the others, and the court must determine in each instance the real intent of the party, in order to determine which is intended. *Smith-McCord Dry Goods Co. v. Carson*, 52 Pac. 880, 882, 59 Kan. 295.

Sales are transfers in the ordinary course of business. Assignments commonly grow out of the embarrassments or suspension of business. A sale is usually for a consideration, actually paid or agreed to be paid, and created or passing simultaneously. An assignment is in most cases for a consideration already executed, as for a precedent or subsisting debt. An important distinction between the two modes of transfer arises out of the character of a trust, which belongs to an assignment. A sale is, on delivery of the thing sold and receipt of the consideration, a complete transaction, passing absolutely and irrevocably all the seller's interest in the subject of it, without reversion or return under any circumstance. An assignment is likewise an absolute conveyance, by which the legal and equitable estate is divested out of the grantor; but the title vested in the assignee is subject to the uses and trusts in favor of the creditors. *Burrill*, Assignm. § 4. It is not essential, however, that a trustee should be named as such in the instrument; and when the creditor undertakes, under an agreement with the assignor, to sell the property and apply the proceeds to the payment of his own and other debts of the assignor, and refund the surplus, he becomes a trustee, and the transaction amounts to a voluntary assignment. *Burrill*, Assignm. § 3. A sale has been generally distinguished from an assignment by the absence from it of the trust element which is essential to assignments. In a sale of property there is a fixed price, but no

trust, while in an assignment there is a trust, and no fixed value given to the property. 3 Am. & Eng. Enc. Law, p. 13. There is a broad and well-defined distinction between a general assignment for the benefit of creditors and a deed or bill of sale. The former is a transfer by a debtor of his property to another, in trust to sell and convert into money and distribute the proceeds among his creditors, and it implies a trust, and contemplates the intervention of a trustee. The others import an absolute sale and transfer of the title, to be held and enjoyed by the purchaser without any attending trust. *Tompkins v. Hunter*, 149 N. Y. 117, 43 N. E. 532. A general assignment, in its ordinary legal significance, means an assignment by a debtor, transferring all his property in general terms to an assignee in trust for all his creditors. A written instrument from a debtor to a creditor, purporting to be a bill of sale of all the debtor's property, which is worth more than the creditor's claims, and which states that the property is sold in consideration of the indebtedness due the creditor and to secure other creditors, is not a bill of sale, but an attempted assignment for the benefit of creditors. *Young v. Stone*, 70 N. Y. Supp. 558, 560, 61 App. Div. 364.

Sales are transfers in the ordinary course of business, usually for a consideration actually paid or agreed to be paid; while an assignment commonly grows out of the embarrassment or suspension of business, and is in most cases for a consideration already executed, as for a precedent debt. *Knoxville Mantel & Cabinet Co. v. Coon*, 61 Mo. App. 151, 154.

The word "sale," as used in Gen. St. p. 1058, § 121, declaring that if, after the conveyance of any land sold for taxes, it shall be discovered or adjudged that the same was invalid, the county commissioners shall cause the money on the sale and all subsequent taxes and charges paid thereon by the purchaser or an assign to be refunded, with interest on the whole amount at a specified rate per annum, does not relate to and include the subsequent assignment of a tax sale certificate by the county clerk, but merely refers to the original sale of land made by the county treasurer. *Sapp v. Brown County Com'rs*, 20 Kan. 243, 248.

#### **Bailment distinguished.**

A recognized distinction between bailment and sale is that, when the identical article is to be returned in the same or in some altered form, the contract is one of bailment, and the title to the property is not changed; on the other hand, when there is no obligation to return the specific article, and the receiver is at liberty to return another thing of value, he becomes a debtor to make the return, the title to the property is changed, and the transaction is a sale.

**Lafin & Rand Powder Co. v. Burkhardt**, 97 U. S. 110, 116, 24 L. Ed. 973. An assignment of goods to the care of another, to be shipped to a foreign country and there sold to the best advantage, any loss resulting from sale below the invoice price to be borne by consignors, and profits in excess thereof to be equally divided, consignee to bear expenses of shipment and to return free of charge any goods not sold, is not a contract of sale or return, but a bailment. **Sturm v. Boker**, 14 Sup. Ct. 99, 104, 150 U. S. 312, 37 L. Ed. 1093.

The distinction usually drawn between a bailment and a sale is that in the former the subject of the contract, although possibly in an altered form, is to be restored to the owner, while in the latter there is no obligation to return a specific thing; the party receiving being at liberty to return some other thing of equal value for it. To meet the apparent exigencies of commerce the rule was somewhat extended in **Sexton v. Graham**, 53 Iowa, 181, 4 N. W. 1090, so that where grain is stored with the understanding that it may be mixed with other grain of like quality and kind, and the warehouseman may buy and mix his own therewith, and ship and sell therefrom, the owner does not lose his title to his proportionate share of the grain, even though the identity of the entire mass has changed through additions and subtractions. **Backus v. Lawbaugh** (Iowa) 86 N. W. 298, 299.

The distinction between bailment and sale is not difficult of ascertainment, if due regard be had to the elements peculiar to each. In bailment the identical thing delivered is to be restored. In a sale there is an agreement, express or implied, to pay money or its equivalent for the thing delivered, and there is no obligation to return. **Sturm v. Boker**, 150 U. S. 312, 14 Sup. Ct. 99, 37 L. Ed. 1093. The bailee may, however, by contract enlarge his common-law liability without converting the bailment into a sale. The test would seem to be: Has the lender the right to compel the return of the thing lent, or has the receiver the option to pay for the thing in money? In *re Galt* (U. S.) 120 Fed. 64, 67, 56 O. C. A. 470.

If property be delivered to another under a contract that another thing shall be returned, there is a sale, while, if the identical thing itself is to be returned, it is a bailment. **Marsh v. Titus** (N. Y.) 6 Thomp. & C. 29, 31.

Where one agrees with another to send him goods for the latter to sell or return, it is often difficult to determine whether the contract constitutes a sale or a bailment. The contract may not constitute a sale, but be a bailment, with an option on the part of the bailee to buy, or it may be a sale, with an option on the part of the vendee

to return the goods; such a contract being termed a "contract of sale or return." An option to purchase if he like is essentially different from an option to return a purchase if he should not like. In one case the title will not pass until the option is determined; in the other, the property passes at once, subject to the right to rescind and return. **Hunt v. Wyman**, 100 Mass. 198. If the owner of goods deliver them to another, with the understanding that there is to be no sale until the happening of a certain condition, this is a bailment, and the title does not pass until the condition happens. If the goods be delivered with the understanding that under certain circumstances the vendee may return them, this is a conditional sale, and title immediately passes, although under the contract the vendee may have the right to rescind and return the goods. In the one case the condition is precedent; in the other, subsequent. Under a contract of sale or return the title passes, and remains in the vendee until the option to return is exercised. A bailee with an option to purchase does not become a purchaser until he exercises such option. **Furst Bros. v. Commercial Bank**, 43 S. E. 728, 729, 117 Ga. 472.

Where grain is stored in an elevator warehouse, with the understanding that it may be sold by the warehouseman and that, when the depositor shall surrender the receipt, the warehouseman will give the highest market price, or the same amount of grain of a like quality, but not the identical grain, the transaction is a "sale," and not a bailment. Viewed in the light of the uniform course of business, the contract is not one of bailment proper, but one (*mutuum*) where the property passes to the mutuary or receiver, and is delivered to him for his own use or consumption, and where he is not bound to return the identical article in its original or altered shape, but property of the same kind and value, in which case it is a sale, and the receiver becomes a debtor for the stipulated return. That this is a correct view is expressly adjudged in **South Australian Ins. Co. v. Randell**, L. R. 3 P. C. 109; **Loneragan v. Stewart**, 55 Ill. 44; **Stearns v. Raymond**, 26 Wis. 74; **Rahilly v. Wilson** (U. S.) 20 Fed. Cas. 179, 181.

It is well settled that where a warehouseman has received grain on deposit for its owner in a common granary, where it is mingled with other grain in such receptacle, to which from day to day other grain of various owners of like kind and quality is added, and from which from time to time sales of grain are made, and the warehouseman keeps constantly on hand grain of the quality received, prepared for delivery on call to all depositors, the contract is a bailment and not a sale. **Potter v. Mt. Vernon**

Roller Mill Co., 73 S. W. 1005, 1006, 101 Mo. App. 581.

#### **Bargain distinguished.**

"To sell" means to transfer a thing in consideration of a price paid or agreed to be paid in current money, while a bargain is where the consideration, instead of being payable in money, is made in goods or merchandise. *Commonwealth v. Davis*, 75 Ky. (12 Bush) 240, 241.

#### **Barter distinguished.**

A sale is an exchange of goods or property for money paid or to be paid, as distinguished from barter, which is an exchange of one commodity or article of property for another; an exchange of goods; a commutation; transmutation or transfer of goods for other goods. *Coker v. State*, 8 South. 874, 875, 91 Ala. 92.

An exchange or a barter has a different legal import from a sale. Where one commodity is exchanged for another of the same or a different kind, without agreement as to the price or reference to money payment, the transaction is not a sale, but a barter or exchange. *Gillan v. State*, 2 S. W. 185, 186, 47 Ark. 555.

A sale differs from barter in this: that in a barter the consideration, instead of being money, is paid in goods or merchandise susceptible of a valuation, while a sale is a transfer of property from one to another in consideration of a price paid or agreed to be paid in current money. *Labaree v. Klosterman*, 49 N. W. 1102, 1106, 33 Neb. 150.

"Barter" is a transaction where goods are exchanged for goods, it being immaterial whether the goods exchanged are of the same kind and quality, or of an entirely different species, or whether mutual delivery is had contemporaneously with the making of the contract, or delivery by one is made then and delivery by the other is to occur afterwards. "Barter" differs from "sale," in that a barter is always of goods for goods, while a sale is of goods for money or for money and goods; there being in the sale a fixed price, while in the barter there is not. *Jenkins v. Mapes*, 41 N. E. 137, 138, 53 Ohio St. 110.

A sale is confined to a subject coming from a single side. It has no relation to or dependence on any other subject. The evidence of possession taken of it is therefore confined to the single subject, and if not taken in a reasonable time, or so as to make it doubtful whether it is contributable to the contract, the parol sale is not taken out of the statute. It differs from an exchange, in that the latter necessarily has a subject on each side which stands related to the other. One is the representative of the other, so much so that the law implies a con-

tract of warranty by the act of exchanging. In order that equity will decree specific execution of a parol sale of lands, possession must be taken in pursuance of the contract, improvements made, and the purchase money paid, in whole or in part; nor must the vendee abandon his possession. *Jermyn v. McClure*, 45 Atl. 938, 950, 195 Pa. 245. "Barter" means an exchange of one article for another, but the question of price does not necessarily enter into the transaction, and in that respect a barter differs from a sale, and the exchange imports a consideration. *Forkner v. State*, 95 Ind. 406.

"Barter" is a contract by which parties exchange one commodity for another. It differs from a sale, in that the latter is a transfer of goods for a specified price, payable in money. *Speigle v. Meredith* (U. S.) 22 Fed. Cas. 910, 911; *Hatfield v. State*, 36 N. E. 664, 9 Ind. App. 296.

A sale is defined by Bouvier as an agreement by which one man gives a thing for a price in current money. This differs from a barter or exchange in this: that in the latter the price understood as being paid in money is paid in goods or merchandise, susceptible of a valuation. *Madison Ave. Church v. Baptist Church in Oliver St.*, 46 N. Y. 131, 139.

#### **Discount distinguished.**

See "Discount."

#### **Pledge distinguished.**

The essential difference between a power to sell and a power to pledge is stated as follows: "It is manifest that, when a man is dealing with other people's goods, the difference between an authority to sell and an authority to mortgage or pledge is one which may go to the root of all motives and purposes of transaction. The object of a person who has goods to sell is to turn them into money; but, when those goods are deposited by way of security for money borrowed, it is a transaction of a totally different character. If the owner of the goods does not get the money, his object and purpose are simply defeated; and if, on the other hand, he does get the money, a different object and different purpose are substituted for the first, namely, that of borrowing money and contracting the relation of debtor with a creditor, while retaining a redeemable title to the goods, instead of exchanging the title to the goods for a title, unaccompanied by any indebtedness, to their full equivalent in money." *Allen v. St. Louis Nat. Bank*, 7 Sup. Ct. 460, 462, 120 U. S. 20, 30 L. Ed. 573 (citing *City Bank v. Barrow*, 5 App. Cas. 664, 670).

#### **Exchange.**

An averment of a contract of sale is not supported by proof of an exchange, since the words "sale" and "exchange" express

legally different transactions. *Vall v. Strong*, 10 Vt. 457, 465.

The word "sale," in law, has a well-defined meaning, and trustees empowered to sell real estate are not authorized to exchange it for other. *Chapman v. Hughes*, 58 Pac. 298, 301, 134 Cal. 641.

Code Civ. Proc. § 2348, authorizing the sale of an infant's land, does not authorize an exchange. *Moran v. James*, 45 N. Y. Supp. 537, 20 Misc. Rep. 235.

A sale, within the meaning of Ann. Code, § 1038, relating to the sale of mortgaged personal property without disclosing existence of the mortgage, does not apply to a case where such property is exchanged for other personal property and money does not pass; for the word "sale" technically means a contract between parties to give and pass rights and property for money, and the statute, being penal, must be construed strictly. *State v. Austin (Miss.)* 23 South. 34.

Where defendant sold pastboard checks, and then accepted such checks in exchange for beer, there was a sale of beer. *Billingsley v. State*, 11 South. 408, 96 Ala. 114.

St. 1855, c. 215, § 15, providing that if any person shall directly or indirectly, on any pretense or by any device, sell, or in consideration of the purchase of any other property give, to any person any spirituous or intoxicating liquor, he shall be subject to certain penalties, should be construed to include an exchange of intoxicating liquors by a distiller for grain from which to distill such liquor, whether the liquor be delivered at the time of receiving the grain or afterwards. *Commonwealth v. Clark*, 80 Mass. (14 Gray) 367, 372.

A count, in an information for the sale of intoxicating liquors contrary to law, which charges the defendant with selling and exchanging such liquors, is not bad for duplicity, though it be admitted that a sale and exchange are essentially different transactions, and cannot be regarded as successive stages of the same transaction. The intention of the Legislature was to prevent the disposition of liquor for a consideration. Hence an exchange, as well as sale, is in terms prohibited. The intention of the pleader is equally plain to charge one transaction and one only, there is but one time and one place, and we think it was intended to charge but one act; but whether that act was a sale for cash, or a sale in a broader sense by way of exchange, the pleader, not knowing, alleged that it was both, so that proof of either would sustain the charge. *State v. Teahan*, 50 Conn. 92, 99.

"Sale" and "exchange" are used interchangeably in the law, and mean transmu-

tation of property from one party to another in consideration of some price or recompense in value. *Berger v. United States Steel Corp.*, 53 Atl. 68, 71, 63 N. J. Eq. 809.

The terms "exchange" and "sale," used in an order by county commissioner for the election to determine whether or not the sale or exchange or barter of intoxicating liquors shall be prohibited, are not synonymous, and therefore such a use is not warranted by a statute authorizing the commissioners to order an election to determine whether or not the sale of intoxicating liquors shall be prohibited. *Ex parte Beaty*, 1 S. W. 451, 452, 21 Tex. App. 426.

An averment of a contract of sale is not supported by proof of an exchange, since the words "sale" and "exchange" express legally different transactions. *Vall v. Strong*, 10 Vt. 457, 465.

As used in speaking of the "exchange of personal property," if used with precision, "exchange" means a commutation of goods for goods; for, if a transfer for money, it is a sale. And although sometimes, in loose conversation, persons may speak of exchange of goods, when a small part of the value is paid by one of the parties in money, yet seldom or never, when the greater part is paid in money. *Long v. Fuller*, 21 Wis. 121, 124.

#### Contract for future delivery.

The word "sale," in the statute of frauds, requiring every contract for the sale of goods over the value of \$50 or more to be in writing, was construed not to include an order for an assortment of watch cases and cologne articles, to be thereafter manufactured; but it is a contract for work, labor, and materials. *Roubicek v. Haddad*, 51 Atl. 938, 67 N. J. Law, 522.

A contract to deliver at a future period corn which at the time of the contract is in the field, ungathered and unshucked, is not within the statute of frauds, providing that the sale of goods, wares, and merchandise must be in writing. *Ellison v. Brigham*, 38 Vt. 64, 66.

#### Contract for manufacture.

A contract to make a certain number of bricks for another, and deliver them to him at a certain price, such other to select the spot where the clay out of which the bricks are to be manufactured, held not a contract of sale, but of manufacture. *O'Neil v. New York & Silver Peak Min. Co.*, 3 Nev. 141, 145.

#### Contract of sale.

A written contract for the purchase of an estate, binding both the vendor and purchaser, is a sale, within the meaning of an agreement to pay a commission to a broker

upon sale of the estate. *Rice v. Mayo*, 107 Mass. 550.

A contract to sell real property for a commission is performed when the broker procures a person who is able to pay for the same and enters into a valid contract to purchase upon the terms proposed, or when he induces some person to offer to pay for the property and take a conveyance thereof upon being allowed a reasonable time to examine the title thereto, which offer is refused by the owner on the ground that the time allowed by the broker within which to effect the sale is about to expire. *Watson v. Brooks* (U. S.) 13 Fed. 540, 543.

The word "sale," in a contract whereby a manufacturer of railroad and bar iron appointed a person a selling agent for the sale of the railroad iron on a commission, means actual sale in a commercial sense, and not a mere contract to sell. *Creveling v. Wood*, 95 Pa. 152, 158.

The word "sale," as used in Const. art. 233, cl. 2, providing that no sale of property for taxes should be set aside, except on proof of payment of the taxes prior to the date of sale, means a completed sale, which vests such title in the purchaser as gives him color of right and places him in a position either as plaintiff or defendant to have the legality thereof tested in the courts. *Ashley Co. v. Bradford*, 33 South. 634, 640, 109 La. 641.

The phrase "sale of land," as used in the statutes requiring that the contract for the sale of lands, tenements, and hereditaments shall be in writing, means where a contract has been made for a sale of lands, and does not apply where parties orally agree to become jointly interested in a purchase of land about to be made. *Evans v. Green*, 23 Miss. 294, 295.

Where a contract states that one party has sold to the other a certain plantation, the title to said property to be made at the convenience of the party, as by private agreement, the contract is not a sale, but a mere agreement for sale. *Broadwell v. Raines*, 34 La. Ann. 677.

The word "sale," as used in Rev. St. c. 24, providing for the sale of school lands, means a contract of sale, and not an actual sale. *Smith v. Mariner*, 5 Wis. 551, 581, 68 Am. Dec. 73.

In its strictest legal sense a "sale" is "the transfer of the absolute or general property in a thing for a price in money." *Wittkowsky v. Wasson*, 71 N. C. 455 (quoting *Benj. on Sales*). This is the definition of an executed sale, but some authorities recognize an executory contract of sale as coming within the meaning of the term in question. *Houston, E. & W. Ry. Co. v. Keller*, 90 Tex. 214, 220, 37 S. W. 1062, 1063.

### Distributing liquor among owners.

The phrase "sale or exposing for sale" in Pub. St. c. 100, § 1, prohibiting the sale or exposing for sale of intoxicating liquors, except as authorized by law, does not prohibit the drinking or buying of intoxicating liquor, or a distribution of it among persons who own it in common. If, therefore, two or more persons unite in buying intoxicating liquor, and then distribute it among themselves, they do not violate the statute, and the intent with which they do this is immaterial. *Commonwealth v. Pomphret*, 137 Mass. 564, 566, 50 Am. Rep. 340.

### Executed contract.

The use of the word "sell," in a contract stating that one party sells certain goods to the other party on certain conditions, and agrees to give the purchaser a clear bill of sale when the total amount of the purchase money is paid, does not import an executed contract for a sale, and therefore title does not pass until payment is made in full. *Fennikoh v. Gunn*, 69 N. Y. Supp. 12, 14, 59 App. Div. 132.

### Lease.

A lease for 20 years of a part of the premises held by the lessor as a lessee for lives is not a breach of the covenant of such lessee for lives not to sell, dispose of, or assign his estate in the demised premises. Nothing short of an assignment of his whole estate would produce a forfeiture of the lease. *Jackson v. Harrison* (N. Y.) 17 Johns. 66, 71, note (citing *Jackson v. Silvernail* [N. Y.] 15 Johns. 278).

An agreement in which A. "leases" a certain tract of land to B., and agrees to give B. the exclusive right to mine and sell all of the coal in the tract, B. agreeing to open the mines, build chutes, etc., and to pay a royalty of a certain amount per ton, is not a lease, but is a sale of the coal. *Appeal of Duff* (Pa.) 14 Atl. 364, 367.

Where under the terms of the contract the possession of a certain mine was to continue until all the coal was mined, and the money to be paid therefor, though called by various names, in reality was a certain price per ton, and the grantee agreed to remove all the coal and to remove a certain quantity each year, there was an actual sale of the coal, though the operative word of the contract was "lease." *Delaware, L. & W. R. Co. v. Sanderson*, 1 Atl. 394, 396, 109 Pa. 583, 58 Am. Rep. 743.

Under Code 1876, §§ 2705, 2707, providing that the wife's separate estate shall be sold only by a joint deed of herself and husband, but giving him power to manage and control it, it is held that the husband has power to lease the land for a year or less, but that a lease for a longer period is a



sale of an interest in the land in which the wife must unite in order to make it valid. *Chandler v. Jost*, 2 South. 82, 83, 81 Ala. 411.

Where a will authorized executors to sell certain property in their discretion, they were not thereby authorized to lease the property. *Slocum v. Slocum* (N. Y.) 4 Edw. Ch. 613, 618.

The statutes of Alabama conferring upon a married woman the right or power to buy, sell, or convey real and personal property, and to sue and be sued as a feme sole, confers upon her the right or power to lease lands. *Warren v. Wagner*, 75 Ala. 188, 197, 51 Am. Rep. 446.

Under Mansf. Dig. § 1407, authorizing county courts to sell and convey real or personal property belonging to the county, a lease by the county court of the county property for a term of 99 years amounts to a sale of the property, and in order to be valid must be made in accordance with the provision of the statute regulating the sale and conveyance of county property. *State v. Baxter*, 50 Ark. 447, 8 S. W. 188, 191.

#### **Loan.**

Where one in good faith lends a pint of whisky to another, to be consumed by the latter, he agreeing to return, and in fact returning, to the lender another pint of the same kind of whisky, the transaction does not constitute a sale, within the meaning of Code, § 2125, relating to the sale of liquor. *Skinner v. State*, 25 S. E. 364, 97 Ga. 690.

Where a defendant loaned whisky to another, who promised to return it in kind, if the exchange was made in good faith, it would not be a sale, within the meaning of the prohibitory liquor law. In the case of *Commonwealth v. Abrams*, 150 Mass. 393, 23 N. E. 53, the Supreme Court held that such exchange would be a sale within the meaning of the statute. Mr. Black, in his work on *Intoxicating Liquors*, speaking of this and other cases, says: "We think these decisions cannot be sustained on principle. 'Sale,' we are told, is a word of precise legal import, both at law and in equity. It means at all times a contract between parties to give and to pass right of property for money, which the buyer pays or promises to pay to the seller for the thing sold." *Robinson v. State*, 27 S. W. 233, 234, 59 Ark. 341 (quoting Black, *Intox. Liq.* § 403).

The delivery by one person to another of whisky, to be paid for in other whisky at some future time, constituted a sale, within Pen. Code 1895, art. 402, punishing the sale of intoxicating liquors within a prohibition district. *Keaton v. State*, 38 S. W. 522, 523, 36 Tex. Cr. R. 259; *Id.* (Tex.) 36 S. W. 440.

#### **Merger of separate properties.**

The word "sale," as used in the statute providing for the proceedings for the sale of

the property of religious societies, means a transmutation of property from one to another in consideration of some price or recompense. The petition of a religious corporation for the sale of its real estate alleged: That the petitioner and defendant, another religious society, had made arrangements for uniting upon the following terms: Petitioner was to convey all its property to the defendant, and the two societies were to merge and meet for worship in petitioner's church. Defendant's trustees were to resign, and there was to be a new election of trustees by the united societies. Defendant was to take petitioner's corporate name, and the property of both was to become liable for the debts of both. That the plan of union was agreed to by both corporations. That petitioner was indebted, and that defendant owned property over its indebtedness which would become applicable to petitioner's debts. That each corporation had obtained subscriptions to be applied to the floating indebtedness of each. Under the definition of the word "sale," the proposed arrangement did not constitute a sale. *Madison Ave. Baptist Church v. Baptist Church in Oliver St.* (N. Y.) 11 Abb. Prac. (N. S.) 132, 142.

#### **Serving liquor to boarders.**

The term "sale of intoxicating liquors," within the meaning of Act Cong. March 3, 1893, forbidding the sale of intoxicating liquors in the District of Columbia without license, includes the act of a boarding house keeper in furnishing beer to his boarders with their meals and lunches, even though it is not especially called for or contracted for by the boarders. *Lauer v. District of Columbia* (D. C.) 11 App. Cas. 453.

#### **Serving liquor in club.**

The word "sale," as used in Acts 1866, c. 66, prohibiting the sale of spirituous liquors on Sunday, does not include a transaction whereby a member of a social club obtains liquor from another member of the club pursuant to an arrangement whereby members of the club are required to pay for refreshments and liquors they obtain and consume at the clubhouse. *Seim v. State*, 55 Md. 566, 571, 39 Am. Rep. 419.

A sale of tickets to members of a social club, which were exchanged for or given in payment of liquors drunk by members of the club presenting the tickets, was a sale of liquors within the statute prohibiting the same. *State v. Mercer*, 32 Iowa, 405, 407.

Where intoxicants are purchased with the funds of an incorporated club, a sale of any part of the same to one of the members of the club by a steward acting for the corporation and receiving a salary for his services renders the steward liable for a violation of the local option law. *Krnavek v. State*, 41 S. W. 612, 614, 38 Tex. Cr. R. 44.

Laws 1892, c. 401, § 81, provides that any person who without a license shall sell spirituous liquors shall be guilty of a misdemeanor. Held, that the dispensing of liquors by a social club, which has a limited and select membership, and was organized for a legitimate purpose, to which the furnishing of liquors to its members on payment thereof is merely incidental, is not a sale, within the meaning of the said statute. *People v. Adelphi Club of City of Albany*, 43 N. E. 410, 411, 149 N. Y. 5, 81 L. R. A. 510, 52 Am. St. Rep. 700.

To constitute a sale there must be a passing of the right or title to property for money, which the buyer pays or promises to pay to the seller for the thing bought or sold. Where a society or club of persons having a treasurer and other officers met every Sunday, and each person on becoming a member paid into the treasury a certain sum, and monthly assessments thereafter, it formed the basis of a fund to pay the expenses and for relief, and the treasurer by order of the club and for the club on each Saturday evening purchased a keg of beer and placed it in the hall where the meetings were held, and on Sunday, when any member desired a glass of beer, he got it, drank it on the premises, and delivered to the treasurer five cents, which money was placed in the treasury to keep up the funds, pay expenses, and for relief of members when dry, it was held that the delivery of a glass of beer under such circumstances to a member of the club constituted a sale within the meaning of a statute prohibiting the sale of intoxicating liquor. *Marmont v. State*, 48 Ind. 21, 25.

On an indictment under Gen. St. Mo. c. 87, § 7, for keeping a liquor nuisance, proof that the defendant, as the agent of a club, bought intoxicating liquor with money advanced by the club; that the liquor purchased was the property of the club; that checks of the denomination of five cents each were delivered to each member to the extent of the amount of money advanced by him; that the defendant was a member of the club, and delivered to each member, upon presentment of checks from time to time, liquor of the club to the amount of the checks presented; and that the residue of the undelivered liquor, amounting by calculation to 20 per cent., was to belong to defendant as compensation for his services and for the use of his room—does not justify a ruling that the facts as a matter of law constitute a sale, but whether the facts amounted to an evasion of the law is a question for the jury. *Commonwealth v. Smith*, 102 Mass. 144, 147.

#### **Serving liquor with food.**

Evidence that defendant furnished intoxicating liquor with meals supplied to customers, the payment of which included pay-

ment for the liquor, sustains a prosecution under Gen. St. c. 87, § 6. *Commonwealth v. Worcester*, 126 Mass. 256, 257.

To constitute a sale of liquor in violation of the law, there must be the assent of two parties. There must be a vendor and a vendee. But no words need be proved to have been spoken. A sale may be inferred from the acts of the parties, and no disguise which the parties may attempt to throw over the transaction, with a view of evading the law, can avail them, if in fact such sale is found to have taken place. Where a witness bought a cake of the defendant for a fixed price, and at the same time a bottle of liquor was set upon the bar, from which he helped himself, it constituted a sale. *Commonwealth v. Thayer*, 49 Mass. (8 Metc.) 525, 526.

#### **Serving milk with meal.**

Where milk is bought and delivered to one as a part of a breakfast, it was just as much a sale within the statute making a party liable for sale of milk not of the standard quality as if a specific price had been put upon it or it had been bought and paid for by itself. *Commonwealth v. Warren*, 36 N. E. 308, 160 Mass. 533.

#### **Mortgage.**

An insurance policy provided that it should be void if there was any change of title or possession of the property insured, whether by legal process, judicial decree, or voluntary sale, transfer, or conveyance. Held, that the policy was not avoided by a mortgaging of the property, since a mortgage is but an incumbrance on the property, created for the purpose of securing the payment of money, but is in no sense a sale or alienation within the usual accepted meaning of these words, which is a transfer of title, since the mortgagor still retained the exclusive possession and the general right of property, and had the same insurable interest in the property that he had before the mortgage was executed. *Friezen v. Allemania Fire Ins. Co. (U. S.)* 30 Fed. 352, 358.

A provision in a fire policy rendering it void if the property should be "sold or transferred, or any change take place in the title by legal process or otherwise," was not broken by the execution of a mortgage on the property, since such section was not within the meaning of the words "sale, transfer or change of title." *Byers v. Farmers' Ins. Co.*, 35 Ohio St. 606, 620, 35 Am. Rep. 623.

The word "sale," in an agreement to pay certain royalties for the right to the manufacture and sale of a particular patented article, is used in its broad sense, and intended to include any transfer of title to the manufactured article, and therefore the giving of a chattel mortgage on the article man-

ufactured in a sale which will render the royalties due and payable. *People v. E. Remington & Sons*, 12 N. Y. Supp. 824, 828, 59 Hun, 282.

As used in the statute, declaring that "any person who, after once disposing of any land, shall again and for a valuable consideration knowingly or fraudulently sell or dispose of the same lands to any other person, shall be deemed guilty of felony," the expression "sell or dispose of" looked to a parting or agreeing to part with the title itself. A mortgage is not a sale of land, nor is it an agreement for sale. If merely to mortgage is to dispose of lands within the act, then to give a second mortgage would be to dispose of them a second time, and would or might be a crime. Upon the same reasoning, too, it might be criminal in a person to convey lands upon which he had already placed an incumbrance by way of mortgage, and the court held that the giving a mortgage upon land which had previously been sold and conveyed was not within the terms of the statute. *People v. Cox*, 45 Cal. 342, 344.

A power to "sell" real estate does not confer authority to mortgage. A power to "sell and convey" real estate does not authorize the attorney to mortgage. *Golinsky v. Allison*, 46 Pac. 295, 296, 114 Cal. 458 (citing *Jeffrey v. Hursh*, 49 Mich. 31, 12 N. W. 898; *Wood v. Goodridge*, 60 Mass. [6 Cush.] 117, 52 Am. Dec. 771; *Brown v. Rouse*, 93 Cal. 237, 28 Pac. 1044; *Campbell v. Foster Home Ass'n*, 163 Pa. 609, 30 Atl. 222, 224, 26 L. R. A. 117, 43 Am. St. Rep. 818); *Trutch v. Bunnell*, 4 Pac. 588, 589, 591, 11 Or. 58, 50 Am. Rep. 456; *Brown v. Vanduzee*, 44 Vt. 529, 533; *Hawxhurst v. Rathgeb*, 51 Pac. 846, 847, 119 Cal. 531, 63 Am. St. Rep. 142; *Vaughan v. Forsyth County Com'rs*, 24 S. E. 425, 118 N. C. 636.

An inhibition upon the board of trustees of a corporation by one of the articles of its incorporation to sell real estate is not necessarily an inhibition upon the power to mortgage. *Krider v. Western College Trustees*, 31 Iowa, 547.

#### **Serving oleomargarine with meal.**

It is held that the serving of oleomargarine with a meal at a restaurant as a substitute for butter is a sale thereof, within the meaning of an act prohibiting such a sale, although the oleomargarine is not eaten, but is paid for and carried away by the customer. There is, however, in this case a dissenting opinion in which Paxson, C. J., holds that the law prohibiting the sale of oleomargarine was intended to apply only to dealers or persons engaged in the sale thereof in the line of their business. *Commonwealth v. Miller*, 18 Atl. 938, 939, 131 Pa. 118, 6 L. R. A. 633, 25 Wkly. Notes Cas. 137, 138.

#### **Pledge.**

Gen. St. tit. 13, § 21, provided that no "sale or transfer" by a husband of the personal property of his wife held by him in trust for her under the statute, or of his interest therein, should be valid unless she should join with him in a written conveyance of the same. A wife, with the consent of her husband and upon a good consideration, delivered to the creditor of the husband a piano belonging to her and held by her husband in trust for her, under an agreement that the creditor should hold the piano as a pledge until the debt was paid. Held, that it was not a "sale or transfer" within the meaning of the statute, so as to be invalid because there was no writing signed by the husband and wife. *Padbury v. Garlick*, 36 Conn. 384.

A power to sell and assign will not authorize an agent to pledge the property of his principal, as in such case the terms themselves exclude the idea of any other disposition than a sale out and out. *Chetwood v. Berrian*, 39 N. J. Eq. (12 Stew.) 203, 207.

#### **Conveyance in payment of debt.**

"Sale" is a word of precise legal import, both at law and in equity. It means of itself a contract between parties to give and to pass rights of property for money, which the buyer pays or promises to pay to the seller for the thing bought and sold. No departure from the manner in which the sale is directed to be made, either under a judgment at law or a decree in equity, is permitted. So, under a decree authorizing a trustee to sell lands and with the proceeds to pay debts, a conveyance of the land to a creditor in payment of a debt is not a sale and conveys no title. *Williamson v. Berry*, 49 U. S. (8 How.) 495, 544, 12 L. Ed. 1170.

An authority to sell property is not an authority to transfer it in payment of the owner's debts. *Butts v. Newton*, 29 Wis. 632, 640; *Durham v. Oddie (La.)* 1 Mart. (N. S.) 444, 447, 14 Am. Dec. 190.

#### **Partition.**

A partition which merely severs the relation existing between tenants in common in the undivided whole, and vests title to a corresponding part in severalty, is not such a sale or transfer of title as will be affected by the statute of frauds. *McKnight v. Bell*, 19 Atl. 1036, 1037, 135 Pa. 358.

The statute of frauds, requiring a "contract for the sale of land" to be in writing, does not include a parol partition, as a partition is not a sale. *Meacham v. Meacham*, 19 S. W. 757, 758, 91 Tenn. (7 Pickle) 532.

A power given trustees to "sell or exchange" property conveyed to them will be construed to include the right to partition

the property. *Phelps v. Harris*, 101 U. S. 370, 377, 25 L. Ed. 855.

Testator devised the remainder of his real estate to his executors, to sell or dispose of as they may think best and to divide it among his two children. Held, that the words "sell or dispose of" should be construed liberally, and authorized the executors to dispossess themselves of the estate for the benefit of the testator's two children in their discretion, and hence authorized them to partition the property between the two children, and such a partition vested each of the two children with the fee of the share set off to him. *Elle v. Young*, 24 N. J. Law (4 Zab.) 775, 779.

A power to sell and convert all the testator's property into money, and make and execute necessary and proper transfers thereof, cannot be construed to confer power to consent to a partition of the land. *In re Carr*, 19 Atl. 145, 16 R. L. 645, 27 Am. St. Rep. 773.

#### **Relinquishment.**

"Sell," as used in a power of attorney authorizing the attorney to sell a certain tract of land, means to sell or contract to sell the land for a valuable consideration to third persons in the ordinary course of business, and does not authorize a relinquishment of the lands to the state, under the act of 1794 authorizing persons holding tracts of land subject to taxation to relinquish or disclaim their title to such land, making an entry of the tract so disclaimed with the surveyor of the county, for such relinquishment is not in the strict sense of the term a "sale." *Clarke v. Courtney*, 30 U. S. (5 Pet.) 319, 347, 8 L. Ed. 140.

#### **Sale on condition.**

The fact that under transactions by peddlers the sales were on the installment plan, the title being retained until the terms of the sale were complied with, did not eliminate from the transaction all the characteristics of a contract of sale. Most of the sales made by commercial travelers or drummers are mere conditional sales, yet no one would think of denying that they are sales; the title to the property remaining in the seller until the conditions of the sale are fully complied with. Where personal property is sold for cash on delivery, the sale is conditional, and the title to the property will not vest until the terms of the sale are complied with, and yet no one would think of denying that such a transaction was a sale. If such contention were to prevail, all sales by peddlers might escape all restraint by cities by the insertion of such a provision in the contract. *City of South Bend v. Martin*, 41 N. E. 315, 322, 142 Ind. 81, 29 L. R. A. 531.

#### **Sale on credit.**

A sale is either for cash or on credit, and the price agreed on as well as the time at which the payment shall be made is necessarily included in the terms and conditions of the sale. The word "sell," as used in an assignment for the benefit of creditors, authorizes the assignee to sell and dispose of assigned property on such terms and conditions as in his judgment may appear best, therefore authorizing the assignee to sell on credit, rendering the assignment void. *Keep v. Sanderson*, 2 Wis. 42, 59, 60, 60 Am. Dec. 404.

A sale of intoxicating liquors on credit is a sale within the meaning of the statutes prohibiting the same. *Commonwealth v. Burns*, 74 Mass. (8 Gray) 482, 483.

#### **Sale upon execution.**

An insurance policy provided for an immediate termination of the risk if the property be sold or transferred, or any alienation or change take place in the title or possession, whether by legal process or judicial decree, or voluntary transfer or conveyance. It was held that the words "sold," "transferred," and "alienated" do not ordinarily include a sale upon execution, and the words "change in the title of possession" do not extend the meaning, and this would be the meaning, were it not for the words "by legal process or judicial decree"; but where, under a sale on execution, the owner of the land has full rights of possession and occupancy for 15 months after the sale, and for 12 months of that time he has an absolute right to redeem, so that neither possession nor title passes before the end of 15 months, a sale on execution does not violate the provisions of the policy. *Hammel v. Queen's Ins. Co.*, 11 N. W. 349, 355, 54 Wis. 72, 41 Am. Rep. 1.

#### **Soliciting of orders.**

As used in Laws 1897, c. 76, § 1, providing that no person shall go about from town to town or from place to place in the same town "selling goods, wares, or merchandise" without a license, selling cannot be construed to include the soliciting of orders by a person for his employers, a firm having a permanent place of business in the state and subsequently delivering the goods thus ordered; he not carrying any goods about with him for sale, nor exposing any for that purpose. *State v. Wells*, 45 Atl. 143, 144, 69 N. H. 424, 48 L. R. A. 99.

#### **SALE AND EXCHANGE.**

The power of "sale and exchange" of property has a defined meaning. It implies that the proceeds of the sale of the property are to be vested in another estate of the same character and to be settled to the same

uses. *Rail v. Dotson*, 22 Miss. (14 Smedes & M.) 176, 184.

### SALE AND RETURN.

A "contract on sale and return" is an agreement by which goods are delivered by a wholesale dealer to a retail dealer, to be paid for at a certain rate if sold again by the latter, and if not sold to be returned. *Haskins v. Dern*, 56 Pac. 953, 955, 19 Utah, 89.

A "sale and return" is a condition subsequent, the title passing at once, subject to the right of the purchaser to rescind the contract and return the property; while a conditional contract constitutes a condition precedent, which must be satisfied before the promise it qualifies becomes effectual, and the title does not pass until the option is determined. *Hickman v. Shimp*, 109 Pa. 18, 19.

### SALE AT AUCTION.

See "Auction."

### SALE BY THE CANDLE.

Sale by the candle, or sale by the inch of candle, see "Candle."

### SALE BY COMMERCIAL BROKER.

Act July 13, 1866, fixing a tax of a certain per cent. on sales by commercial brokers, will not be construed to include a broker purchasing goods, as well as the broker selling such goods. *Collector v. Doswell*, 83 U. S. (16 Wall.) 156, 158, 21 L. Ed. 350.

### SALE BY SAMPLE.

"A sale by sample is where a small quantity of any commodity is exhibited by the vendor as a fair specimen of a larger quantity called the 'bulk,' which is not present, and there is no opportunity for a personal examination. To constitute such sale it must appear that the parties contracted solely with reference to the sample, and mutually understood that they were so dealing in regard to the quality of the bulk." *Reynolds v. Palmer* (U. S.) 21 Fed. 433, 435; *Wadhams & Co. v. Balfour*, 51 Pac. 642, 645, 32 Or. 313.

"A sale by sample contemplates that the goods are in esse, that the sample is taken from the bulk, and that the latter is equal in quality to the sample." *Gurney v. Atlantic & G. W. R. Co.*, 58 N. Y. 358, 364. That is a general definition of a sale by sample. An order for goods to be manufactured, by sample, but requiring numerous changes and variations in the article to be manufactured, is not a sale by sample; and

hence there is no implied warranty that the quality of the manufactured article shall correspond to the sample exhibited. *Smith v. Coe*, 67 N. Y. Supp. 350, 353, 55 App. Div. 585.

A sale of goods by sample amounts to an undertaking on the part of the seller with the purchaser that all the goods are similar, both in nature and quality, to those exhibited. If they be not, the purchaser may either rescind the contract and return the goods, or keep them and recover damages for the breach of such warranty. *Beirne v. Dord*, 5 N. Y. (1 Seld.) 95, 98, 53 Am. Dec. 321.

The circumstance, merely, that at the time of the sale a sample was produced, is not sufficient to constitute the sale one by sample. To have that effect, it must be fairly inferable from the evidence that the parties mutually understood, or at least that the seller intended the buyer to understand, that the bulk of the commodity sold should in kind and quality be equal to the sample shown. Neither is a sale conclusively one by sample because, at the time of the sale, a sample was produced, and it was inconvenient or impracticable to examine the bulk of the goods sold. These circumstances, however, should be duly considered in arriving at a conclusion that the sale was or was not one by sample. The question, therefore, is in every case one of the intention of the parties, to be determined from the evidence. On an issue as to whether a sale of raisins by defendant to plaintiff was by sample, it appeared that, when plaintiff called to examine the raisins, defendant showed her a sample taken from one box, and said that the balance was like it. Afterwards she called again, and defendant's salesman opened one box for her to examine, but refused to open any more on the ground that he did not have time. Thereupon plaintiff purchased the lot. Held, that the evidence was sufficient to sustain a finding that the sale was by sample. *Jacobs v. Day*, 25 N. Y. Supp. 763, 764, 5 Misc. Rep. 410.

A sale of grain or other commodities in bulk cannot be regarded as a "sale by sample," simply because a portion only is exposed to view. If the bulk is thrown open to inspection, the buyer is considered to have inspected the bulk, and not to have relied upon that only which is exposed to view as a sample. The intention of the parties in such case is to sell by inspection, not by sample. *Selser v. Roberts*, 105 Pa. 242, 245.

The term "sale by sample" does not characterize a sale of wool, which the purchaser examines before he buys, although samples were first sent to him and he offers to take the wool if according to sample, which offer the seller accepts on condition that the buyer personally examine the wool.

**Barnard v. Kellogg**, 77 U. S. (10 Wall.) 383, 389, 19 L. Ed. 987.

"Sale by sample" contemplates that the goods are in esse, that the sample is taken from the bulk, and that the latter is equal in quality to the sample. The term does not include an agreement to manufacture goods to correspond with the pattern. **Gurney v. Atlantic & G. W. R. Co.**, 58 N. Y. 358, 364.

In judicial sales the proceedings are altogether hostile to the owner of the goods sold, which are taken against his will and exposed to sale without his consent. It would be a great injustice to make him responsible for the quality of the goods thus taken from him, nor can the marshal or auctioneer, while acting within the scope of their authority, be considered in any respect whatever as warranting the property sold. The marshal, from the nature of the transaction, must be ignorant of the particular state and condition of the property. He is the mere minister of the law to execute the order of the court, and a due discharge of his duty does not require more than that he should give to the purchasers a fair opportunity of examining and informing themselves of the nature and condition of the property offered for sale. An auctioneer, in the ordinary discharge of his duties, is only an agent to sell, and, when selling for a marshal at a judicial sale, he acts only as a special agent of the marshal, without any authority, express or implied, to go beyond the single act of selling the goods; and the marshal, as an officer to execute the orders of the court, has no authority in his official character to do any act that shall expressly or impliedly bind any one by warranty. Such a sale is not a "sale by sample," according to the mercantile understanding of that practice or the legal acceptance of the term. In sales by sample the purchaser trusts entirely to his warranty, and in general is not referred to, nor has he an opportunity of examining the article in bulk, and at all events is not chargeable with negligence if he fails to make the examination which he has it in his power to make. **The Monte Allegre**, 22 U. S. (9 Wheat.) 616, 644, 645, 6 L. Ed. 174.

The phrase "selling by sample," as used in Ky. St. § 4218, requiring peddlers to be licensed, and providing that neither merchants nor their agents, selling by sample, shall be deemed peddlers, means taking orders for future delivery, as the commercial traveler ordinarily does; but it is not necessary for the traveling salesman to carry with him a sample of every article he takes orders for. **Standard Oil Co. v. Commonwealth**, 55 S. W. 8. 9, 107 Ky. 606.

#### SALE CONFIRMED.

A sale confirmed is a bargain complete between the purchaser and the parties to

the suit whose title has been sold, and the same is enforceable in specie through orders in the cause in the same manner and to the same extent as a vendee under articles, and the vendor may enforce specific performance against the other. **Etheridge v. Vernoy**, 80 N. C. 78, 80.

#### SALE FOR PAYMENT OF DEBT.

A sale for payment of debts of a decedent is in the nature of an execution. "It is a judicial sale, and the principles which govern one are applicable to the other. As in the case of a sheriff's sale, the purchaser takes only the interest of the heir, and the administrator who makes the sale is but the officer of the court." In *re Bloodhart's Estate*, 2 Pa. Co. Ct. R. 476, 477 (citing **Bashore v. Whisler** (Pa.) 3 Watts, 490, 494).

#### SALE IN GROSS.

The term "sale in gross," as applied to a sale of land, means a sale by the tract, without regard to quantity. **Yost v. Mallicote's Adm'r**, 77 Va. 610, 616. And in that sense it is *ex vi termini* a contract of hazard. **Russell v. Keeran** (Va.) 8 Leigh, 9. A sale of a lot of timber as all the timber within certain boundaries, without any estimate of the quantity, is a sale in gross. **Shoemaker v. Cake**, 83 Va. 1, 4, 5, 1 S. E. 387, 389.

"Sales in gross" may be divided into various subordinate classifications: First, sales directly and essentially by the contract, without reference in the negotiation or in the consideration to any designated or estimated quantity of acres; second, sales of a like kind, in which, though a supposed quantity by estimation is mentioned or referred to in the contract, the reference was made only for the purpose of description, and under such circumstances or in such a manner as to show that the parties intended to risk the contingency of quantity; third, sales in which it is evident, from extra circumstances of locality, value, price, time, and the conduct and conversation of the parties, that they did not contemplate or intend to risk more than the usual rates of excess or deficit in similar cases, or than such as might reasonably be calculated on as within the range of ordinary contingency; fourth, sales which, though technically deemed and denominated "sales in gross," are in fact sales by the acre, and so understood by the parties. **Sibley v. Hayes**, 70 S. W. 538, 541, 96 Tex. 78 (citing **O'Connell v. Duke**, 29 Tex. 299, 312, 94 Am. Dec. 282; **Harrison v. Talbot**, 32 Ky. [2 Dana] 258). See, also, **Skinner v. Walker**, 34 S. W. 233, 234, 98 Ky. 729.

The term "sale in gross," as used in a deed of land providing that "this is a sale in gross, and not by the acre, and embraces all that tract left to the wife of the ven-

for by her father," should be construed to mean that the land was sold for the price named by the tract, without regard to quantity, and in that sense is synonymous with a contract of hazard. When a sale in gross is used equivalent to a contract of hazard, the term is properly applicable, not to price, but to the subject; for a sale by the acre may be a contract of hazard, and a sale for a gross sum may not, and hence the terms of the deed preclude any claim for abatement in the purchase money. *Green v. Taylor* (U. S.) 10 Fed. Cas. 1120, 1126.

### SALE OF OFFICE.

The words "sale of office," as used in the statute of Virginia prohibiting the sale of any office, but providing that nothing in the act shall be so construed as to prohibit the appointment, qualification, and acting of any deputy clerk or sheriff who shall be employed to assist his principal in the execution of the respective offices, does not include the appointment by a sheriff of a deputy for a sum in gross, to be paid by the deputy, who agrees to discharge all the duties and take all the emoluments of the office. Where the salary is certain, if the officer making a deputation reserves a less sum out of the salary, it is not a sale prohibited by statute, or if the profits be uncertain, arising from fees, if the officer make a deputation, reserving a certain sum out of the fees and profits of the office, it is not within the prohibition of the statute; for in both cases the deputy is not to pay unless the profits amount to so much. *Salling v. McKinney* (Va.) 1 Leigh, 42, 44, 19 Am. Dec. 722.

### SALE ON CREDIT.

A sale is not one on credit, where no time was given for payment of the price, or leave given to take the property away without payment. *Riley v. Wheeler*, 42 Vt. 528, 532.

### SALE ON EXECUTION.

See "Execution Sale."

### SALE ON TRIAL.

If it is a sale on trial, it is said to be a sale on condition precedent to buy if satisfied; that is, the title does not pass until the condition prescribed is fully performed, although the possession is delivered, being rather a bailment with the option to buy than a sale. Where defendant bought a harvesting machine, stipulating that if it did not work to his satisfaction he might return it, it was a sale on trial. *Osborne & Co. v. Francis*, 18 S. E. 591, 592, 38 W. Va. 312, 45 Am. St. Rep. 859.

### SALE OR RETURN.

See "On Sale or Return."

The class of contracts known as "contracts of sale or return" exists where the privilege of purchase or return is not dependent upon the character or quality of the property sold, but rests entirely upon the option of the purchaser to retain or return. In this class of cases the title passes to the purchaser, subject to such option, and if before the expiration of a reasonable time or the exercise of the option the property is destroyed, even by inevitable accident, the buyer is responsible for the price. In *Hunt v. Wyman*, 100 Mass. 198, 200, Judge Wells says: "An option to purchase if he like is essentially different from an option to return the purchase if he should not like. In one case title will not pass until the option is determined; in the other the property passes at once, subject to the right to rescind and return." *Sturm v. Boker*, 14 Sup. Ct. 99, 104, 150 U. S. 312, 37 L. Ed. 1093.

### SALE PER AVERSIONEM.

A "sale per aversionem" was by the Roman law a sale of lands for a gross sum, to be paid for the whole premises, and not at a specified price by the foot or acre. *Winston v. Browning*, 61 Ala. 80, 83.

To constitute a "sale per aversionem" there must be certain limits or a distinct object described, as a field inclosed, or an island, because it is presumed the parties have their attention fixed rather on the boundaries than the enumeration of the quantity. *Innis v. McCrummin* (La.) 12 Mart. (O. S.) 428, 13 Am. Dec. 379; *Boyce v. Cage*, 7 La. Ann. 672. Again: "The sale of a body of land, as a section, which has limits mathematically fixed and established and generally known, is not a sale per aversionem." *Phelps v. Wilson*, 16 La. 185. Again: "A sale in which specific boundaries are given is a sale per aversionem, or a sale from one fixed boundary to another, which includes all the ground between the points mentioned, whether the measure be correctly stated or not; the calls for a boundary controlling the enumeration of quantity." *Harman's Heirs v. O'Moran*, 18 La. 526; *Prejean v. Giroir*, 19 La. 423; *Hoover v. Richards* (La.) 1 Rob. 34; *Saulet v. Trepannier* (La.) 2 Rob. 357; *Labiche v. Jahan* (La.) 9 Rob. 30. Again: "The sale of a certain number of acres between certain limits, so as to include the said number of acres, is not a sale per aversionem, but of the number of acres specified." *Hoover v. Richards* (La.) 1 Rob. 34. To constitute a sale one per aversionem, the property should be designated by adjoining tracts, or from boundary to boundary. *Hall v. Nevill*, 3 La. Ann. 326. In case the upper boundary be given with sufficient certainty, yet no lower one is mentioned, it

is not a sale per aversionem. *State v. Buck*, 15 South. 531, 535, 46 La. Ann. 656 (citing *Boyce v. Cage*, 7 La. Ann. 672).

### SALES GUARANTIED.

The term "sales guarantied," as used in a contract for the sale of goods, means that if the goods were not sold, or if they proved to be not sellers, the purchaser might return them and have credit for their value. *Newell v. Nicholson*, 43 Pac. 180, 181, 17 Mont. 389.

### SALESMAN.

See "Itinerant Salesman"; "Traveling Salesmen."

### SALESROOM.

Where premises were leased to be occupied as a studio and salesroom, and for no other purpose, a sublease to a person occupying the premises as a dramshop was a breach of the contract; the court saying that "while we often hear dramshops spoken of as 'saloons,' and see them so mentioned in city ordinances, and signs upon them often read, 'Sample Room,' 'Family Resort,' and other designations, yet no one has ever, we believe, yet endeavored to attract custom by calling a dramshop a 'studio' or a 'salesroom.'" *Bryden v. Northrup*, 58 Ill. App. 233, 235.

### SALMON.

For the purpose of the chapter relating to fish and fisheries, the term "salmon" means the common migratory salmon of the sea-coast and rivers. *Rev. St. Me. 1883*, p. 375, c. 40, § 32.

Whenever the term "salmon" is used in the act regulating the catching of salmon, it shall be construed to include and apply to chinook, steelhead, blueback, silverside, and all other species of salmon. *Ballinger's Ann. Codes & St. Wash. 1897*, §§ 3357, 7387.

### SALOON.

See "Refreshment Saloon"; "Temperance Saloon."

A saloon is a place for the retailing of spirituous liquors. *McMurtry v. State*, 43 S. W. 1010, 1012, 38 Tex. Cr. R. 521.

The term "saloon," as used in an information charging that a certain person kept open a saloon and bar, will be held to mean a building and a bar, constituting a place where intoxicating liquors are sold. *State v. Donaldson*, 81 N. W. 299, 300, 12 S. D. 259.

The word "saloon," which originally meant a large public room or parlor, has now acquired a more restricted meaning, and is

usually applied to a place where intoxicating liquors are sold. *McDougall v. Giacomini*, 14 N. W. 150, 151, 18 Neb. 431.

A saloon is a barroom or grogshop; a place devoted to the retailing of intoxicating liquors. *Town of Leesburg v. Putnam*, 103 Ga. 110, 113, 29 S. E. 602, 603, 68 Am. St. Rep. 80.

"Saloon," as used in the title of an act, being *Sess. Laws 1891*, p. 315, entitled "An act to regulate the keeping of saloons and other drinking places and resorts," will be held to have been used in the sense of a barroom or drinking saloon, for supplying intoxicating liquors, so that the title of the act is not indefinite. *Cardillo v. People*, 58 Pac. 678, 679, 26 Colo. 355.

"Saloon," as used in *St. 1889*, p. 71, entitled "An act fixing the time for the opening and closing of saloons and gaming houses," refers only to places where intoxicating liquors are kept. *Ex parte Livingstone*, 21 Pac. 322, 325, 20 Nev. 282.

A city ordinance provided a license to keep or maintain a saloon or restaurant, and declared that "the words 'saloon' and 'restaurant,' as used in this ordinance, shall not be construed to include any place of business kept exclusively for the purpose of furnishing meals, nor any place of business kept exclusively and only for the purpose of selling any or all of the following articles, to wit: Cigars, tobacco, confectionery, nuts, candies, ice cream, pop, cakes, fruits, vegetables, or lemonade." These exceptions seem carefully designed to exclude from the operation of the ordinance all keepers of saloons or restaurants not engaged in the sale of intoxicating drinks, but to include all those who are or shall be so engaged. The ordinance is therefore manifestly an ordinance to license saloons and restaurants for the sale of intoxicating drinks, because in its terms it manifestly applies to them, and not to others, and such a license could not be granted under the provision of the Constitution, declaring that the Legislature shall not pass any act authorizing the grant of license for the sale of spirits or the sale of other intoxicating liquors. *Dewar v. People*, 40 Mich. 401-403, 29 Am. Rep. 545.

A saloon is a place where persons who call for them are supplied with refreshments. *Goozen v. Phillips*, 12 N. W. 889, 890, 49 Mich. 7.

"Saloon," as used in *Act Feb. 21, 1887*, making it a misdemeanor to permit a minor to play pool in a dramshop or saloon, includes a place where cider, birch beer, and ginger ale are served after the manner of dramshops. *Snow v. State*, 9 S. W. 306, 50 Ark. 557.

The term "saloon" applies to all places where persons resort to obtain food or drink, which are not also devoted to some other



**business.** It is a place of refreshment, and it does not necessarily import a place where intoxicating liquors are sold. *Kitson v. City of Ann Arbor*, 26 Mich. 325, 326; *State v. Mansker*, 36 Tex. 364, 365.

A saloon does not necessarily mean a house for retailing spirituous liquors, and therefore a violation of a statute prohibiting playing in the latter places is not shown by evidence of playing in a saloon. *Springfield v. State* (Tex.) 13 S. W. 752; *Early v. State*, 5 S. W. 122, 23 Tex. App. 364.

The word "saloon," when used in an indictment charging the burning of a building called a "saloon," may be understood to be "either a spacious and elegant apartment for the reception of company, or for works of art, as Webster defines the word, or that the building was used as a shop for the retail of intoxicating liquors"; and hence the indictment is insufficient. *State v. O'Connell*, 26 Ind. 266, 267.

A saloon may or may not mean a place for the retail of spirituous liquors (*Snow v. State*, 50 Ark. 557, 561, 9 S. W. 306; *Springfield v. State* [Tex.] 13 S. W. 752; *State v. Mansker*, 36 Tex. 364, 365); and hence, where a corporation authorized to carry on a general brewing and malting business, and to manufacture and sell soda waters, rented premises which by the terms of the lease were to be occupied for a saloon, and no other purpose whatever, the word "saloon" in such lease will not be understood as matter of law to mean a place where intoxicating liquors were to be sold, and not a place for the sale of soda water, so as to render the lease ultra vires on the part of the corporation. *Brewer & Hofmann Brewing Co. v. Boddie*, 55 N. E. 49, 181 Ill. 622.

In ordinance No. 1 of the city of Clinton, Iowa, providing that all saloons of every description shall be kept closed after 11 o'clock at night, the term "saloon" includes a place where intoxicating liquors, beer, wine, pop, cigars, and ginger ale are sold. It is a hall of reception; a public room or parlor; apartments for specific public uses, as a saloon of a steamboat; a refreshment saloon, or the like. *City of Clinton v. Grusendorf*, 45 N. W. 407, 408, 80 Iowa, 117 (citing *Webst. Dict.*).

"Saloon," as used in *How. Ann. St.* § 2847, subd. 7, providing that villages incorporated under the general village incorporation act, should have power to suppress saloons for the sale of intoxicating liquors, should be construed in its common and well-understood meaning, and every man making a sale of liquor is not a saloon keeper within such act. *Village of Sparta v. Boorum*, 89 N. W. 435, 436, 129 Mich. 555.

The term "saloon," in the title of an act entitled "An act fixing the time for the open-

ing and closing of saloons and gaming houses," clearly refers only to places where intoxicating liquors are kept, and is not misleading. *Ex parte Livingston*, 21 Pac. 322, 325, 20 Nev. 282.

A saloon or grocery shall be deemed to include all places where spirituous or vinous liquors are sold by quantities less than one quart. *Mills' Ann. St. Colo.* 1891, § 2834.

A dramshop, or place where spirituous liquor is sold by the drink, is commonly called a "saloon"; but the latter word has a much broader meaning. To constitute a saloon, it is not necessary that ardent spirits should be offered for sale, or that it should be a business requiring a license under the revenue laws of the state. A place where cider, birch beer, ginger ale, and like refreshments are served, after the manner of dramshops, is a saloon within the letter and spirit of the prohibition of the statute (Act Feb. 21, 1887) making it a misdemeanor to permit a minor to play pool in a dramshop or saloon. *Snow v. State*, 50 Ark. 557, 561, 9 S. W. 306.

#### Dispensary.

A saloon is a public room for specific uses, especially a barroom or grogshop, as a drinking saloon, etc., or a place devoted to the retailing and drinking of intoxicating liquors. A grogshop and a dispensary cannot be called a saloon. The terms "barroom" and "saloon" are inseparately connected with that class of liquor traffic formerly represented by what was called "tippling house" or "grogshop." The use of either term conveys at once the idea of a place where liquors are sold in such quantities as to be drunk upon the premises where sold; and authority to a municipal corporation to license and regulate "barrooms, saloons," etc., does not include the right to operate a dispensary. *Town of Leesburg v. Putnam*, 29 S. E. 602, 603, 103 Ga. 110, 68 Am. St. Rep. 80.

#### Inclosed park.

"Saloon," as used in *Gen. St.* tit. 52, § 4, prohibiting the keeping open on Sunday of a store, saloon, or other building where intoxicating liquors are sold, does not include an inclosed park in which such liquors are sold. *State v. Barr*, 39 Conn. 40, 44.

#### As store.

See "Storehouse"; "Store."

#### SALOON FURNITURE.

See "Furniture."

#### SALOON KEEPER.

As merchant, see "Merchant."

The description in a certificate filed by a married woman, under *St.* 1862, c. 198, §

1, of the nature of a business proposed to be done by her on her separate account in a country town as the general business of a "saloon keeper," is sufficiently descriptive and definite of the business. Such description would seem to be quite as intelligible as the words "grocery," "innkeeper," "storekeeper," and the like. *Cahill v. Campbell*, 105 Mass. 40, 41.

### SALOON PURPOSES.

The words "saloon purposes," as used in McClain's Code 1888, § 2389, providing that, where a place used for the unlawful manufacture and sale of intoxicating liquors is declared a nuisance, the court shall order the same to be securely closed against the use and occupation of the same for saloon purposes, applies not only to such places as are used for retailing intoxicating liquors, but also to all places used for the unlawful manufacture, sale, or keeping for sale of intoxicating liquors. *Craig v. Werthmueller*, 43 N. W. 606, 608, 78 Iowa, 598.

### SALT LICK.

"A salt lick is so called in the Western country from the fact that deer and other wild animals resort to it and lick or drink the brackish water. In this respect no distinction is perceived between a lick, as frequently used, and a salt spring"; and the terms, as used in 1 Stat. 465, requiring surveyors to note in their field books the true situation of all mines, salt licks, salt springs, and mill seats which shall come to their knowledge, are synonymous. *Indiana v. Miller* (U. S.) 13 Fed. Cas. 25, 26.

### SALT MARSH LANDS.

"The term 'salt marsh lands,' in the legislation of California, applies to a certain class of swamp or overflowed lands held by the state under the Arkansas act." *Rondell v. Fay*, 32 Cal. 354, 364.

### SALT MEADOW.

The term "salt meadow" is applied to the tracts of land which lie above the seashore, and which are overflowed by spring and extraordinary tides only, and yield grasses which are good for hay. *Church v. Meeker*, 34 Conn. 421, 429.

### SALTPETER.

"Saltpeter," as used in a policy of insurance which insured a stock of drugs and medicines, but contained a provision that the policy should be void if the assured keep gunpowder, saltpeter, etc., does not mean

saltpeter as kept as a drug, but refers only to saltpeter kept in such a manner and in such quantities or for such purposes as would increase the risk. *Collins v. Farmville Ins. & Banking Co.*, 79 N. C. 279, 281, 28 Am. Rep. 322.

### SALT SPRINGS.

See "Salt Lick."

### SALT WELL.

"Salt well," within the meaning of a lease of an existing salt well, is to be taken to mean the salt well as existing, and not to import a covenant that the well will have any particular productive capacity. *Clark v. Babcock*, 23 Mich. 164, 169.

The term "salt wells," in a lease describing the leased property as six salt wells, cannot be construed to mean six salt wells of any particular productive capacity, or six salt wells suitable for the purposes for which they are leased. *Clifton v. Montague*, 21 S. E. 858, 861, 40 W. Va. 207, 33 L. R. A. 449, 52 Am. St. Rep. 872.

### SALTS.

The carbonates of lime, whether produced mechanically or found in a native state, are "salts." *Bryan v. Stevens* (U. S.) 4 Fed. Cas. 510, 513.

### SALVAGE.

"Salvage" when used in the sense of "salvage service," see "Salvage Service."

"Salvage" is the compensation due to persons by whose voluntary assistance a ship or its lading has been saved to the owner from impending peril or recovered after actual loss. *The Rita* (U. S.) 62 Fed. 761, 763, 10 C. C. A. 629; *Lea v. The Alexander* (U. S.) 15 Fed. Cas. 91, 92; *Baker v. Hoag*, 7 N. Y. (3 Seld.) 555, 559, 59 Am. Dec. 431.

"Salvage" is an allowance made by the consent of all nations and all laws for saving a ship or goods from the danger of the seas, or from fire, pirates, or enemies. *Weeks v. The Catharina Maria* (U. S.) 29 Fed. Cas. 579; *Lea v. The Alexander* (U. S.) 15 Fed. Cas. 91, 92; *Muntz v. Raft of Timber* (U. S.) 15 Fed. 555, 556.

"'Salvage' is a reward or recompense given to those by means of whose labor, intrepidity, or perseverance a ship or goods have been saved from shipwreck, fire, or capture." *Cope v. Vallette Dry-Dock Co.*, 7 Sup. Ct. 336, 337, 119 U. S. 625, 30 L. Ed. 501 (citing 2 Bell, Comm. [7th Ed.] 638).

"Salvage" is a reward or bounty, exceeding the actual value of their services, given to those by means of whose labor, intrepidity, and perseverance a ship or her goods has been saved from shipwreck or other dangers of the sea. *The Lyman M. Law* (U. S.) 122 Fed. 816, 822 (citing *The Sandringham* [U. S.] 10 Fed. 536).

"Salvage" is a compensation allowed to persons by whose assistance a ship or her cargo has been saved in whole or in part from impending perils on the sea, or in recovery of such property, as in case of shipwreck, derelict, or recapture. *The Blackwall*, 77 U. S. (10 Wall.) 1, 11, 19 L. Ed. 870; *Cope v. Vallette Dry Dock Co.*, 7 Sup. Ct. 336, 337, 119 U. S. 625, 30 L. Ed. 501; *Baker v. Hoag*, 7 N. Y. (3 Seld.) 555, 559, 59 Am. Dec. 431.

"Salvage" is compensation for maritime services rendered in saving property or rescuing it from impending peril on the sea, or on a public navigable river or lake, where interstate or foreign commerce is carried on. *The Old Natchez* (U. S.) 9 Fed. 478; *Muntz v. Raft of Timber* (U. S.) 15 Fed. 555, 556.

"Salvage" is defined to be the compensation to which any person may be entitled for services rendered to a ship in distress, by saving it or its cargo from impending perils, or recovering the same after actual abandonment or loss." *Baker v. Hoag* (N. Y.) 7 Barb. 113, 116.

"By a great weight of authority 'salvage,' in the sense in which the term is used in the maritime law, can only be claimed for the rescue of a ship or its cargo, or a portion of the same. *Raft of Cypress Logs* (U. S.) 20 Fed. Cas. 169, 170.

"Salvage" is properly a charge apportionable upon all the interest and property at risk in the voyage which derived any benefit therefrom; but, although it is often in the nature of a general average, it is far from being universally true that all salvage charges are to be deemed a general average. Expenses incurred for the benefit of all concerned are a general average." *Peters v. Warren Ins. Co.* (U. S.) 19 Fed. Cas. 370, 371.

"Salvage" is defined by Justice Bradley in *Sonderburg v. Ocean Towboat Co.* (U. S.) 22 Fed. Cas. 795, to be a reward for meritorious services in saving property in peril on navigable waters, which might otherwise be destroyed, and is allowed as an encouragement to persons engaged in business on such waters, and others, to bestow their utmost endeavor to save vessels and cargoes in peril. *The Spokane* (U. S.) 67 Fed. 254, 256; *Gilchrist Transp. Co. v. 110,000 Bushels of No. 1 Northern Wheat* (U. S.) 120 Fed. 432, 435.

The definition of "salvage" given by Abbott is clear, comprehensive, and accu-

rate. It is "the compensation that is to be made to persons, other than those connected with the ship, by whose assistance a ship or its loading may be saved from impending peril or recovered from actual loss." *Hand v. The Elvira* (U. S.) 11 Fed. Cas. 413, 415.

"Salvage" means the compensation which is earned by persons who voluntarily assist in saving a ship or cargo from peril. 1 Pars. Mar. Law, art. 505. The relief of property from an impending peril of the sea, by the voluntary exertions of those who are under no legal obligations to render assistance, and the consequent ultimate safety of the property, constitutes a technical case of salvage. *Hennessey v. The Versailles* (U. S.) 11 Fed. Cas. 1128.

Firemen employed and paid under a city ordinance are not entitled to salvage for vessels saved while lying at their wharves, as their services were simply in their line of duty. *Davey v. The Mary Frost* (U. S.) 7 Fed. Cas. 11, 12.

"Salvage" is a compensation given for saving property exposed to marine peril. This definition is believed to be correct. The entire property must be saved, in order to charge the entire property with the claim of salvage. The saving of part will not create a claim of salvage against the residue. *The Alabamian* (U. S.) 1 Fed. Cas. 283, 284.

"Salvage" is a gratuity beyond a quantum meruit, above a compensation pro opere et labore, a tax upon commerce for the benefit of commerce, to encourage meritorious action, and requires and demands entire good faith toward the property during the entire connection with it. It is declared to be a gratuity given in the interest of commerce. *Acosta v. The Halcyon* (U. S.) 1 Fed. Cas. 58, 62.

"Salvage" is an extraordinary compensation for services of a certain highly-favored character. *The Cherokee* (U. S.) 30 Fed. 703, 707.

"Salvage" is a recompense paid to persons who have assisted in saving ships or goods from the dangers of the seas, from pirates, or from enemies. *Kennedy v. Rickner* (U. S.) 14 Fed. Cas. 318, 319 (citing 3 Wood, Lect. 132, note "r").

"Salvage" is not a payment due on implied contract, but a reward for extraordinary service and risk. In general salvage service is personal, and the reward is due immediately, and only to the persons actually rendering it. *Browning v. Baker* (U. S.) 4 Fed. Cas. 453, 458.

The term "salvage" is sometimes used to express the service rendered. See *The Versailles* (U. S.) 11 Fed. Cas. 1128; *The Alphonzo* (U. S.) 30 Fed. Cas. 4; *The Alaska* (U. S.) 23

Fed. 597, 607; *Baker v. Hemenway* (U. S.) 2 Fed. Cas. 463; *The H. B. Foster* (U. S.) 11 Fed. Cas. 948.

"Salvage" is the compensation allowed to persons by whose voluntary assistance a ship at sea, or her cargo, or both, have been saved in whole or in part from impending sea peril, or in recovering such property from actual peril or loss, as in the case of shipwreck, derelict, or recapture. Three elements are necessary to a valid salvage claim: (1) A marine peril; (2) salvage service rendered when not required as an existing duty or from a special contract; (3) success in whole or in part, or that the service rendered contributed to such success. *The Sabine*, 101 U. S. 384, 25 L. Ed. 982.

"Salvage," in its simple character, is the service which voluntary adventurers spontaneously render to the owner in the recovery of property from loss or damage at sea, under the responsibility of making restitution, and with a lien for their reward. *Macl. Shipp.* 608. "Salvage" is the compensation due to persons by whose voluntary assistance a ship or its lading has been saved to the owner from impending peril, or recovered after actual loss. *Ben. Adm.* § 300. *The Rita*, 10 C. C. A. 629, 632, 62 Fed. 761, 763. Where a steamship in the Gulf of Mexico, 60 miles from the mouth of the Mississippi, was disabled by the breaking of a shaft, beyond any temporary repairs that could be made, and in need of assistance to reach her port, although not in immediate peril, she was so in distress that aid voluntarily given her by towing her to the mouth of the river constituted salvage services. *The Catalina* (U. S.) 105 Fed. 633, 635, 44 C. C. A. 638.

"Salvage" is a compensation for actual services rendered to the property charged with it. *Talbot v. Seeman*, 5 U. S. (1 Cranch) 1, 2 L. Ed. 15. It is allowed as a reward for the meritorious conduct of the salvor, and in consideration of a benefit conferred on the person whose property he has saved. *The Alerta*, 13 U. S. (9 Cranch) 359, 367, 3 L. Ed. 758. Not only must the service rendered be meritorious, but the possession taken of the thing saved must be lawful. Unless the property be in fact saved by those who claim the compensation, salvage cannot be allowed, however benevolent their intentions or heroic their conduct. *Clarke v. The Dodge Healy* (U. S.) 5 Fed. Cas. 949, 952.

"Salvage" is due for assistance in dangerous situations at sea, and for property preserved after having been cast on shore, as where it is rescued from enemies or pirates; but in all these instances it must be shown that the thing saved was in danger, without such aid, of being lost or materially injured. *Waite v. The Antelope* (U. S.) 28 Fed. Cas. 1341.

#### Amount of award.

Salvage should be regarded in the light of compensation, and not in the light of prize. The latter is more like a gift of fortune, conferred without regard to the loss or sufferings of the owner, who is a public enemy, while salvage is the reward granted for saving the property of the unfortunate. The courts should be liberal, but not extravagant; otherwise, that which is intended as an encouragement to rescue property from destruction may become a temptation to subject it to peril. *The Sullote* (U. S.) 5 Fed. 99, 102; *The Elena G.* (U. S.) 61 Fed. 519, 520; *The Florence* (U. S.) 65 Fed. 248, 249.

The amount awarded as salvage comprises two elements, viz., adequate remuneration, and a bounty given to encourage similar exertions in future cases; the relative amount to depend on the special facts and merits of each case. The leading considerations to be observed in determining the proportion or amount of an award for salvage services are well defined. We are to consider (1) the degree of danger from which the lives or property are rescued; (2) the value of the property saved; (3) the risk incurred by the salvors; (4) the value of the property employed by the salvors in the wrecking enterprise, and the danger to which it is exposed; (5) the skill shown in rendering the service; (6) the time and labor occupied. These are the ingredients which must enter, each to a greater or less degree, as a *sine qua non*, into every true salvage service. *The Rita* (U. S.) 62 Fed. 761, 763, 10 C. C. A. 629.

"In determining the amount of compensation for salvage service, the elements which enter into the estimates are (1) the value of the property saved and that employed in saving it; (2) the degree of peril from which the saved property is delivered; (3) the risk to which the person and property of the salvor is exposed; (4) the duration of his labor; (5) the promptness with which he interposes his services; and (6) the skill, courage, and judgment involved in them. *The Queen of the Pacific* (U. S.) 21 Fed. 459, 472.

The measure of reward in cases of salvage, where the peril to the salvaged vessel was great, depends upon circumstances of the case, and the award is in the sound discretion of the court. It is not to be measured positively by the value of the property in peril, though this may always be taken into account in determining the amount, as the owners are benefited in that proportion, and a small percentage assists in compensating salvors for services that are frequently performed where the property is so small that adequate remuneration cannot be given without hardship to the owner. Though each cause is disposed upon its own merits, the discretion of the court should be guided

by general principles, and in applying them should as far as practicable, where circumstances show the similarity of reasoning and common bond of agreement as to amount, consider the precedents of adjudicated cases. *The Neto* (U. S.) 15 Fed. 819, 821.

"Salvage is a reward or bounty exceeding the actual value of their services, given to those by means of whose labor, intrepidity, and perseverance a ship or her goods have been saved from shipwreck or other dangers of the sea. It may be laid down as a cardinal part of salvage that the right of compensation to be allowed in any case must not only compensate the labor and exertion and danger attending the particular enterprise, but must be so liberal, if the condition of the fund at disposal permits, as to attract public attention." *The Sandringham* (U. S.) 10 Fed. 556, 572.

Sir John Nicholl in *The Clifton*, 3 Hagg. Adm. 117, 120, says: "Now salvage is not always a mere compensation for work and labor. Various circumstances upon public considerations—the interests of commerce, the benefit and security of navigation, the lives of the seamen—render it proper to estimate a salvage reward upon a more enlarged and liberal scale. The ingredients of a salvage service are, first, enterprise in the salvors in going out in tempestuous weather to assist a vessel in distress, risking their own lives to save their fellow creatures and to rescue the property of their fellow subjects; secondly, the degree of danger and distress from which the property is rescued, whether it were in imminent peril and almost certain to be lost, if not at the time rescued and preserved; thirdly, the degree of labor and skill which the salvors incur and display and the time occupied; lastly, the value." *Cope v. Vallette Dry Dock Co.*, 7 Sup. Ct. 336, 337, 119 U. S. 625, 30 L. Ed. 501.

"Salvage" is regarded in the light of compensation, not reward; but it may be diminished by services to mere wages. "Salvage is an award for meritorious services in saving property on navigable waters, in peril and which might otherwise be destroyed, and is allowed as an encouragement to all persons engaged in business at sea or on navigable waters, and others, to bestow their utmost endeavors to save vessels and cargoes which are in imminent peril." Viewed in this light, it is awarded in such measure, in proportion to the value of the property saved, as to secure the object intended. *Stone v. The Jewel* (U. S.) 41 Fed. 103, 104 (citing *Sonderburg v. Ocean Towboat Co.* [U. S.] 22 Fed. Cas. 795).

There is no positive rule which governs absolutely the rate of salvage. Yet in fixing it the common usage of commercial nations, and especially of those whose sub-

jects are interested in the particular case, ought unquestionably to be regarded. *Mason v. The Blaireau*, 6 U. S. (2 Cranch) 240, 266, 267, 2 L. Ed. 266.

"Salvage" is the reward granted for saving the property of the unfortunate, and should not exceed what is necessary to insure the most prompt, energetic, and daring effort from all those who have it in their power to furnish aid or succor. Anything beyond that would be foreign to the principles and purposes of salvage. Anything short of it would not secure its objects. *The Cyclone* (U. S.) 16 Fed. 486, 489.

In every case the allowance of salvage should be sufficiently liberal to make every one concerned eager to perform the service with promptness and energy, and to encourage the maintenance of steam vessels sufficiently powerful to make the assistance effective; but it should not be so large and so out of proportion to the services actually rendered as to cause vessels, in situations in which it was expedient that they should quickly accept such service, to hesitate or decline to receive it because of its ruinous cost. *Ehrman v. The Swiftsure* (U. S.) 4 Fed. 463, 467.

"Every case of salvage has its own peculiar circumstances, and, where the amount awarded for a salvage towage service seems to be large, an examination of the special service will disclose a reason in some extraordinary feature of the case, either the great peril from which the property saved was rescued, its great amount, or the unusual risk run or inconvenience and expense incurred." *Brooks v. The Adirondack* (U. S.) 2 Fed. 387, 391.

#### General average distinguished.

See "General Average."

#### As prize.

See "Prize."

#### Subject of salvage.

The subject of salvage must be a ship, a cargo, or portions of the same. *Raft of Cypress Logs* (U. S.) 20 Fed. Cas. 169, 170.

#### SALVAGE LOSS.

A "salvage loss" is that kind of loss which it is presumed would, but for certain services rendered, have become a total loss. The charges incurred are called "salvage charges," the property saved is the "salvage," and the difference between the amount of salvage after deducting the charges and the original value of the property is called the "salvage loss." In general, a salvage loss of goods is one in consequence of shipwreck or where by the perils of the sea the vessel is prevented from proceeding

on her voyage, and the cargo or the part that is saved is obliged to be sold at a place short of the port of destination. *Koons v. La Fonciere Compagnie D'Assurances* (U. S.) 71 Fed. 978, 981 (citing *Stevens, Average*).

"A 'salvage loss' is a total loss diminished by salvage, and takes place in relation to goods where there is either an absolute or constructive total loss of the subject insured, but some portion of the property has been recovered by the insured. In that case the claim upon the underwriters is for the difference between the insured value and the net proceeds, and the latter are computed by deducting from the gross proceeds of the property saved all charges incurred in realizing the salvage." *Devitt v. Providence Washington Ins. Co.*, 70 N. Y. Supp. 654, 662, 61 App. Div. 390 (quoting *Richards, Ins.*).

### SALVAGE SERVICE.

#### As requiring success.

Success is essential to a claim for salvage service, as if the property is not saved, or if it perish, or, in case of capture, it be not retaken, no compensation can be allowed. *The Blackwall*, 77 U. S. (10 Wall.) 1, 11, 19 L. Ed. 870.

Success has always been held to be an essential element of a salvage service, and its absence fatal to a claim for salvage compensation. *The Edam* (U. S.) 13 Fed. 135, 138.

The compensation for salvage service, in the absence of express contract, is understood to be contingent upon success; but that is, perhaps, not absolutely essential to a salvage service, when it has been rendered by request, though, if that contingency is shown, the contract is presumed to be for salvage. *The M. B. Stetson* (U. S.) 16 Fed. Cas. 1272, 1273.

#### As requiring peril of property.

Salvage is such service as is rendered in rescue or relief of property at sea in imminent peril of loss or deterioration. *The H. B. Foster* (U. S.) 11 Fed. Cas. 948.

"Salvage," in the legal acceptance of the word, *eo nomine*, is allowed only for services which result in saving property from the perils of the sea. In this sense of the word, there must be, as a foundation for salvage, an impending, imminent peril, and the saving from that peril; but compensation, larger or smaller, in the nature of salvage, is allowed by the court for services to property on high seas, when such property is not in imminent peril, or perhaps in very little peril of total loss. *The Mt. Washington* (U. S.) 17 Fed. Cas. 925, 926.

"Salvage service" is performed when goods are saved from peril at sea, or on

other navigable waters, or cast on the shores thereof. A salvage service is, therefore, performed when a raft of timber is saved from peril on navigable waters. 50,000 Feet of Timber (U. S.) 9 Fed. Cas. 47, 48.

It is the fact of peril, and not its extent, that gives foundation for salvage. It is sufficient if it be "something distinctly beyond ordinary danger—something which exposes the property to destruction, unless extraordinary assistance be rendered." 2 Pars. Shipp. & Adm. 282. And it is not essential that escape by other means be impossible. *The Spokane* (U. S.) 67 Fed. 254, 256 (citing *Talbot v. Seeman*, 5 U. S. [1 Cranch] 1, 2 L. Ed. 15).

"Salvage service" is a service which is voluntarily rendered to a vessel needing assistance, and is designed to relieve her from some distress or danger, either present or to be reasonably apprehended; and to constitute such service it is not necessary that the distress should be actual or immediate, or the danger imminent and absolute. It is sufficient if, at the time the assistance is rendered, the ship has encountered any damage or misfortune which might possibly expose her to destruction if the services were not rendered. *McConnachie v. Kerr* (U. S.) 9 Fed. 50, 53; *The Alaska* (U. S.) 23 Fed. 597, 608; *The Plymouth Rock* (U. S.) 9 Fed. 413, 416.

"Salvage" is defined to be the relief of property from an imminent peril of the sea by the voluntary exertions of those who are under no legal obligation to render assistance, and the consequent ultimate safety of the property. It may be a case of more or less credit, according to the degree of peril in which the property was and the danger and difficulty of relieving it. But these circumstances affect the degree of the award, and not its nature. *Williamson v. The Alphonso* (U. S.) 30 Fed. Cas. 4, 6 (cited in *Stone v. Jewel* [U. S.] 41 Fed. 103); *The Alaska* (U. S.) 23 Fed. 597, 607.

A situation of actual apprehension, though not of actual danger, makes a case for salvage compensation. *Raikes*, 1 Hagg. Adm. 247. "Salvors," says Judge Story, "are not to be driven out of court upon the suggestion that, if they had not touched a derelict ship, the latter might in some other possible way have been saved from all calamity, and therefore the salvors have little or no merit." Thus it was held that a steamship taking possession of a vessel which had been abandoned on the rocks, and which had afterwards floated off and was drifting toward a dangerous shoal, was entitled to salvage compensation, though the crew of the vessel was approaching the vessel and could possibly have saved it. *Holmes v. The Joseph C. Griggs* (U. S.) 12 Fed. Cas. 417, 418.

Salvage is the compensation for the rescue of property from present impending perils, and not for the rescue of it from possible future perils. It is a compensation for labor and service and activity and enterprise—for courage and gallantry actually exerted. It is allowed because the property is saved, not because it might have otherwise been lost. *The Emulous* (U. S.) 8 Fed. Cas. 704, 707.

Towing into port a lightship, which had broken adrift during a severe storm and been carried out to sea, is not a "salvage service" when the lightship was not in peril when she was taken into tow, and could, with a little delay, have reached a place of safety without assistance. In order to sustain a salvage service in such a case, it is necessary to find that the lightship was in peril when the tow came to her aid. *The Viola* (U. S.) 52 Fed. 172, 173.

"Salvage" is a compensation for the rescue of the property from present impending peril, and not for the rescue of it from possible future perils. It is a compensation for labor and services, for activity and enterprise, for courage and gallantry actually exerted, and not for the possible exercise of them, which under the other circumstances might have been requisite. It is allowed because the property is saved, not because it might have been otherwise lost upon future contingency; and subsequent perils and storms may enter as an ingredient into the case, when they are foreseen, to show the promptitude of the assistance and the activity and sound judgment with which the business was conducted, but they can scarcely avail for any other purpose. *The Saragossa* (U. S.) 21 Fed. Cas. 426, 427.

Any service rendered to a vessel in peril or distress which in any measure conduces to its safety is in the nature of a "salvage service," and is none the less such because the peril apprehended did not befall, or because the labor was insignificant and performed without actual risk. *The Apache* (U. S.) 124 Fed. 905, 913.

#### As not requiring peril of salvors.

Where a steamboat on the Ohio river laden with flour was sunk by floating ice within a few feet of the shore, and her cargo was saved at the request of the master of the boat by 50 or 60 persons on the bank of the river, such service entitles the parties to a decree for salvage. Risk or danger of life is not a necessary element of a salvage service; but the controlling inquiry in salvage cases is, was the property in peril of being lost, and was it saved by the effort of those claiming to be salvors? *Spencer v. Avery* (U. S.) 22 Fed. Cas. 917, 919.

To constitute salvage service, if a ship be the thing saved, she must have been in actual danger and have been delivered from

it. It is immaterial that there should have been risk to the salvors. If there were, this circumstance would go to enhance their reward. It determines the amount of reward, not the character of the service; but it is essential that the ship should have been in peril and that she was successfully saved from it. If the danger was great, the reward may be liberal; if inconsiderable, then the reward should be commensurately meager. Danger, peril, and a successful deliverance from it by voluntary effort, is what constitutes a case of salvage. *The Fannie Brown* (U. S.) 30 Fed. 215, 220.

Salvage service consists, not only of labor rendered voluntarily, but of the skill displayed and the risk incurred by those who undertake it. *Gourdin v. West* (S. C.) 11 Rich. Law, 288, 294.

#### As voluntary service.

Salvage service is a service which is voluntarily rendered to a vessel needing assistance. *Stone v. The Jewell* (U. S.) 41 Fed. 103, 105; *Williamson v. The Alphonso* (U. S.) 30 Fed. Cas. 4, 6; *The Alaska* (U. S.) 23 Fed. 597, 607; *McConnochin v. Kerr* (U. S.) 9 Fed. 50, 53.

"Salvage" is a reasonable reward for services rendered in saving property in danger of perishing from a maritime misadventure by parties under no obligation or duty, who voluntarily undertake the services. It is a reward for services, and the service is rendered in the expectation of the reward. *United States v. Morgan* (U. S.) 99 Fed. 570, 572, 39 C. C. A. 653.

The crew of a tug, who under order of its captain assists in towing a disabled steamer into port for a certain compensation, which the captain considers and charges for as towage services, are not volunteers in such a sense as to be entitled to salvage compensation. *The New Camella* (U. S.) 105 Fed. 637, 44 C. C. A. 642.

#### Towage distinguished.

"If there is any extrinsic difference between towage and salvage, it would appear to be that salvage service must always be that given in rescue or relief of property in imminent peril of loss or deterioration, while towage may be applied merely in aid of a vessel against adverse winds or tides, or in difficult passages, while she is in possession of her ordinary powers of locomotion." *The H. B. Foster* (U. S.) 11 Fed. Cas. 948.

There is a clear distinction between a towage and a salvage service. When a tug is called or taken by a sound vessel as a mere means of saving time, or from consideration of convenience, the service is classed as towage; but if the vessel is disabled, and in need of assistance, it is a salvage service. *The Flottbek* (U. S.) 118 Fed. 954, 960.

There is no generic difference between "towage" and "salvage." In the absence of a contract, the towing of a vessel in peril or disabled is salvage; but as a convenient word, to distinguish an ordinary case of contract from one of salvage, "towage" is often used. *Baker v. Hemenway* (U. S.) 2 Fed. Cas. 463.

"If there is any extrinsic difference between towage and salvage, it would appear to be that salvage service must always be that given in rescue or relief of property in imminent peril of loss or deterioration, while towage may be applied merely in aid of a vessel against adverse winds or tides, or in difficult passages, while she is in possession of her ordinary powers of locomotion. Sir Stephen Lushington says, in the case of *The Reward*, 1 W. Rob. Adm. 177: 'Mere towage service is confined to vessels that have received no injury or damage, and mere towage reward is payable in these cases only where the vessel receiving the service is in the same condition she would ordinarily be in without having encountered any damage or accident.'" *The H. B. Foster* (U. S.) 11 Fed. Cas. 948.

#### **Towing disabled vessel or raft.**

Towing a disabled vessel on the high seas is always a salvage service. *The Great Northern* (U. S.) 72 Fed. 678, 681.

"Salvage" is the towing of a vessel in peril or which is disabled. *Baker v. Hemenway* (U. S.) 2 Fed. Cas. 463.

Where a barge, which was the only one of a tow of seven not stranded and sunk, was drifting in a severe storm, without motive power of any kind or an anchor suited to the occasion, and it is probable she would have sunk, had she not been rescued by libellant and conveyed to harbor, the service of libellant was a salvage service, though the barge was stanch and well-constructed, and might have survived the storm, and it was possible she would have been picked up by others, if libellant had not rescued her. *The Rescue v. The George B. Roberts* (U. S.) 64 Fed. 139, 140.

In order to make a salvage service it is not necessary that a vessel, whether sailing or steam, should be unnavigable, or that a steam vessel should be injured, not merely in her machinery, but in her hull or her sails also. Towing a steam vessel, which has lost the use of her steam machinery by an accident, although she is sound in hull and masts, is a salvage service. *The Saragossa* (U. S.) 21 Fed. Cas. 425, 426.

The rescue of a raft of timber, found adrift in a harbor and floating out to sea, is a maritime salvage service, for which compensation may be awarded. *Raft of Spars* (U. S.) 20 Fed. Cas. 173.

Assistance rendered to a raft of logs, when in danger of being broken or swept away, is not a "salvage service," as such term is used in admiralty. *Gastrel v. Cypress Raft* (U. S.) 10 Fed. Cas. 83.

Ferryboats, or any other property of value, adrift on the Ohio river and in peril, are the subjects of "salvage service." *The Cheeseman v. Two Ferryboats* (U. S.) 5 Fed. Cas. 528, 532.

#### **Unsuccessful attempt.**

Among the recognized elements of salvage service is the taking aid to a distressed ship, or information for her to port, and standing by a distressed ship. The officers and crew of a tugboat, which started with another to the rescue of an imperiled ship, in response to her request for assistance, but encountered sea perils which disabled her and compelled her return, so that she did not actually take part in the rescue, are entitled to a salvage award proportionate to their services and the risk to which they were exposed. *The Flottbek* (U. S.) 118 Fed. 954, 959, 55 C. C. A. 448.

"Salvage service" is defined to be the compensation allowed to other persons by whose assistance a ship or its loading may be saved from impending peril. In an effort made in good faith, with means believed to be adequate, the salvor may recover something in the nature of a quantum meruit, though his efforts were unsuccessful. *The Sailor's Bride* (U. S.) 21 Fed. Cas. 159, 160.

#### **SALVAGE UNDERTAKING.**

A "salvage undertaking" is a speculative venture, in which there is no reward if nothing is saved to the owner, and may result in great profit or serious loss; and hence, if a claimant appears, the salvors are not entitled to the entire proceeds, even if they have necessarily incurred expenses exceeding the same. Where a steam vessel moored alongside a vessel laden with oil was withdrawn from a burning wharf by tugs, but sank immediately afterwards, and the tug owners then claimed a right, by virtue of their salvage service, to raise the vessel, which they did at an alleged expense of \$20,000, besides their services, and the vessel sold under order of court for only \$10,560, the salvors were not entitled to the full proceeds, but only to two-thirds thereof. *The Felix* (U. S.) 62 Fed. 620, 622.

#### **SALVOR.**

A "salvor" is a person who, without any particular relation to a ship in distress, proffers useful services and gives it as a volunteer adventurer, without any pre-existing covenant that connected him with



the duty of employing himself for the preservation of that ship. *Lea v. Alexander* (U. S.) 15 Fed. Cas. 91; *The Florida* (U. S.) 22 Fed. 617, 618; *The Wave v. Hyer* (U. S.) 29 Fed. Cas. 464, 466; *Evans v. The Charles* (U. S.) 8 Fed. Cas. 838; *The Nebraska* (U. S.) 75 Fed. 598, 600, 21 C. C. A. 448; *The Clarita and The Clara*, 90 U. S. (23 Wall.) 1, 16, 23 L. Ed. 146 (citing *The Branston*, 2 Hagg. Adm. 3; *The Vrede*, Lush. 322; *The Two Friends*, 1 C. Rob. Adm. 285); *The Neptune*, 1 Hagg. Adm. 227, 236.

The term "salvors" is used to designate persons saving ships or other cargoes from impending perils or losses by recovering them after they are lost, or by bringing them in and preserving them when found derelict, in order to have them restored to their rightful owners. Such persons are entitled to salvage for their compensation. *Baker v. Hoag*, 7 N. Y. (3 Seld.) 555, 559, 59 Am. Dec. 431.

## SAME.

The word "same" is defined to mean "not different or other; identical." *United States v. East Tennessee, V. & G. R. Co.* (U. S.) 13 Fed. 642, 644.

"As ordinarily understood, the word 'same,' when used in comparison, means of like kind, species, sort, dimensions, or the like, not differing in character, or in the quality or quantities compared, corresponding, not discordant, similar, like." *Cobb v. City of Lincoln*, 17 N. W. 365, 366, 15 Neb. 86. The word "same," as used in a statute relating to an increased punishment on a second conviction for the same offense, is held to mean "similar," and not "identical." *In re Dougherty*, 27 Vt. (1 Williams) 325, 327.

"The same" does not always mean identical, or not different or other. It frequently means of the kind or species, though not the specific thing. It is often used as a substitute for that which was used before, and is employed in the sense of a pronoun. In this sense it is very frequently employed in legal documents and pleadings. "To deliver policies and receive premiums upon the same" is equivalent to deliver policies and receive premiums upon them; i. e., to receive premiums upon the policies. *Crapo v. Brown*, 40 Iowa, 487, 493.

A Vermont statute exempting certain enumerated animals from execution, and also "sufficient forage for the keeping of the same" through the winter, should be construed to mean sufficient forage for the keeping of all the animals named in the statute, and not merely limited to sufficient forage for the keeping of such of the animals

enumerated in the statute as the debtor has on hand at the time of the execution. *Kimball v. Woodruff*, 55 Vt. 229, 230.

"Same," as used in Rev. St. § 166, providing that, as soon as may be after the assessor's book of each county shall be corrected and adjusted according to law, the county court shall ascertain the sum necessary to be raised for county purposes, and fix the rates of taxes on the several subjects of taxation, so as to raise the required sum, and the same to be entered in the proper columns in the tax book, refers to the rates and subjects of taxation only. *Raley v. Guinn*, 76 Mo. 263, 274.

### Known antecedent.

The words "the same," as used in a contract, statute, etc., imply a known antecedent. *Smith v. Boyd*, 5 N. E. 319, 320, 101 N. Y. 472.

### Last antecedent.

The relative "same" invariably refers to the last antecedent. *Brown v. State*, 13 S. W. 150, 28 Tex. App. 379.

The relative "same" always refers to the next antecedent (Co. Litt. 20b, 385b; also note 3), and in this respect differs from "said," which only refers thereto when it seems to be consistent with and to support the meaning and intention as manifested by the other parts of the writing or instrument. *Sampson v. Commonwealth* (Pa.) 5 Watts & S. 385, 388.

In construing a provision of a will by which testator gave to his "daughter \$600 per annum, to be regularly paid to her in quarterly payments out of my 3 per cent. stock during her life, and, should she marry and have issue, then at her decease the same to go to her children and the children of Betsy Hancock equally," and in holding that the words "the same" referred to the stock which should be equally divided among such children, the court said: "This seems to us also to be the most obvious, grammatical construction of the language used. The words 'the same' may refer to the \$600 per annum or to the 3 per cents., but the most obvious reference is to the last antecedent. By a necessary implication the stock was to remain during the life of his daughter, and is not otherwise disposed of by the will than by the clause in question or the residuary clause." *Hancock v. Hancock*, 31 Mass. (14 Pick.) 70, 75.

A description of a deed stating the course to be to a post standing on the north bank of a certain creek, thence "down the same," means "down the creek," which is the immediate antecedent of the word "same," and not "down the bank." *Seneca Nation v. Knight*, 23 N. Y. 498, 500.

**Antecedent other than last.**

"Same," as used in Bankr. Act 1867, § 26, providing that no bankrupt shall be liable to arrest during the pendency of the proceedings in bankruptcy in any civil action, unless the same is founded on some debt or claim from which his discharge in bankruptcy would not release him, refers to the arrest, and not to the action. In re Kimball (U. S.) 14 Fed. Cas. 474, 476.

"Same," as used in a demurrer, stating that: "Come now the defendants, and demur severally to each paragraph of the complaint as amended, because the same does not state facts sufficient to constitute a cause of action against defendants"—refers to each paragraph, and not to the entire complaint. *Terre Haute & L. R. Co. v. Sherwood*, 31 N. E. 781, 782, 132 Ind. 129, 17 L. R. A. 339, 32 Am. St. Rep. 239.

In construing a devise in which testator left a sum of money to trustees, in trust to collect and receive the interest thereof, and pay the same unto his three grandchildren during all the term of their natural lives, so that the same should not be liable for any of their contracts, debts, or engagements, nor should the same be subject to anticipation, and that, immediately after the death of any one of them dying without issue, then the same should revert to the surviving heirs of testator's son, it was held that the word "same," in the provision for the death of one of the grandchildren without issue, referred to the income theretofore payable to him, and that consequently no distribution of principal could take place while any of them were living. In re Phillips' Estate (Pa.) 48 Leg. Int. 232.

The word "same," in a description of real estate in which the first boundary runs to the side of a lane, thence along the same, is to be construed as referring to the side of the lane particularly mentioned, and the grant does not include the land, in view of the fact that the deed also grants an easement in the lane to the grantee. *Mott v. Mott*, 68 N. Y. 246, 255.

The word "same," as used in a deed of marriage settlement, declaring the uses, trusts, and limitations of the settlement, and empowering the trustees to sell and hold the proceeds subject to the same uses, refers to something which is mentioned before. *Creighton v. Pringle*, 3 S. C. (3 Rich.) 77, 94.

**SAME AS.**

The words "same as," in the constitutional provision declaring that the property of all corporations for pecuniary profit shall be subject to taxation the same as that of individuals, suggests the meaning that the property of all such corporations shall be subject to taxation just as the property of

individuals is. That of individuals is liable to taxation. They have not been granted immunity from taxation, and so in like manner the property of all corporations for pecuniary profit shall be liable to taxation. Such property shall not be freed from liability, but shall always be liable to be taxed just as the property of individuals is so liable. "The same as" are words of comparison. *Mississippi Mills v. Cook*, 56 Miss. 40, 52.

The words "same as individuals," in Const. art. 8, providing that the property of all corporations for pecuniary profit shall be subject to taxation the same as that of individuals, are to be construed as requiring the Legislature to impose the burden of taxation upon the property of corporations for pecuniary profit the same as or equally with that of individuals; that the property of this class of corporations shall bear the same burdens of taxation as are placed upon that of individuals; that each shall be taxed for the same objects and in the same degree, so that individuals shall not be required to pay any taxes on their property which are not also assessed and laid upon the property of corporations of the class named, nor in any greater proportion. *City of Davenport v. Chicago, R. I. & P. R. Co.*, 38 Iowa, 633, 644 (quoted in *Adams v. Yazoo & M. V. R. Co.*, 24 South. 200, 216, 77 Miss. 194, 60 L. R. A. 33).

**SAME CAUSE.**

"Same cause" in Code, § 405, providing that, when an action is terminated in certain specified ways, a new action may be brought for the same cause after the expiration of the period of limitations, was not intended to have such a narrow meaning as to require the plaintiff to bring an action of the same character, when there was another at his election. Such a construction would be very inconvenient and defeat the beneficial purpose of the statute. The words were intended to remove the disability of limitations whenever a new suit was brought within a year based upon the same transaction as the former one, without regard to its technical form, and was intended to prevent mere mistakes as to the form of the remedy from concluding the party from subsequently pursuing the real right under a more appropriate form of action. *Titus v. Poole*, 40 N. E. 228, 230, 145 N. Y. 414.

**SAME CAUSE OF ACTION.**

"Same cause of action," in rule 53 in admiralty, providing that security may be required of the respondents whenever a cross-bill is filed upon any counterclaim arising out of the same cause of action for which the original libel was filed, cannot be

construed to mean the same legal demand or legal claim, but is used in a more general sense, meaning the same transaction, dispute, or subject-matter which had been the cause of the action being brought, and includes those cases of cross-litigations where the question in dispute is identical in both, the defense in one suit being the ground of the claim in the other; and hence a cross-litigation to recover payment of freight upon iron that was delivered arises out of the same cause of action as the original litigation filed to recover the value of iron not delivered. *Vianello v. The Credit Lyonnais* (U. S.) 15 Fed. 637, 638.

A judgment in the same cause of action means a case where the same evidence will support both actions, though they happen to be granted on different writs. Thus where the plaintiff sued in trespass for the taking of staves, and failed after trial on the merits on the ground that he had no right to the staves, he could not thereafter waive the tort and bring assumpsit on the same proof, the two actions being for the same cause, since, if he had no right of action against the defendant for the taking of the staves, because he had no property in them, he had no right, without further and different proof, to the value of the staves. *Rice v. King* (N. Y.) 7 Johns. 20, 21.

#### **SAME CHARACTER OF WORK.**

The meaning of the term "same character of work," as used in *Sayles' Civ. St. art. 4560h*, declaring that only persons in the common service of a railroad, doing the same character of work, and working at the same piece of work are fellow servants, is not at all clear. In a very broad general sense, the ordinary laborers, doing work which requires no special skill, may be said to be engaged in work of the same character. On the other hand, employing the words in a very restricted sense, a man who holds the spike may be said to be engaged in a different character of work from that of the servant who drives it. It would seem that the former meaning is too general, while the latter is probably too restrictive. It was held that a section hand, returning from work to the toolhouse to place his tools therein, was not a fellow servant with other section men engaged in carrying the tools to the toolhouse on a hand car, because doing the same character of work, since the means employed in doing the work differentiated its character. *Long v. Chicago, R. I. & T. Ry. Co.*, 57 S. W. 802, 804, 94 Tex. 53.

#### **SAME CLASS OF SUBJECTS.**

Const. art. 10, § 3, declaring that all taxes shall be uniform upon the "same class of subjects" within the territorial limits of

the authority levying the tax, clearly shows that the division of property into separate and distinct classes of subjects is authorized. *People v. Henderson*, 21 Pac. 144, 146, 12 Colo. 369.

#### **SAME COMPENSATION.**

*St. Louis City Charter*, art. 4, § 17, provides that the president of the council or speaker of the house of delegates shall perform the duties of mayor in case of the absence of the mayor, and shall receive the same compensation. In *Bates v. City of St. Louis*, 54 S. W. 439, 440, 153 Mo. 18, 77 Am. St. Rep. 701, it is held that the phrase "same compensation as the mayor" does not mean that the acting mayor shall receive the compensation of the mayor, so that a deduction is to be made from the mayor's salary, in case he is absent, but that the acting mayor shall receive compensation equal to that of the mayor.

#### **SAME CONDITION.**

A dredge boat, which was exported from the United States and again returned thereto, but before such return was extensively repaired, the repairs consisting in part in putting in a new dipper and crane, substituting new and much heavier anchors and a more powerful anchor hoist, and also in raising her deck to enable her to carry the additional weight, which involved an expenditure amounting to 40 per cent. of her value after the work was done, cannot be construed as "returned in the same condition as exported" within the meaning of *Rev. St. § 2505*, entitling manufactures or machines so returned to enter without duty. *United States v. Dunbar* (U. S.) 67 Fed. 783, 785, 14 C. C. A. 639.

Molasses barrels, exported empty when new, and afterwards brought back into the United States filled with molasses, are not brought back "in the same condition as when exported," within the meaning of *Act Cong. March 2, 1799, § 47, Schedule 1*, and *Tariff Act March 3, 1857, § 5*, etc., exempting from duties certain articles imported to a foreign country and brought back to the United States in the same condition as when exported. *Knight v. Schell*, 65 U. S. (24 How.) 526, 530, 16 L. Ed. 760.

#### **SAME CONDITIONS.**

"Same conditions and terms," as used in a will bequeathing property to testator's nephew, to be enjoyed in a certain manner, and also giving him a remainder in other property, to be enjoyed upon the same conditions and terms, embrace all the limitations and restrictions placed on the first gift; the word "terms" meaning that the re-

mainder is given in the same way as the other bequest. *Pendleton v. Larrabee*, 28 Atl. 482, 483, 62 Conn. 393.

#### **SAME DIRECTION.**

Code, § 1966, imposes a penalty on any railroad which shall charge for transportation of any freight over its road a greater sum than shall be charged at the same time by it for an equal quantity of the same class of freight transported in the same direction over any portion of the same railroad of equal distance. Held, that the phrase "transported in the same direction" means the direction in which the other is carried from the depot in which the shipment is made, and embraces branches of the same road in that direction which are used in connection with and as a part of the same road. *Hines v. Wilmington & W. R. Co.*, 95 N. C. 434, 440, 59 Am. Rep. 250.

#### **SAME EXTENT.**

The words "same extent," in Gen. Laws, c. 24, § 7, providing that nonresidents of states shall be taxed on capital invested in the business in the state to the same extent as if they are residents, means that the non-resident is to be taxed to the same extent on the same sort of property, and that the property is to be valued at the same rate as if it belonged to a resident. *People v. Feltner*, 67 N. Y. Supp. 893, 896, 56 App. Div. 280.

#### **SAME FEES.**

The term "same fees," as used in Comp. St. p. 106, § 8, providing that the police judge shall receive the same fees as justices of the peace for similar services, cannot be construed as importing, not only that the measure of the police judge's compensation is the same as that provided for justices of the peace, but also that he shall in all cases receive it, if not from the persons adjudged to pay it, then from the city, whose officer he is. It has special reference to the amount of compensation to be charged and paid for particular purposes, and not the source from whence it should come. *Cobb v. City of Lincoln*, 17 N. W. 365, 15 Neb. 86.

#### **SAME FUND.**

The word "same," as used in a will, providing that the trustee may at his discretion pay over the income of a fund to a certain party for the support of himself and family during life, and at his death pay and deliver over the same in equal portions to his children, includes not only the body of the trust fund, but also any unexpended portion of the income. *Appeal of Clement*, 49 Conn. 519, 520, 533.

#### **SAME GENERAL BUSINESS.**

Civ. Code, § 1130, providing that an employer shall not be liable for the injury to his servant caused by the negligence of another person employed by the employer in the same general business, has reference "to the general business of the department of service in which the employé is engaged, and does not embrace business of every kind which may have some relation to the affairs of the employer, or even be necessary for their successful management." *Jones v. Southern Ins. Co. (U. S.)* 38 Fed. 19, 21.

As used in a definition of a fellow servant, defining such term as a person engaged in the same general business with another, the words "same general business" have reference to the general business of the department of service in which the employé is engaged, and do not embrace business of every kind which may have some relation to the affairs of the employer, or even be necessary for their successful management. This construction must obtain, since, if any other were adopted, there would be no such thing as a separate department of service in the business of large corporations; for whatever would aid in the doing of any of the work would come under the designation of the "general business of the company." *Webb v. Denver & R. G. W. Ry. Co.*, 26 Pac. 981, 7 Utah, 363.

#### **SAME GRADE OF EMPLOYMENT.**

By the phrase "same grade of employment," within the meaning of Fellow Servant Act, § 2, providing that all persons who are engaged in the common service of certain railway corporations and are working together at the same time and place, to a common purpose of same grade, neither of such persons being intrusted by such corporations with any superintendence or control over their fellow employés, are fellow servants, is not meant that two employés must be engaged in work of equal dignity or receiving equal compensation. If neither has any superintendence or control over the other, or any authority to direct the other in the performance of any duty, they are in the same grade of employment. Thus a railroad hostler employed to take engines into a roundhouse, and a boiler washer engaged therein, neither having any control over the other, are in the same grade of employment. *Missouri, K. & T. Ry. Co. of Texas v. Whitaker*, 33 S. W. 716, 11 Tex. Civ. App. 663.

#### **SAME GRANTOR.**

"Same grantor," as used in reference to a recording act, not making void an unrecorded deed as against a purchaser under a title totally unconnected with that deed, but only as against purchasers under the same

grantor, does not mean necessarily from the same person; but deeds purporting to convey the same title, whether by the grantor, his heir, his heir's grantee, or any other person in the devolution of the same line of title, are from the "same grantor." *Farmer v. Fisher*, 46 Atl. 892, 893, 197, Pa. 114.

### SAME INVENTION.

For a reissue to be valid as covering the "same invention" as that in the original, within the meaning of Rev. St. § 4916 [U. S. Comp. St. 1901, p. 3393], providing for a new patent for the same invention, it must be for the same invention as the original patent, as such invention appears from the specification and claims of such original. *Carpenter Straw Sewing Mach. Co. v. Searle* (U. S.) 52 Fed. 809, 812 (citing *Topliff v. Topliff*, 145 U. S. 156, 12 Sup. Ct. 825, 38 L. Ed. 658).

### SAME MANNER.

The phrase "in the same manner" has a well-understood meaning in legislation, and that meaning is not one of restriction or limitation, but of procedure. It means by similar proceedings, so far as such proceedings are applicable to the subject-matter. *Wild-er's S. S. Co. v. Low*, 112 Fed. 161, 164, 50 C. C. A. 473 (citing *Phillips v. Middlesex County*, 122 Mass. 258, 260).

The words "in the same manner as if" and the words "as if" mean exactly the same. *Suydam v. Voorhees*, 43 Atl. 4, 6, 53 N. J. Eq. 157.

St. 1869, c. 378, authorizing the county commissioners to remove all dams on certain streams for the purpose of proper drainage in certain towns, and providing that damages therefor shall be assessed "in the same manner" as in the laying out of highways, means by similar proceedings so far as such proceedings are applicable to the subject-matter. *Phillips v. Middlesex County*, 122 Mass. 258, 260.

A will in which the principal gift is to one for life, with remainder over, and devising other property to another person, to take "in the same manner," will generally be considered to pass the property subject to the same limitations as those affecting the principal gift. *McDonald v. Dunbar* (Pa.) 12 Atl. 553, 557.

"Same manner," as used in Rev. St. art. 672, providing that when any unorganized or disorganized county has been attached to another county, and desires to be organized or reorganized, a petition shall be presented to the commissioners' court of the county to which such county is attached, and the court shall proceed without delay to the organization or reorganization of such county "in the same manner" as hereinbefore provided for

the organization of new counties, clearly shows that the intention of the Legislature was that such counties could only be organized through an election, to be held at the time and in the manner prescribed by the sections relating to new counties, and that the word "manner" applies to the time at which the election must be held, as well as to places and the machinery provided for its ordering and conducting. The phrase "in the same manner" means by the same proceedings, so far as applicable to the subject-matter. *State v. Cook*, 14 S. W. 996, 998, 78 Tex. 406.

Cr. Code, § 4883, providing that jurors summoned by a coroner are entitled to the same compensation allowed grand and petit jurors, to be "paid in the same manner," means no more than that the compensation of the coroner's jury must be paid from the county treasury, and does not render applicable to the members of a coroner's jury all the terms of the statutory provisions touching the compensation of grand and petit jurors. *Hawkins v. Duncan*, 15 South. 828, 103 Ala. 398.

The charter of a borough, providing that the assessor shall assess on the persons and property of the residents and the property of nonresidents within the said borough "in the same manner" and within the same time as the assessors of townships are or may be by law required to assess the state and county taxes, "authorizes the assessment of the taxes raised in the borough, not only in the same manner as to form, but also as to the objects to be taxed, as taxes should afterwards be assessed in the townships, save only that whatever property was assessed should be assessed at its actual value." *Perkins v. Perkins*, 24 N. J. Law (4 Zab.) 409, 411.

Section 35 of the school law of March 20, 1865 (St. 1864-65, p. 419), providing that delinquent taxes for school purposes shall be recovered "in the same manner and with the same costs as delinquent state and county taxes," means not only that the form of the action and mode of procedure shall be the same, but also that the state shall be the party. *State v. First Nat. Bank*, 4 Nev. 491.

### SAME OFFENSE.

The provision of the Constitution that no person shall be subject for the "same offense" to be twice put in jeopardy of limb or life is an ancient phrase known in the law, and such a clause may be considered as equivalent to a declaration of the common-law principle that no person shall be twice tried for the same offense. The application of the maxim in each particular case in which it is relied on as a bar to further proceedings in a prosecution requires the consideration whether in fact the party plead-

ing has before been put in jeopardy, and whether it can be said to be for the same offense. Mr. Blackstone states it thus: "The pleas of a former acquittal and former conviction must be upon a prosecution for the same identical act and crime." It must therefore appear to depend on facts so combined and charged as to constitute the same legal offense or crime. It is obvious, therefore, that there may be great similarity in the facts, where there is a substantial legal difference in the nature of the crimes; and, on the contrary, there may be considerable diversity of circumstances, where the legal character of the offense is the same. Where there is a diversity of circumstances, such as time and place, where time and place are not necessary ingredients in the crimes, still the offenses are to be regarded as the same. In considering the identity of the offense it must appear by the plea that the offense charged was the same in law and in fact, as is well expressed in *East's Crown Law*, as drawn from the case of *Rex v. Vandercomb*, 2 Leach, 816. These cases establish the principle that, unless the first indictment were such as the prisoner might have been convicted upon by proof of the facts contained in the second indictment, an acquittal on the first indictment can be no bar to the second. *Commonwealth v. Roby*, 29 Mass. (12 Pick.) 496, 502.

In the fifth amendment to the United States Constitution, declaring that no one shall be twice put in jeopardy for the same offense, the phrase "same offense" means one which is the same both in law and in fact. If an act is made an offense by the articles of war and also by the criminal law, the perpetrator is not exempt from indictment because he has been tried and acquitted by court-martial. The act is the same, but the offense is not. *United States v. Cashiel* (U. S.) 25 Fed. Cas. 318, 319.

The term "same offense," in Const. art. 1, § 14, providing that no person for the same offense shall twice be put in jeopardy of life or liberty, does not signify the same offense *eo nomine*, but the same criminal act or omission. *Hirshfield v. State*, 11 Tex. App. 207, 214.

The words "same offense," within the meaning of the fifth amendment of the Constitution of the United States, means one which is the same both in law and in fact. If an act is made an offense by the articles of war and also by the criminal law, the perpetrator is not exempt from indictment because he has been tried and acquitted by a court-martial. The act is the same, but the offense is not. *United States v. Cashiel* (U. S.) 25 Fed. Cas. 318, 319.

The words "same offense," as used in the Bill of Rights, providing that no person in any criminal case shall be "twice put in

jeopardy of life or liberty for the same offense," has been construed to mean by some courts the same as a criminal act, while others have held the contrary. Where the criminal act is at the same time an offense against the laws of the state and those of the United States, the words "same offense" are properly interpreted otherwise than equivalent to the words "same criminal act." *Moundville v. Fountain*, 27 W. Va. 182, 195, 197.

A person is not in jeopardy twice for the same offense where he is indicted on the charge of selling liquor to a minor and subsequently tried for a sale without a license; the proof necessary to convict of the offense charged in the second prosecution not being sufficient to convict in the first prosecution, though the offenses were committed by the same act. *State v. Gapen*, 47 N. E. 25, 17 Ind. App. 524.

"Same offense," as used in the constitutional provision that no person shall be twice put in jeopardy for the same offense, was said by Bishop to be "equivalent to the same criminal act." *People v. Stephens*, 21 Pac. 856, 857, 79 Cal. 428, 4 L. R. A. 845 (citing 1 Bish. Cr. Law, § 1060).

To entitle a party to the benefit of the constitutional provision that no person shall "be twice put in jeopardy for the same offense," the second jeopardy must be for the same offense. The principle on which the numerous authorities quoted rest is that the charge of stealing goods, the property of A., is not the same offense with a charge of stealing goods, the property of B., and that the evidence essential to support one charge would necessarily destroy the other. *State v. Williams*, 12 South. 932, 933, 45 La. Ann. 936.

In the constitutional guaranty that no person, after being once acquitted by a jury, shall again be put in jeopardy of his life for the same offense, the expression "same offense" includes not only identity in the act constituting the offense, but apparently, also, identity in the form, nature, or effect of the prosecution, so that it is held in *State v. Gustin*, 53 S. W. 421, 422, 152 Mo. 108, that under Rev. St. § 3951, which provides that, when a defendant shall be acquitted or convicted upon an indictment, he shall not thereafter be tried or convicted of a different degree of the same offense, nor for an attempt to commit the offense charged in the indictment, or any degree thereof, or any defense necessarily included therein, provided he could have been legally convicted of such a degree or offense, or attempt to commit the same, under the first indictment, the fact that defendant was convicted of an assault in a magistrate's court under a municipal ordinance, and fined, is not a bar to an indictment for an assault with a felonious intent,

though the assault for which he was convicted under the ordinance was the same as the one referred to in the indictment.

"Same offense," as used in the act of 1852 relating to convictions for illegal sale of intoxicating liquor, and authorizing an increased punishment on a second conviction for the same offense, means "similar offense," and not the identical offense for which the first conviction was had, and a conviction in the language of the statute will stand. *In re Dougherty*, 27 Vt. (1 Williams) 325, 327.

#### **SAME PARTIES.**

"Same parties," as used in a statute authorizing a second action of ejectment to be brought by the same parties, includes their heirs or assigns. *Dishong v. Finkbinder* (U. S.) 46 Fed. 12, 17 (citing *Britton v. Thornton*, 112 U. S. 535, 5 Sup. Ct. 291, 28 L. Ed. 816).

"Same parties," as used in Code Civ. Proc. § 2034, providing that, where a deposition has been once taken in an action, it may be read by either party in any other action between the same parties upon the same subject, includes successors in interest. *Briggs v. Briggs*, 22 Pac. 334, 335, 80 Cal. 253.

#### **SAME PIECE OF WORK.**

The meaning of the term "same piece of work," as used in *Sayles' Civ. St. art. 4560h*, declaring that only persons in the same service of a railroad, doing the same character of work and working at the same piece of work, are fellow servants, is not at all clear. In the general sense, changing the rails upon the same part of a railroad track is the same piece of work. In a limited sense, the handling of rails and the driving of spikes are different pieces of work. When applied to the complicated constructions and repairs incident to the business of a railroad, terms more indefinite could hardly have been found. It was held that a section hand, returning from work to a toolhouse to place his tools therein, was not a fellow servant with other section men engaged in carrying tools to the toolhouse on a hand car, because working at the same piece of work, since he was carrying his tools without their aid. *Long v. Chicago, R. I. & T. Ry. Co.*, 57 S. W. 802, 804, 94 Tex. 53.

#### **SAME PUNISHMENT.**

The words "same punishment," as used in Code, § 4488, declaring that an accessory shall receive and suffer the same punishment as would be inflicted on a person convicted of having stolen goods, etc., may mean that the sentence of the principal in case of his conviction shall be the exact measure of

that pronounced upon the accessory; but the better construction probably is that the latter shall not exceed what the former might have been, if the court had seen proper to inflict the maximum of the law. *Anderson v. State*, 63 Ga. 675, 678.

#### **SAME RATE OF INTEREST.**

Within the meaning of a note which contained the stipulation "with interest from date at rate of 10 per cent. per annum," and with the further stipulation that, if interest be not paid annually, it is to become principal and bear the same rate of interest, refers to the contract rate of interest expressed on the face of the note; that is, 10 per cent. per annum. *Vaughan v. Kennan*, 38 Ark 114, 117.

#### **SAME RIGHT.**

Under the employers' liability act of Massachusetts (Acts 1887, c. 270), giving an employé the "same right" of compensation and remedies against his employer for negligence as if he had not been an employé, was a right to compensation and remedy for injury caused by the negligence of another, subject to be defeated if the injured person's own negligence contributed to produce the injury. *Griffin v. Overman Wheel Co.* (U. S.) 61 Fed. 568, 573, 9 C. C. A. 542.

In a statute providing that mutual debts between parties to an action, due at the time of action brought in the same right, may be the subject of set-off, the plain meaning of the phrase "due in the same right" is that a debt due from A. alone shall discharge only a debt to A. alone, or that a debt of one character—i. e., whether several or joint, individual or representative—shall discharge a debt of the like character and no other. Thus a joint debt cannot be set off against a several or individual one. *Wingate v. Parsons*, 4 Del. Ch. 117, 122 (quoted and approved in *Greer v. Arlington Mills Mfg. Co.*, 43 Atl. 609, 613, 1 Pennewill [Del.] 581).

#### **SAME STREET.**

"Same street," as used in St. 1882, c. 220, prohibiting the granting of a license to sell intoxicating liquors within 400 feet of a schoolhouse situated on the same street, will be construed to apply to all of the stated distance on the same thoroughfare, though the two parts of the street bear different names. *Commonwealth v. McDonald*, 36 N. E. 483, 160 Mass. 528.

"Same street," as used in St. 1882, c. 220, forbidding the licensing of a place for the sale of intoxicating liquors on the same street with a schoolhouse, means on the same street on which the entrances of the schoolhouse are, and with which it is connected by the use of it as a schoolhouse, and

does not apply to a street which merely abuts on the side of a lot on which the schoolhouse stands. *Commonwealth v. Jenkins*, 137 Mass. 572, 573.

#### **SAME TIME.**

Code, § 1966, imposes a penalty on any railroad which shall charge for transportation of any freight over its road a greater sum than shall be charged at the same time by it for an equal quantity of the same class of freight transported in the same direction over any portion of the same railroad of equal distance. Held, that the phrase "shall at the same time be charged" is used in the sense of the same period, or same occasion. *Hines v. Wilmington & W. R. Co.*, 95 N. C. 434, 444, 59 Am. Rep. 250.

#### **SAME VOYAGE.**

The phrase "on the same voyage," as used in Act March 3, 1851, § 4, providing that if any loss shall be suffered by several freighters or owners of goods, wares, and merchandise on the same voyage, and the whole value of the ship and her freight for the voyage shall not be sufficient to make compensation to each of them, the shipowners are authorized to transfer their interest in the vessel for the benefit of such claimants to a trustee, etc., restricts the participation in the apportionment to the freighters for a single voyage, and not to permit the shipowners to bring into the compensation losses sustained on prior or other voyages. *Wright v. Norwich & N. Y. Transp. Co. (U. S.)* 30 Fed. Cas. 685, 688.

#### **SAMPLE.**

See "Sale by Sample."

Sample or otherwise, see "Otherwise."

The word "sample," both in its legal and popular acceptance, means that which is taken out of a large quantity as a fair representation of the whole; a part shown as a specimen. *Webber v. Commonwealth (Va.)* 33 Grat. 808, 904; *Brantley v. Thomas*, 22 Tex. 270, 273, 73 Am. Dec. 264; *Whittaker v. Hueske*, 29 Tex. 355, 358.

"The fair import of the exhibition of a sample is that the article supposed to be sold is like that which is shown as a parcel of the article. It is intended to save the purchaser the trouble of examining the whole quantity. It certainly means as much as this: 'The thing I offer to sell is of the same kind and essentially of the same quality as the specimen I give you.' I do not know that it would be going too far to say that it amounts to a declaration that it is equally sound and good." *Bradford v. Manly*, 13 Mass. 138, 143, 7 Am. Dec. 122.

#### **SAMPLE MERCHANT.**

A "sample merchant," within the meaning of Acts 1881-82, pp. 511, 513, is one who sells or offers to sell any description of goods, wares, or merchandise by sample, card, description, or other representation, verbal or otherwise, or who acts as agent for the sale or collection of orders by sample or descriptive list. *White v. Commonwealth*, 78 Va. 484, 485.

#### **SAMPLE ROOM.**

"Sample room," as used in an indictment charging a person with breaking and entering a sample room in a hotel, cannot be affirmed from its mere designation to be a shop, store, warehouse, or other building, structure, or inclosure in which goods, merchandise, or valuable things are kept for use, sale, or deposit, within Cr. Code, § 3786, defining burglary. *Thomas v. State*, 12 South. 409, 410, 97 Ala. 8.

#### **SANCTION.**

The word "sanction" conveys the idea of sacredness or of authority, and hence, as used in an instruction that any dying declaration is given all the sanction of evidence which the law can give to evidence, the word will be construed to mean "weight," rendering the instruction erroneous, since such declaration is not entitled to as much weight as though the declarant had stated the same facts on the trial, and opportunity had been given to cross-examine him and to observe his demeanor. *People v. Kraft*, 43 N. E. 80, 81, 148 N. Y. 631.

The sanction of an oath is a belief that the Supreme Being will punish falsehood; and whether that punishment is administered by remorse of conscience or in any other mode in this world, or is reserved for the future state of being, cannot affect the question, as the sum of the matter is a belief that God is the avenger of falsehood. *Blocker v. Burness*, 2 Ala. 354-356.

#### **SANCTIONING RIGHT.**

Where a master wrongfully discharges a servant from his service under a contract for a definite period, a new right accrues in favor of the servant against the master, which right is one to recover damages for the breach of the contract. This right is called by some authors a "sanctioning right." *Tiffin Glass Co. v. Stoeher*, 54 Ohio St. 157, 164, 43 N. E. 279.

#### **SAND.**

Where a deed conveyed all the fishing rights and "rights to the sand and to all use



ful things that may drift upon the beach," and also contained a description of the land that constituted the beach and words of inheritance, the word "sand" in the deed should be construed as equivalent to "land." *Spinney v. Marr*, 41 Me. 352, 353.

The meaning of the words "sand and gravel," in a deed from a town reserving the right to enter on the land and take sand and gravel for the purpose of making and repairing highways, is to be determined by evidence to prove the meaning of the words as generally understood in such locality. *Brown v. Brown*, 49 Mass. (8 Metc.) 573, 576.

#### **SAND BAR.**

A description of the land in a bill to remove a cloud on title as a sand bar, a piece of ground, etc., is sufficient to include the term "island." *Butler v. Grand Rapids & I. R. Co.*, 48 N. W. 569, 572, 85 Mich. 246, 24 Am. St. Rep. 84.

#### **SAND BLAST.**

A sand blast is one prepared by partially filling an opening or crevice in the rock with powder, laying a fuse, and filling in with sand and slate rubbish. *Stephens v. Martins*, (Pa.) 17 Atl. 242, 243, 1 Monag. 376, 380.

#### **SAND PACKING.**

A term in use among people engaged in raising cotton, preparing it for market, and selling and purchasing it, indicating the fraudulent packing or baling of cotton by the placing of sand or other worthless foreign substance in the bales. *Daniel v. State*, 61 Ala. 4, 8.

#### **SANE.**

See "Nonsane."

"Sanus" means whole, sound, in a healthful state, and is applicable equally to the mind and to the body. *Den v. Vancleve*, 5 N. J. Law (2 Southard) 589, 661.

If a defendant in a prosecution for homicide, at the time of the homicide had sufficient mind to know right from wrong and to understand the nature and quality of the act he was committing, he was sane in the law. *Eckert v. State*, 89 N. W. 826, 827, 114 Wis. 160.

The term "sane" can hardly be used to characterize one, while sober, who has gone so far in drink as to bring on the stages of delirium tremens or mania potu. *Menkins v. Lightner*, 18 Ill. (8 Peck) 282, 284.

A "sane man" is defined by Chief Justice Shaw, in *Commonwealth v. York*, 50 7 Wds. & P.—31

Mass. (9 Metc.) 93, 43 Am. Dec. 373, to be "a voluntary agent acting on motives, and must be presumed to contemplate and intend the necessary, natural, and probable consequences of his own acts." If, therefore, one voluntarily or willfully does an act which has a direct tendency to destroy another's life, the necessary and natural conclusion from the act is that he intended so to destroy such person's life. *State v. Hays*, 23 Mo. 287, 326.

A person of sound mind, within the meaning of the statute authorizing persons of sound mind to make wills, is a person who has a sane mind. "Sanity" means health, and therefore a sane mind is a healthy mind. When a mind not imbecile acts healthy, it may be called sound. But if a testator acts under a delusion which is the result of a disordered mind amounting to insanity, and this delusion influences the testator in making his will, or any part of it, it will be sufficient to avoid it on the ground of want of a sound mind when he made it. *Robinson v. Adams*, 62 Me. 369, 398, 16 Am. Rep. 473.

#### **SANE MEMORY.**

To be of the "sane memory" required in order to warrant testator in making a will, he must have been of mental capacity to receive and recognize external facts and things in the manner of men in general; i. e., through the medium of his senses. This is the first faculty or operation of the mind required by law. Secondly, he must also be able to retain in mind the facts and things so perceived and recognized, whether for a longer or shorter time, so that he may conceive of them and reflect upon their import, without confounding them with mere imaginations or hallucinations, or the speculations of other men. *Farr v. Thompson* (S. C.) 1 Speers, 93, 105.

#### **SANE OR INSANE.**

See "Suicide, Sane or Insane."

#### **SANITARY.**

"Sanitary," as used in the title of Act March 31, 1891, entitled "An act to provide for the formation of sanitary districts," and conferring certain powers on such districts, will not include the regulation of intoxicating liquors, so that a section of the act granting commissioners of the district power to regulate sales of intoxicating liquors is unconstitutional, as not being expressed in its title. *In re Werner*, 62 Pac. 97, 99, 129 Cal. 567.

In Laws 1891, c. 401, providing for laying out of ditches, drains, and levees across the land of others for agricultural, sanitary, or mining purposes, the term "sanitary pur-

poses" comprehends and imports the idea of public health. The word "sanitary" is one of purely abstract meaning. It is utterly devoid of any suggestion of numbers, or of public or private relation. For such purpose it is strictly neutral and impartial. Without some qualifying word, it is inoperative to designate the purpose as a public one, or as in the interest of the public health, and hence the statute authorizing the taking of land for such purpose is unconstitutional. *Johnson v. Schmidt*, 63 N. W. 288, 289, 90 Wis. 301.

The word "sanitary," in a city charter providing that the assembly can authorize the construction of sewers in sewer districts when the board of public improvements shall recommend it as necessary for sanitary or other purposes, embraces everything pertaining to the health of the inhabitants. *Eyerman v. Blaksley*, 78 Mo. 145, 151.

#### SANITARY DISTRICT.

As municipal corporation, see "Municipal Corporation."

#### SANITY.

The word "sanity," which we generally use to express soundness of mind, is nothing more or less than "sanitas," which means health, soundness of body, mind, wit, and memory, with an English termination, which is here used with reference to a bodily infirmity, and which has acquired that limited sense, in our language, from use alone. *Piper v. Stinson* (S. C.) 3 McCord, 251, 254; *Hogan v. Bowlware*, Id.

"Sanity" is the presence of reason, thought, and comprehension. *Somers v. Pumphrey*, 24 Ind. 231, 245.

"Sanity," when used as a test of criminal responsibility, is the ability of a person to distinguish between right and wrong in reference to the act which he is about to commit. The true test is not, as sometimes laid down, the capacity merely to distinguish between the rightfulness and wrongfulness of the act committed, but there must also be sufficient will power to choose whether he shall do or refrain from doing it. It is a state of mind in which the criminal is capable of the perception of consciousness of right and wrong as applied to the act he is about to commit, and the ability through that consciousness to choose by an effort of the will whether he will do the deed which he knows to be wrong; that is, it is a knowledge of the rightfulness or wrongfulness of the contemplated action and the power to decide against doing a wrongful deed. *State v. Reidell*, 14 Atl. 550, 552, 9 Houst. (Del.) 470.

Every man is presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crime; and to establish insanity as a defense it must be proved that at the time of committing the offense defendant was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or, if he did know it, such as not to know he was doing wrong.

It is not necessary that the defense of insanity be established beyond a reasonable doubt. It is sufficient if the jury is reasonably satisfied by the weight or preponderance of the evidence that the accused was insane at the time of the commission of the act. *State v. Klinger*, 43 Mo. 127, 132.

Sanity being the normal and usual condition of the mind, the law presumes that every individual is in that state. *Walker v. People*, 1 N. Y. Cr. R. 7, 17 (citing *Brotherton v. People*, 75 N. Y. 159, 162).

#### SARSAPARILLA.

"Sarsaparilla" means a root, or its extract, and "iron," as used in connection with the word "sarsaparilla," must mean a solution of the metal iron, so that the words "sarsaparilla and iron" are descriptive of the article, and cannot be appropriated as a trade-mark. *Schmidt v. Brieg*, 35 Pac. 623, 625, 100 Cal. 672, 22 L. R. A. 790.

#### SATISFACTION—SATISFY.

See "Entirely Satisfied"; "Fully Satisfied"; "Legally Satisfied"; "Not Satisfied"; "Reasonably Satisfied"; "Thoroughly Satisfied"; "Well Satisfied"; "Entire Satisfaction"; "Means of Satisfaction"; "Reasonable Satisfaction."

Accord and satisfaction, see "Accord and Satisfaction."

The phrase "become satisfied," as used in a statute providing that, if the board of county commissioners become satisfied that a proposed drain is a public utility, they shall appoint appraisers, who shall assess lands affected, etc., means that if the county board is convinced, or if the board finds, that the work contemplated is a public utility, they shall appoint appraisers. The statute does not confer discretionary power, but imposes a judicial duty on the county board to hear and determine the question of the public utility of the contemplated work. *Bryan v. Moore*, 81 Ind. 9, 12.

Acceptance by the creditor of the consideration of an accord extinguishes the obligation, and is called "satisfaction." Civ. Code Cal. 1903, § 1523; Civ. Code Mont. 1895, § 2062; Rev. Codes N. D. 1899, § 3826; Civ. Code S. D. 1903, § 1179.

A "satisfaction," in its legal significance, is the performance of the terms of an accord, and if such terms require a payment of money, then that such payment has been made. *Harrison v. Henderson*, 72 Pac. 875, 876, 67 Kan. 194, 62 L. R. A. 760.

#### **Cause of action.**

The term "satisfaction," when applied to the satisfaction of a cause of action, differs from a release, in that the former is a bar to further proceedings on the same cause of action, while a release may be given, though no part of the damage has been paid. Thus a technical release given to one joint tort-feasor will not release other joint tort-feasors. *Miller v. Beck*, 79 N. W. 344, 346, 108 Iowa, 575.

#### **Claim or debt.**

A plea of an insurance company to a declaration by a party for insurance (the amount of the claim having been fixed by arbitrators) that a tender of the amount had been made "in satisfaction" of plaintiff's claim means simply that the full amount of the award was tendered. It does not import a condition attached to the tender. *Hall v. Norwalk Fire Ins. Co.*, 17 Atl. 356, 357, 57 Conn. 105.

"Satisfaction" means that which satisfies; compensation; indemnification; reward; remuneration; requital; amends; atonement; recompense; payment of a legal debt or demand; the discharging or canceling of a mortgage by paying the amount of it. Thus, a debt is discharged and the debtor released when the creditor has received something from the debtor which satisfies him. It may be money or its equivalent. It may consist of offsetting mutual demands or wiping out mutual disputed claims by mutual concessions, in which event no money is required to pass from one to the other. *Rivers v. Blom*, 63 S. W. 812, 813, 163 Mo. 442.

There are two kinds of satisfaction of a debt—actual and legal; actual where payment in money or its equivalent is made of the debt, and legal where by some act done by the party, or from lapse of time, the law presumes payment. *Mazyck v. Coil* (S. C.) 3 Rich. Law, 235, 236.

#### **Contracts.**

In a contract of sale of machinery, wherein persons agree to buy if they are satisfied with its soundness, the word "satisfied" gives the purchasers the right to declare arbitrarily that they are not satisfied, whether or not they ought to have been so. *Gray v. Central R. Co. of New Jersey* (N. Y.) 11 Hun, 70, 74.

"The authorities are abundant to the effect that a contract containing a provision that an article to be made and delivered shall be satisfactory to the purchaser, it must be

satisfactory to him, or he is not required to pay. It is not enough that he ought to be satisfied with the article. He must be satisfied, or he is not bound to accept it. Such a contract may be unwise, but of its wisdom the party so construing is to be his own judge, and if he deliberately enters into such an agreement he must abide by it." *Silsby Mfg. Co. v. Town of Chico* (U. S.) 24 Fed. 893, 894.

The cases where the parties provide that the promisor is to be satisfied, or to that effect, are of two classes; and whether the particular case at any time falls within the one or the other must depend on the special circumstances, and the question must be one of construction. In the one class the right of decision is completely reserved to the promisor, and without being liable to disclose reasons or account for his course, and all right to inquire into the grounds of his action and overhaul his determination is absolutely excluded from the promisee and from all tribunals. It is sufficient for the result that he wills it. The law regards the parties as competent to contract in that manner, and, if the facts are sufficient to show that they did so, their stipulation is the law of the case. The promisee is excluded from setting up any claim for remuneration, and is likewise debarred from questioning the grounds of decision on the part of the promisor, or the fitness or propriety of the decision itself. The cases of this class are generally such as involve the feelings, taste, or sensibility of the promisor, and not those gross considerations of operative fitness or mechanical utility which are capable of being seen and appreciated by others. But this is not always so. It sometimes happens that the right is fully reserved, where it is the chief ground, if not the only one, that the party is determined to preserve an unqualified option, and is not willing to leave his freedom of choice exposed to any contention or subject to any contingency. He is resolved to permit no right in any one else to judge for him, or to pass on the wisdom or unwisdom, the justice or injustice, of his action. Such is his will. He will not enter into any bargain, except upon the condition of reserving the power to do what others might regard as unreasonable. In the other class, the promisor is supposed to undertake that he will act reasonably and fairly, and found his determination on grounds which are just and sensible; and from thence springs a necessary implication that his decision, in point of correctness and the adequacy of the grounds of it, is open to consideration, and subject to the judgment of judicial triors. Under these principles it was held that where a contract for the sale of a machine was entered into with great reluctance by the vendee on the solicitation of the vendor's agent, and it appeared that the vendee would not enter into the agreement until the warranty of satisfaction had

been inserted therein, the jury were justified in finding that the vendee had reserved the absolute right to reject the machine. *Wood Reaper & Mowing Mach. Co. v. Smith*, 15 N. W. 906, 908, 50 Mich. 565, 45 Am. Rep. 57.

Where a son agreed to support and maintain his father, and covenanted that, if at any time the father should become dissatisfied with living with him, the son would pay the charges for the father's board and necessary expenses, the father had the right to quit the son's family whenever he became dissatisfied, and was not obliged to show any good excuse for leaving. In reaching this conclusion the court said: "It is a case where the law will not undertake to say for the party that he must be satisfied, and has no right to be dissatisfied with living in this family; for the party, by the express terms of his contract, has made his own feelings the sole judge of the matter. Contentment and satisfaction with a man's position in a particular family is a matter which the law will not assume to determine for him; neither will it do the converse, and say he had no cause to be discontented and dissatisfied, and therefore he cannot be regarded as dissatisfied. The agreeableness or disagreeableness of the society and state of things about him in the family are left to his own tastes and feelings to determine. If the defendant is right in the construction which he puts upon this clause of the contract, and we are to hold that the plaintiff had no right to quit without good cause, arising from a neglect of the defendant to perform his duties under the contract, \* \* \* then the clause of the contract is wholly superfluous, and is divested of all meaning and legal effect; for, if the defendant has not performed his duty toward the plaintiff under the covenant, then the plaintiff would be justified in leaving, were there no such clause in the contract." *Hart v. Hart* (N. Y.) 22 Barb. 606, 610.

Plaintiff agreed to make and deliver to defendant a suit of clothes, which were to be made to defendant's satisfaction. It was held that defendant had the absolute right to refuse the suit, if he was not satisfied with it, and his reasons for so refusing could not be required of him. *Brown v. Foster*, 113 Mass. 136, 139, 18 Am. Rep. 463.

Defendant engaged plaintiff to make a portrait of his daughter, under an agreement that he was not to be compelled to pay for it unless it was satisfactory to him. It was held that defendant had the right to refuse the picture on the ground that it was not satisfactory, without giving any reasons why he was dissatisfied with it. The court said in this regard: "It may be that the picture was an excellent one, and that the defendant ought to have been satisfied with it and accepted it; but under the agreement the defendant was the one person who had the right to decide this question. Where parties

thus deliberately enter into an agreement which violates no rule of public policy, and which is free from taint of fraud or mistake, there is no hardship whatever in holding them bound by it. Artists or third parties might consider the portrait an excellent one, but yet it might prove very unsatisfactory to the person who ordered it, although such person might be unable to point out with clearness or certainty the defects or objections; and if the person giving the order stipulates that the portrait, when finished, must be satisfactory to him, or else he will not accept it, and this is agreed to, he may insist upon his right as given him by the contract." *Gibson v. Cranage*, 39 Mich. 49, 50, 33 Am. Rep. 351.

Where by a contract brick are to be made of certain kind and character, to the satisfaction of the general superintendent of a company, or his authorized representative, the right of rejection by the superintendent was absolute, and his reasons cannot be investigated, if in good faith; that is, not fraudulent. *Barrett v. Raleigh Coal & Coke Co.*, 41 S. E. 220, 221, 51 W. Va. 416, 90 Am. St. Rep. 802.

A contract of employment, providing that the work performed would be to the satisfaction of the employer, means that the employer is to be the judge; and the question of the reasonableness of the judgment is not open to contention, and does not mean that the employé will be entitled to recover if he was a competent workman. *Koehler v. Buhl*, 54 N. W. 157, 159, 94 Mich. 496.

A contract to let a certain person have a binder, providing that it shall "give satisfaction," and, if not, the latter was to pay for the use, should not be construed to mean merely that it should be a good machine and do good, reasonable work, which would be satisfactory to reasonable men using machinery, but that the person to whom it was let had an option to accept or reject it, according as it gave him satisfaction or not, according to his own judgment. *Plano Mfg. Co. v. Ellis*, 35 N. W. 841, 843, 68 Mich. 101.

Where one contracted to purchase certain land, if on investigation he "should be satisfied with the title," such language meant that he was given the power to determine whether he would purchase or not, so long as his objection to the title was not unreasonable. *Taylor v. Williams*, 45 Mo. 80, 81.

Defendant requested plaintiff to deliver him certain pans, for which he agreed to pay, "if satisfied" with them. In construing this phrase the Supreme Court of Vermont said: "We think the ruling of the court that the defendant had no right to say arbitrarily and without cause that he was dissatisfied, and would not pay for the pans, was sensible and sound. The pans were made with appliances to graduate the temperature of the milk by

running water, and in that consisted their excellence. Without these, they were like other pans, save their greater capacity. All this the defendant well knew. If a man orders a garment made of given material and fashion, and promises to pay if satisfied, he cannot say that the garment in material and manufacture is according to the order, and yet refuse to test the fit or pay for it. He must act honestly, and in accordance with the reasonable expectations of the seller, as implied from the contract, its subject-matter, and surrounding circumstances. His dissatisfaction must be actual, not feigned. *Daggett v. Johnson*, 49 Vt. 345, 348.

"Satisfaction," as used in a contract providing that work shall be done to the satisfaction of the architect, means a legal satisfaction; and though an architect capriciously and willfully refuse to be satisfied, if the work has been performed substantially in compliance with the contract, the law will hold the architect to be satisfied. *Pollock v. Pennsylvania Iron Works Co.*, 34 N. Y. Supp. 120, 130, 13 Misc. Rep. 194 (citing *Hopper v. Cutting*, 13 N. Y. Supp. 820; *Byron v. Bell*, 10 N. Y. Supp. 693, 16 Daly, 198; *Highton v. Dessau*, 19 N. Y. Supp. 395; *McCarthy v. Gallagher*, 4 Misc. Rep. 188, 23 N. Y. Supp. 884; *Duplex Safety Boiler Co. v. Garden*, 101 N. Y. 387, 4 N. E. 749, 54 Am. Rep. 709; *Nolan v. Whitney*, 88 N. Y. 648; *Bowery Nat. Bank v. City of New York*, 63 N. Y. 336; *Doll v. Noble*, 116 N. Y. 230, 22 N. E. 406, 5 L. R. A. 554, 15 Am. St. Rep. 398).

Where a party took an organ, agreeing to keep and pay for it, if satisfied, such contract merely meant that he was bound to act honestly and to give the instrument a fair trial, and he was not bound to be satisfied because he had no ground to be dissatisfied. *McClure v. Briggs*, 58 Vt. 82, 87, 2 Atl. 583, 56 Am. Rep. 557.

An agreement by which the plaintiffs were to execute a bond to defendants "to their satisfaction" meant that if, in the exercise of their judgment, acting on the best information conveniently within their reach, the defendants in good faith concluded that the bond was not sufficient, plaintiffs were bound by their action. *Harris v. Miller* (U. S.) 11 Fed. 118, 122.

Defendant purchased an evaporator from plaintiff on trial, agreeing to pay for it if he liked it; the plaintiff to take it back if he did not like it. The court said: "The trial upon which the defendant took the evaporator was to be had for the purpose of ascertaining whether defendant liked it or not, and not for the purpose of ascertaining whether it was equal to plaintiff's recommendations of it or not. The trial was to be had solely with reference to the defendant's wishes in respect to the machine for such uses as he might find he could make of it, and not with

reference to any usefulness of it for other persons. To this trial the defendant was bound to bring honesty of purpose. Anything short of that would not determine his wishes fairly, but only his willful caprice or his dishonorable design. To it he was not bound to bring any more capacity of judgment than he had; for he was only to ascertain his own wishes, and these could be measured by no judgment or capacity but his own. He was not to determine what would be the wishes of ordinary persons under like circumstances, and therefore was not bound to use the care and skill of ordinary persons in making the determination. *Hartford Sorghum Mfg. Co. v. Brush*, 43 Vt. 528, 532.

A contract for the construction of a book case of a particular description in a good, strong, and workmanlike manner, "to the satisfaction" of the purchaser, was not satisfied by the construction of a book case of a kind described and in the workmanlike manner required, merely, unless the person specified was satisfied. *McCarren v. McNulty*, 73 Mass. (7 Gray) 130, 141.

"Satisfaction," as used in a contract providing that a building shall be completed to the acceptance of the architect and the satisfaction of the owner, has no reference to the quality of the workmanship or materials, and as to these, in the absence of proof of fraud or unfair dealing on the part of the architect, his acceptance of the work as satisfactory binds the owner. *Tetz v. Butterfield*, 11 N. W. 531, 54 Wis. 242, 41 Am. Rep. 29.

Where a contract is required to be done to the satisfaction of one of the parties, the meaning of the word "satisfaction" necessarily is that it must be done in a manner satisfactory to the mind of a reasonable man. *Union League Club v. Blymyer Ice Mach. Co.*, 68 N. E. 409, 413, 204 Ill. 117.

#### **Demand against testator.**

A legacy is presumed to be a satisfaction of a demand against the testator. This is the rule where there are no circumstances in the case, or on the face of the testator's will, showing a different intention. Where a testator directed his executors to pay all his debts, where a legacy is payable when the legatee arrives at age, and where the debt due from the testator to the legatee is in a measure unliquidated, the legacy is no satisfaction of the debt. *Van Riper v. Van Riper*, 2 N. J. Eq. (1 H. W. Green) 1, 3.

#### **In equity.**

"Satisfaction" may be defined, in equity, to be a donation of a thing with the intention, express or implied, that it is to be an extinguishment of some existing right or claim of the donee. It usually arises in a court of equity, as a matter of presumption,

where a man, being under an obligation to do an act, as to pay money, does that by will which is capable of being considered as a performance or satisfaction of it; the thing performed being ejusdem generis with that which he has engaged to perform. Under such circumstances, and in the absence of all countervailing circumstances, the ordinary presumption in courts of equity is that the testator has done the act in satisfaction of his obligation. *Green v. Green*, 49 Ind. 417, 423 (citing *Story*, Eq. Jur. § 1099; 1 *Pow. Dev.* 433, note 4; *Rop. Leg.* 1028; *Blandy v. Widmore*, 1 P. Wms. 324, note; *Chancey's Case*, 1 P. Wms. 408, note; 2 *Redf. Wills*, 185, note; *Eaton v. Benton* [N. Y.] 2 *Hill*, 576).

#### Evidence.

"Satisfied," as used in an instruction directing the jury to return a certain finding, "if from a preponderance of all the evidence you are satisfied" that certain facts existed, meant the same as "find" or "believe." *Callan v. Hanson*, 53 N. W. 282, 283, 86 *Iowa*, 420.

"Satisfy," as used in an instruction that the burden of proof was upon defendants to satisfy the jury by a preponderance of the testimony, etc., is used as synonymous with "believe," and hence is not error. *Sams Automatic Car Coupler Co. v. League*, 54 *Pac.* 642, 644, 25 *Colo.* 129.

In order to be satisfied, one must be reasonably certain; and hence an instruction that if the jury were satisfied from the evidence, etc., is not error. *Kenyon v. City of Mondovi*, 73 N. W. 314, 315, 98 *Wis.* 50.

"Satisfied," as used in a statement that one party to a cause must satisfy the jury of the existence of a certain material fact, means to relieve of all uncertainty or doubt. *Torrey v. Burney*, 21 *South.* 348, 351, 113 *Ala.* 496.

"Satisfied," as used in an instruction in an action against a railroad company for injuries caused by a collision, stating that the circumstances justified an inference of negligence, and that the jury should find in favor of the plaintiff, unless defendant's testimony satisfied their minds to the contrary, cannot be construed as importing merely that the defendant should overcome such inference by a preponderance of the evidence, as the word indicates more than such degree of proof. Hence the instruction should be considered erroneous. *Cleveland, C. & St. L. Ry. Co. v. Best*, 48 N. E. 684, 687, 169 *Ill.* 301.

The word "satisfy," when used in the sense of satisfying a body of men of the truth of a disputed fact, means to free the mind from doubt regarding such fact; to set it at rest. The word implies much more

than a preponderance of the evidence. *Kelch v. State*, 45 N. E. 6, 8, 55 *Ohio St.* 146, 39 *L. R. A.* 737, 60 *Am. St. Rep.* 680.

"Satisfy" ordinarily signifies something more than a belief founded on a preponderance of evidence, and hence its use, in an instruction that the jury should be satisfied from all the facts and circumstances shown in evidence, is erroneous. *Rosenbaum Bros. v. Levitt*, 80 N. W. 393, 394, 109 *Iowa*, 292.

"Satisfied," as used in an instruction in a civil suit requiring that the jury be satisfied with the evidence of ownership of the property in controversy, is not of broader meaning, as demanding the mental concurrence of the jury, than the phrase "preponderance of the evidence," and hence is not error as so used. *Edwards v. Stewart*, 44 *S. W.* 326, 328, 141 *Mo.* 562.

"Satisfaction," as used in an instruction leaving the jury at liberty to require in their discretion such proof as would furnish satisfaction to them of the justness of a claim, should be understood in the sense given in *Worcester's* fourth definition: "To release from suspense, doubt, or uncertainty; the sense of certainty; conviction." To satisfy is "to free from doubt, perplexity, or suspense; to set the mind at rest; to convince." One of the synonyms is to convince the understanding. While one person will be satisfied of the truth of a matter upon a mere scintilla of evidence, and another require that all doubt be removed before it is shown to be true to his satisfaction, it cannot be said that one is satisfied—that his understanding is convinced—of the truth of the matter in respect of which he entertains a reasonable doubt. *Rolfe v. Rich*, 35 N. E. 352, 353, 149 *Ill.* 436.

A "full satisfaction" of the guilt of the defendant in a criminal case is not the equivalent of belief beyond a reasonable doubt. *Williams v. State*, 19 *South.* 826, 73 *Miss.* 820.

"To satisfy the mind, we think the evidence must be such as to remove all reasonable doubt. The general definition of the word, as given in *Webster's Dictionary*, is 'to fill up the measure of a want of a person or thing,' and, more specifically, 'to free from doubt, suspense, or uncertainty; to give assurance to; to set at rest the mind; to convince.' " *Foley v. State*, 72 *Pac.* 627, 629, 11 *Wyo.* 464.

The term "satisfied," as used in an instruction that the burden of proof as to the fact of suicide, if it existed, was with the defendant, and this it must establish to the satisfaction of the jury by a preponderance of evidence, differs from the word "satisfied" in the general sense, as expressing entirely different conditions of mind; the word "satisfied" alone being a much stronger one, and

signifying to settle certainly, or fix permanently what was before uncertain, doubtful, or disputed. *Cox v. Royal Tribe of Joseph*, 71 Pac. 73, 77, 42 Or. 365, 60 L. R. A. 620, 95 Am. St. Rep. 752.

#### Execution.

Though it is said that the single word "Satisfied," indorsed upon an execution and signed by the officer, should be construed as meaning that the officer has made the entire amount of the execution, yet where the word "satisfied" is embraced in the return, but the whole return, taken together, clearly precluded the idea that the officer had made any part of the execution, the use of the word "satisfied" alone will not raise a presumption that any part of the execution has been made. *Aultman v. McGrady*, 12 N. W. 233, 234, 58 Iowa, 118.

"Satisfied," written on an execution, is equivocal, because it does not show in what manner it has been satisfied. *Sims v. Campbell* (S. C.) 1 McCord, Eq. 53, 55, 21 Am. Dec. 595.

#### Fine and costs.

Pen. Code 1895, § 2224, permitted the court, in every case where a defendant, on conviction of crime, was adjudged to pay a fine, to also imprison him "until the fine and costs were satisfied," not exceeding one day for every \$2 of the fine and costs. Laws 1901, p. 167, § 2, provided for the punishment, on conviction of gambling, by a fine and "imprisonment until the fine and costs were paid." Held, that the word "paid," in the latter act, was synonymous with the word "satisfied," as used in the general act, and hence a person convicted of gambling could be imprisoned not to exceed one day for every \$2 of the fine and costs. *State v. Townner*, 67 Pac. 1004, 26 Mont. 339.

#### Injury.

"Satisfaction," as used in a charge that any injury done to the reputation for chastity by the publication of false and libelous charges ought to be compensated for by the assessment of damages, which should be a full and adequate satisfaction for all the wrong and injury inflicted, means equivalent or compensation. *Enquirer Co. v. Johnston* (U. S.) 72 Fed. 443, 447, 18 C. C. A. 628.

#### Judgment.

As record, see "Record."

At common law, in the old English practice, there were two modes of obtaining satisfaction of a judgment. By a writ of fieri facias the sheriff seized and sold the chattels of the debtor, and paid the debt from the proceeds; or by a writ of levavi facias, for want of chattels, the sheriff took the debtor's lands, and appropriated the rents thereof to

the payment of the judgment until sufficient had been received for that purpose. St. 25 Edw. III, c. 13, provided for a writ of capias ad satisfaciendum, on which the body of the debtor could be taken. Generally the creditor could not have all these writs upon the same judgment, but he could elect which to take. In the state of Maine, by special provision of statute, one writ was issued which embraced them all, commanding the sheriff to take the chattels, lands, and, for want thereof, the body, of the debtor. *Bryant v. Fairfield*, 51 Me. 149, 152.

A judgment of affirmance in a court of appeals is not a satisfaction of the judgment in the lower court; "satisfaction" being a technical term, and in its application to judgments meaning the payment of the money due on the judgment, which payment must be entered of record, and nothing but this being a legal satisfaction of a judgment. A payment in pais by the judgment defendant may lay a foundation on which a court will direct satisfaction to be entered, or a levy on sufficient property has been held to be a satisfaction; but a judgment on a judgment is no satisfaction or extinguishment of the first judgment. *Planters' Bank v. Calvit*, 11 Miss. (3 Smedes & M.) 143, 194, 41 Am. Dec. 616.

"Satisfaction" is a technical term, and in its application to a judgment it means the payment of the money due on the judgment, which must be entered of record; and nothing but this is a legal satisfaction of the judgment. A first judgment is not satisfied by a second judgment on the same cause of action, or by an affirmance thereof by a superior court. *Armour Bros. Banking Co. v. Addington*, 37 S. W. 100, 102, 1 Ind. T. 304 (citing *Jackson v. Shaffer* [N. Y.] 11 Johns. 513; *Mumford v. Stocker* [N. Y.] 1 Cow. 178; *Doty v. Russell* [N. Y.] 5 Wend. 129).

A levy on land is not satisfaction of a judgment. Nor does the sale and purchase of land by the judgment creditor operate as a satisfaction of judgment, if by reason of any substantial defects in the execution or proceedings thereon no title passes to the purchaser. If the title to the land was not affected by the sale, the consequence is that the judgment thereon is in the owner of his estate as before, and the judgment remains unaffected by anything done under the execution. *Townsend v. Smith*, 20 Tex. 463, 70 Am. Dec. 400. After the first void sale the judgment remains in full force, and the order in the execution to collect it is just as imperative on the sheriff as ever. *East Greenwich Inst. for Savings v. Allen*, 47 Atl. 885, 886, 22 R. I. 337.

In the Code of Civil Procedure, providing that after "the expiration of 20 years from the time when the party recovering it

was first entitled to a mandate to enforce it," a judgment "is presumed to be paid and satisfied," by the use of the word "satisfied," after the lapse of 20 years, the conclusive presumption mentioned in the section in effect discharges the record of the judgment. *Gray v. Seeber*, 6 N. Y. Supp. 917, 53 Hun. 611.

"Abide and satisfy," within the meaning of Gen. St. 1878, c. 86, § 10, providing that an appeal bond shall be conditioned to pay the costs of said appeal and damages sustained by the respondent in consequence thereof, if said order or any part thereof is affirmed or said appeal is dismissed, and abide and satisfy the judgment or order which the appellate court may give therein, must be construed not only to require payment of the costs and damages, but also the judgment which may be rendered on appeal, with interest, as, if the term be construed to apply only to the costs and damages incident to the appeal, that part of the provision requiring the payment of costs of said appeal and the damages sustained would be without meaning. *Erickson v. Elder*, 25 N. W. 804, 34 Minn. 370.

#### **Legacy.**

Distinguished from ademption, see "Ademption."

The doctrine of satisfaction applies only to legacies. *Burnham v. Comfort* (N. Y.) 37 Hun, 216, 220.

#### **Mortgage.**

As conveyance, see "Conveyance."

As deed, see "Deed."

Civ. Code, § 1735, provides that, when any mortgage has been "satisfied," the mortgagee must execute a certificate of discharge or enter satisfaction on the record. In *Kronebusch v. Raumin*, 42 N. W. 656, 6 Dak. 243, it is held that under Webster's definition of "satisfy," as meaning "to comply with the rightful demand of; to give what is due to; to answer or discharge, as a claim, debt, legal demand, or the like"—a tender of the amount due on a mortgage, and deposit, and notice thereof in compliance with a statute providing that an obligation for the payment of money is extinguished by due offer of payment, if the amount is immediately deposited in the name of the creditor with some bank of deposit of good repute, and notice given, was a satisfaction within the meaning of the statute relative to the release of mortgage.

#### **Tender of satisfaction.**

A tender of satisfaction is not the same as satisfaction. *Prest v. Cole*, 67 N. E. 246, 248, 183 Mass. 283 (citing *Clifton v. Litchfield*, 106 Mass. 34).

### **SATISFACTION OF THE COURT.**

Laws 1890, c. 78, § 20, authorizing the calling in of another judge to hear a particular cause, whenever it is made to appear "to the satisfaction of the court," by affidavit or otherwise, that a fair and impartial trial cannot be had, requires a degree of proof, by affidavit or otherwise, sufficient to satisfy the judge that a fair and impartial trial cannot be had, and does not authorize the judge to vacate his seat and call in another judge, unless he is satisfied that the allegations are true. The mere filing of an affidavit sufficient in form does not authorize the calling in of such other judge. *State v. Chapman*, 47 N. W. 411, 412, 1 S. D. 414, 10 L. R. A. 432.

Where a county court made a contract for making a road and building a bridge according to certain specifications, and added, "to the satisfaction of the court," it means that it must be done according to the specifications, and that would be to the satisfaction of the court. In such case, in a suit by the contractors for damages for breach of the contract, the declaration need not allege that the work was done "to the satisfaction of the court." *Kinsley v. Monongalia County Court*, 7 S. E. 445, 446, 31 W. Va. 464.

"Satisfaction," as used in the requirement that in an application for publication of summons it must appear to the "satisfaction" of the judge that personal services could not be had, necessarily presupposes the exercise of judicial power on the part of the judge. *Coughran v. Markley*, 87 N. W. 2, 3, 15 S. D. 37.

It is only when sufficient facts are stated to call for judicial determination that his decision cannot be questioned in a collateral proceeding. *Davis v. Cook*, 69 N. W. 18, 20, 9 S. D. 319.

### **SATISFACTION PIECE.**

An instrument which purports to discharge land from the lien of a mortgage, and which is equivalent to a release of the mortgaged premises, is a "satisfaction piece of a mortgage"; for it is an instrument by which the title to the land may be affected in law or equity. *Bacon v. Van Schoonhoven*, 87 N. Y. 446, 450.

### **SATISFACTORY.**

A contract for hiring provided that the one party should serve the other as agent for the term of one year, if such agent should fill the place satisfactorily. It was held that the employment could be terminated by the employer, whenever in his judgment the agent failed to meet the requirements of the contract. "Satisfactorily," said the court, "refers to the mental condition of the employer, and not the mental con-



dition of the court or jury. The right of determining whether the agent filled his place satisfactorily must, from the nature and necessity of the case, belong to the person whose interests are directly affected by the plaintiff's action. To require the employer under such a contract to prove that the agent did not fill the place satisfactorily would be to require of him an impossibility, unless his own oath was taken as to his mental status on the subject. If he is required to prove facts and circumstances that would justify him in feeling dissatisfied with the manner plaintiff filled his office, it would be annulling this clause of the contract, as without such a clause he would have the right to dismiss the plaintiff if he did not properly perform his duties. The question is quite similar to the one that is sometimes raised on chattel mortgages containing a clause authorizing the mortgagee to take the property and sell it when he deems himself insecure. The weight of authority is in favor of the right of the mortgagor to take and sell the property, without any obligation to prove that the facts and circumstances surrounding the parties justify him in deeming himself insecure." *Tyler v. Ames* (N. Y.) 6 Lans. 280, 281.

The plaintiff undertook to make a bust which should be satisfactory to the defendant. The case shows that she was not satisfied with it. The plaintiff has not yet, then, fulfilled his contract. It is not enough to say that she ought to be satisfied with it, and that her dissatisfaction is unreasonable. She, and not the court, is entitled to judge of that. The contract was not to make one that she ought to be satisfied with, but to make one that she would be satisfied with. Nor is it sufficient to say that the bust was the very best thing of the kind that could possibly be produced. Such an article might not be satisfactory to the defendant, while one of inferior workmanship might be entirely satisfactory. *Zaleski v. Clark*, 44 Conn. 218, 223, 224, 26 Am. Rep. 446.

A contract for the sale of machinery warranted to perform "in a satisfactory manner" means satisfactory to the defendant. *Stutz v. Loyal-Hanna Coal & Coke Co.*, 18 Atl. 875, 876, 131 Pa. 267.

A contract to install a patent passenger elevator, which is "warranted satisfactory in every respect," means satisfactory to the purchaser; and while it could not be rejected for mere caprice, yet a bona fide objection by him to its working is a sufficient objection to an action for the price thereof. *Singerly v. Thayer*, 108 Pa. 291, 297, 2 Atl. 230, 56 Am. Rep. 207.

Where a machine was sold on the understanding that it need not be accepted unless it worked satisfactorily, the buyer, in operating it, was bound to exercise only such judgment and capacity as he possessed,

and might reject it as unsatisfactory, though in the hands of a person of ordinary skill it would have worked properly. *Haney-Campbell Co. v. Preston Creamery Ass'n*, 93 N. W. 207, 209, 119 Iowa, 188.

Where a contract for the sale of telegraph poles provided that delivery should commence 60 days after the making of the contract, and that the purchaser might annul the contract whenever the sellers should fail to carry on the work with a "satisfactory" rate of progress, in an action on the contract by the sellers for breach thereof it was proper for the court to give a declaration of law to the effect that the right of the purchaser was not an arbitrary one, but one to be construed with reference to the period which the contract gave the party to complete it, and that it meant such a rate of progress as a reasonable man, under all the circumstances, would regard as satisfactory. *Berthold v. St. Louis Electric Const. Co.*, 65 S. W. 784, 792, 165 Mo. 280.

An agreement providing that an article to be furnished shall be "satisfactory to the party" to whom it is to be supplied means that the party has reserved to himself an unqualified option, and is not willing to leave his freedom of choice to any contention or to be subject to any investigation whatever, and the party's own determination is final and conclusive. *Baltimore & O. Ry. Co. v. Brydon*, 9 Atl. 126, 127, 65 Md. 198, 57 Am. Rep. 318.

#### SATISFACTORY CAUSE.

The recital, in the certificate of a magistrate authorizing the arrest of a debtor, that "satisfactory cause" had been shown for the arrest, is not equivalent to the statement required by Gen. St. c. 124, § 5, that he is satisfied there is reasonable cause to believe the charge contained in the affidavit on which the arrest is asked for is true. *Smith v. Bean*, 130 Mass. 298, 300.

#### SATISFACTORY EVIDENCE.

"Satisfactory evidence," which is sometimes called "sufficient evidence," means that amount of proof which ordinarily satisfies an unprejudiced mind beyond a reasonable doubt. *Thayer v. Boyle*, 30 Me. 475, 481 (citing 1 Greenl. Ev. § 2); *Campbell v. Burns*, 46 Atl. 812, 814, 94 Me. 127; *Moore v. Stone* (Tex.) 36 S. W. 909, 910; *Missouri Pac. Ry. Co. v. Bartlett*, 16 S. W. 638, 639, 81 Tex. 42; *Chapman v. McAdams*, 69 Tenn. (1 Lea) 500, 504; *Territory v. Bannigan*, 46 N. W. 597, 598, 1 Dak. 451; *State v. Dineen*, 10 Minn. 407, 416 (Gil. 325, 333); *White v. Chicago, M. & St. P. Ry. Co.*, 47 N. W. 146, 149; 1 S. D. 326, 9 L. R. A. 824; *West v. West*, 57 N. W. 639, 640, 90 Iowa, 41; *Richmond & D. R. Co. v. Trammel* (U. S.) 53 Fed. 196, 201.

A statement that evidence that an instrument purporting to be a deed is in fact a mortgage must be "satisfactory" means a clear preponderance of the evidence. *Winston v. Burnell*, 24 Pac. 477, 478, 44 Kan. 367, 21 Am. St. Rep. 289.

Under R. L. § 3819, providing for condemnation of liquors, and that it must be shown by satisfactory evidence that the liquor is intended for sale or distribution contrary to law, where no evidence is introduced by the defendant, prima facie evidence is sufficient. *State v. Intoxicating Liquors*, 4 Atl. 229, 230, 58 Vt. 594.

"Satisfactory evidence" is defined to be that evidence which is sufficient to produce a belief that the thing is true; in other words, credible evidence. It is otherwise defined to be such evidence as in amount is adequate or sufficient evidence to justify the court or jury in adopting the conclusion in support of which it is adduced. *Walker v. Collins* (U. S.) 59 Fed. 70, 74, 8 C. C. A. 1.

Satisfactory or sufficient evidence is that amount or weight of evidence which is adapted to convince a reasonable mind. *United States v. Lee Huen* (U. S.) 118 Fed. 442, 457.

That evidence is deemed satisfactory which ordinarily produces moral certainty or conviction in an unprejudiced mind. *Code Civ. Proc. Cal. 1903*, § 1835; *Ann. Codes & St. Or. 1901*, § 688; *People v. Stewart*, 22 Pac. 124, 125, 80 Cal. 129.

The word "satisfactory," as defined by Webster, means giving or producing satisfaction, especially relieving the mind from doubt or uncertainty, and enabling it to rest with confidence. The word "satisfactory," therefore, as used in an instruction to the effect that the law requires that the proof shall be satisfactory, where a divorce is sought from the wife for adultery, is erroneous, as the jury would understand by such instruction that their minds must be convinced of the truth of the charge beyond a reasonable doubt, and a divorce case on such a ground is no exception to the general rule covering civil cases as to the degree of proof. *Pittman v. Pittman*, 72 Ill. App. 500, 503.

Under R. L. § 3819, providing that it must be shown by satisfactory evidence that liquor seized is intended for sale or distribution contrary to law, the evidence, to be satisfactory, must necessarily have a tendency to prove the fact, and the mind of the trier must be convinced by it that the fact existed. *State v. Intoxicating Liquors*, 58 Vt. 594, 599, 4 Atl. 229.

#### **SATISFACTORY INDORSER.**

The words "satisfactory indorser" have a recognized commercial signification, and

mean an indorsement satisfactory to the payee, and not only satisfactory to the maker. The payee cannot capriciously reject such indorser, but must show satisfactory reason for his rejection; in other words, he must be an indorser whom he ought to accept. *Cutter v. Cutter*, 48 N. Y. Super. Ct. (16 Jones & S.) 470, 475.

#### **SATISFACTORY NOTE.**

A contract of sale requiring the purchaser to pay for the goods by a "satisfactory note" does not necessarily mean an indorsed note of the vendee, but may include the note of a third person of undoubted solvency. *Hanna v. Mills* (U. S.) 21 Wend. 90, 92, 34 Am. Dec. 216.

#### **SATISFACTORY PROOF.**

The words "satisfactory proof," as used in *Code Civ. Proc. § 3151*, requiring transfer of an action from one justice to another, where defendant presents satisfactory proof that the justice is a material witness, means practically the same thing as the words "if the justice be satisfied." *Bronson v. Gutches*, 45 N. Y. Supp. 487, 488, 17 App. Div. 204.

Laws 31st Sess. c. 204, § 21, provides that a justice, on application and satisfactory proof being offered by any creditor, may issue an attachment, etc. Plaintiff, in an action on notes, made affidavit that defendant had gone to a certain place, as he believed, for the purpose of taking the benefit of the insolvent act, and to defraud his creditors, and avoid being personally served with process. Held, that the affidavit constituted satisfactory proof within the meaning of the statute. *Van Steenberg v. Kortz* (N. Y.) 10 Johns. 167, 169.

Under a life insurance policy, providing for payment within 60 days after satisfactory proof of death, it is held that the term "satisfactory" does not require that the cause of death shall be communicated by the claimant, but merely entitles the insurer to demand that the fact of death shall be shown with reasonable definiteness and certainty, and if the proof furnished fails to satisfy the association of the fact of death, the association, acting reasonably and in good faith, can require further evidence, but cannot require information as to the cause of death. *Buffalo Loan, Trust & Safe Deposit Co. v. Knights Templar & Masonic Mut. Aid Ass'n*, 27 N. E. 942, 943, 22 Am. St. Rep. 839, 126 N. Y. 450.

#### **SATISFACTORY TITLE.**

A contract to convey, and to furnish a good and "satisfactory" title, is complied with by furnishing a good, marketable title, free from reasonable doubt. *Moot v. Busi-*

*ness Men's Inv. Ass'n*, 52 N. E. 1, 4, 157 N. Y. 201, 45 L. R. A. 666.

If one agrees to sell land with a satisfactory title, and shows a title valid and complete, the parties must have intended such a title to be satisfactory, rather than to leave an absolute right in the purchaser to say "I am not satisfied," when no reason could be shown why he was not satisfied. *Pennington v. Howland*, 41 Atl. 891, 21 R. I. 65, 79 Am. St. Rep. 774. A title which is required to be satisfactory to the party by whom it is to be received means a title to which there is no reasonable objection and with which the party ought to be satisfied. *Latrobe v. Winans*, 43 Atl. 829, 834, 89 Md. 636 (citing *Fagen v. Davison*, 9 N. Y. Super. Ct. [2 Duer] 153).

## SAUCES AND PICKLES.

The words "sauces and pickles of all kinds," in the tariff act of 1883, fixing the duty thereon, are to be construed in their natural and ordinary meaning, and not in any particular or restricted trade meaning, in the absence of evidence showing such meaning, and includes anchovy paste and bloater paste. *Bogle v. Magone* (U. S.) 40 Fed. 226, 228.

## SAVANNA.

"Savanna," as the term was used in North Carolina, meant a natural open meadow, which was not uncommon in the lower parts of the state. *Stapleford v. Brinson*, 24 N. C. 311, 312.

## SAVE.

A bequest of money to a town, to hold in trust for the worthy poor, "to save them from pauperism," did not mean for the avowed purpose of preventing those who enjoyed the bounty from imminent pauperism, nor to qualify, or in any wise limit or restrict, distribution to such persons as, without it, would necessarily or probably become a town charge; but it was simply intended to express in the most general and abstract manner the testator's belief of the good effects which might, in part, incidentally result from the bequest. In *re Marston*, 8 Atl. 87, 95, 79 Me. 25.

Gen. St. 1878, c. 86, § 10, providing that an appeal, when taken from an order, shall stay all proceedings thereon and "save all rights" affected thereby, means that "the order shall be inoperative pending the appeal. The words show more than the intent to merely arrest affirmative action on the order. They show the intent that the order, when appealed from and stayed, shall

not affect any rights." *State v. Duluth St. Ry. Co.*, 50 N. W. 332, 333, 47 Minn. 369.

## SAVE HARMLESS.

The words "save me harmless," in a conveyance in which the grantee agrees to save the grantor harmless from a certain mortgage taken by themselves, implies an engagement of indemnity merely; but, when considered in connection with a provision in the deed requiring the grantee to pay the mortgage, it does not operate to preclude a personal liability to pay the debt from attaching to the grantee. *Foster v. Atwater*, 42 Conn. 244, 252.

"Save the lessor harmless," as used in a covenant in a lease of a railroad to save the lessor harmless against all claims for injuries to persons during a term from any and all causes whatsoever, "is predicated on an implication of a primary liability on the part of the lessor. It is an obligation which in no wise affects a third party or the lessor's liability to him, but is simply a contract for the reimbursing of such damages as may be recovered against the lessor by third persons, whose injury results from its breach of duty owed them." *Nugent v. Boston, C. & M. R. R.*, 12 Atl. 797, 801, 80 Me. 62, 6 Am. St. Rep. 151.

## SAVING.

"Saving," as used in a conveyance granting real estate, but saving something connected therewith, implies "a saving out of the conveyance of a part or parcel of the very thing granted, and is appropriate to describe the exclusion of the land itself from the operating of the deed." *Keeler v. Wood*, 30 Vt. 242, 246.

A deed "saving and reserving" from the operation of the deed a certain road, means saving and reserving the right to use the road, and does not except the road from the grant, but merely reserves an easement therein in the grantor, and the fee passes to the grantee. *Bolio v. Marvin*, 89 N. W. 563, 130 Mich. 82.

The word "saving," in a deed conveying certain land, saving certain lots, meant "with the exception." *Langdon v. City of New York* (N. Y.) 6 Abb. N. C. 314, 323.

"Saving and reserving" are apt words to use in a deed to constitute a reservation; but, when used in a deed "reserving and saving coal in the lands to the grantor," they must operate as an exception, because the coal is a corporeal hereditament, in esse at the date of the deed, part of the land itself, and therefore not the subject of a reservation. Says Lord Coke: "Note a diversity between an exception which is ever a part of the thing granted and of a thing in esse, and

a reservation which is always of a thing not in esse, but newly created or reserved out of the land or tenement demised." And his criticism upon the word "reserved" is as follows: "'Reserve' cometh of the Latin word 'reservo'; that is, to provide for store, as, when a man departeth with his land, he reserveth or provideth for himself a rent for his own livelihood. And sometimes it hath the force of saving or excepting." *Whitaker v. Brown*, 46 Pa. (10 Wright) 197, 198 (quoting 2 Thom. Co. Litt. \*412).

### SAVING CLAUSE.

A saving clause is an exception of a special thing out of general things mentioned in a statute. *State ex rel. Crow v. City of St. Louis*, 73 S. W. 623, 629, 174 Mo. 125, 61 L. R. A. 593; *Clark Thread Co. v. Inhabitants of Kearny Twp.*, 55 N. J. Law (26 Vroom) 50, 54, 25 Atl. 327, 329.

A "saving clause" is ordinarily a restriction in a repealing act, and saves rights, pending proceedings, penalties, etc., from the annihilation which would result from unrestricted repeal. *State ex rel. Crow v. City of St. Louis*, 73 S. W. 623, 629, 174 Mo. 125, 61 L. R. A. 593.

### SAVINGS AND LOAN ASSOCIATION.

As benevolent association, see "Benevolent Association."

### SAVINGS BANK.

As bank, see "Bank."

Webster defines a "savings bank" to be "a bank in which savings are deposited and put to interest." *Keyser v. Hitz* (D. C.) 2 Mackey, 473, 479.

"A savings bank is defined to be any institution, in the nature of a bank, formed for the purpose of receiving deposits of money for the benefit of the persons depositing; to accumulate the produce of so much thereof as shall not be required by the depositors, their executors and administrators, at compound interest; and to return the whole or any part of such deposit, and the produce thereof, to the depositors, their executors or administrators, deducting out of such produce so much as shall be required for the necessary expenses attending the management of such institution, but deriving no power whatsoever from any such deposit or the produce thereof." *Johnson v. Ward*, 2 Ill. App. (2 Bradw.) 261, 274 (quoting *Grant, Banking*, 614.)

Savings banks are established for business purposes. Their functions are to receive, hold, and invest moneys that may be deposited with them, and to repay the money

deposited, under reasonable regulations in their by-laws. In order to make the business successful, these institutions are required to keep their money invested as closely as may be consistent with the ordinary demands of depositors. *Fifth Ward Sav. Bank v. First Nat. Bank*, 48 N. J. Law (19 Vroom) 513, 524, 7 Atl. 318, 324.

A savings bank, as existing in this commonwealth, subject to the general laws, is an institution for the purpose of receiving deposits for the benefit of depositors investing the same, accumulating the profits or interest thereof, paying such profit or interest to the depositor, or retaining the same for his greater security. There is no capital stock, and no stockholders who are entitled to receive profits from the business; but its affairs are administered by a board of trustees, the securities in which the deposits shall be invested are prescribed by law, and the conduct of its affairs under the public supervision of the commissioners of savings banks. *Commonwealth v. Reading Sav. Bank*, 133 Mass. 16, 19, 43 Am. Rep. 495.

"Savings banks are, what their name indicates, banks of deposit for the accumulation of small savings belonging to the industrious and thrifty." *Mercantile Nat. Bank v. City of New York*, 7 Sup. Ct. 826, 838, 121 U. S. 138, 30 L. Ed. 895.

Savings banks are institutions under public management, in pursuance of a great and beneficial public policy, organized for the purpose of investing the savings of small depositors, and are not "banking institutions" in the commercial sense of that phrase, though, so far as receiving money on deposit and loaning money, they are somewhat similar to commercial banks, differing, however, from them in that the deposits of their customers are not generally subject to check. *National Bank of Redemption v. City of Boston*, 8 Sup. Ct. 772, 776, 125 U. S. 60, 31 L. Ed. 689.

Savings banks "are banks established for the receipt of small sums deposited by the poorer class of persons for accumulation and interest. Banks, in a commercial sense, are of three kinds: First, of deposit; second, of discount; and, third, of circulation. All or any two of those functions may be and frequently are exercised by the same association, but savings banks are usually banks of the first class, without authority to make discounts or issue a circulating medium." *Bank for Savings v. Collector*, 70 U. S. (3 Wall.) 495, 513, 18 L. Ed. 207.

Whether a bank is a savings bank must be determined from its organization, powers, and mode of doing business provided in its incorporation act; and where defendant bank was incorporated as other banks for 30 years, with a capital stock divided into

shares, and with all the ordinary banking powers accorded to regular banking institutions, with a provision that married women and minors could make deposits, and when their deposits reached \$100 at their option have them converted into stock, it does not show the bank to be a savings bank. *State v. Lincoln Sav. Bank*, 82 Tenn. (14 Lea) 42, 43.

Whether a bank was a "savings bank," within the meaning of Act March 1, 1869, § 14, providing that franchises of savings banks should be taxed, must be determined, not by the name given it by its charter, but by its organized powers and mode of doing business, as provided in its acts of incorporation. *State v. Lincoln Sav. Bank*, 82 Tenn. (14 Lea) 42, 43 (cited in *State v. Nashville Sav. Bank*, 84 Tenn. [16 Lea] 111, 121).

A savings bank is a quasi charitable and purely benevolent institution, its only object being the safe keeping and provident investment of the funds of the depositor. The members of the corporation have no property interest in its funds, of which they are by law constituted the managers and guardians. The depositors, who alone are beneficially interested, have no voice in the management, nor even in the selection of the persons to whom its management is intrusted. Savings banks have no capital stock. They are incorporated and organized, not for the advantage of the corporators, but solely for the benefit of their depositors. *Barrett v. Bloomfield Sav. Inst.*, 54 Atl. 543, 546, 64 N. J. Eq. 425.

The words "savings bank," as used in the chapter relating thereto, shall include institutions for savings incorporated as such in the commonwealth. *Rev. Laws Mass.* 1902, p. 1067, c. 113, § 10.

In the construction of statutes, the term "savings banks" shall include savings banks, societies for savings, and savings societies *Gen. St. Conn.* 1902, § 1.

### SAVINGS BANK BOOK.

As negotiable paper, see "Negotiable Instrument."

A savings bank book has a peculiar character. It is not a mere pass book or the statement of an account. It is issued to the person in whose name the deposit is made, and with whom the bank has made its contract. It is his voucher, and the only security he has as evidence of his debt. The book is the instrument by which alone the money can be obtained, and its possession is thus some evidence of title in the person presenting it at the bank. *Whalen v. Milholland*, 43 Atl. 45, 49, 89 Md. 199, 44 L. R. A. 208.

### SAVINGS INSTITUTIONS.

"Savings institutions," as used in Act Pa. May 1, 1868, imposing taxation upon all companies whatever, except banks and savings institutions and foreign insurance companies, should not be construed to include a building association, and hence such association is liable to taxation as therein provided. *Bourguignon Bldg. Ass'n v. Commonwealth*, 98 Pa. 54, 64.

### SAW TIMBER.

"Saw timber," as used in a contract to cut saw timber, made by persons engaged in the manufacture of lumber, may be shown to mean pine timber suitable for the manufacture of lumber; the words having no necessary legal signification. *Kelly v. Robb*, 58 Tex. 377, 380.

### SAW LOGS.

A saw log is a log cut into a length suitable for being sawed into lumber. A tree standing in the woods can no more be called a saw log, because it is capable of being cut into a saw log, than it can properly be called a plank or a shingle, from its capacity of being sawed into those articles; and *Laws* 1895, c. 173, § 1, making it unlawful to sell or purchase "mill logs" in quantities of 1,000 feet or more, without being inspected and measured by a sworn inspector, does not apply to the purchase of standing timber. *State v. Addington*, 27 S. E. 988, 990, 121 N. C. 538.

"Saw logs," as used in *Ballinger's Ann. Codes & St.* § 1942, giving a lien to laborers who assist in "manufacturing saw logs into lumber," means the grosser operation of converting logs into timbers, planks, and boards, and does not authorize a lien for labor employed in making shingles. *Dexter, Horton & Co. v. Sparkman*, 25 Pac. 1070, 1071, 2 Wash. St. 165.

### SAW MILL.

A policy of insurance on a "steam sawmill" covers not only the building itself, but all the machinery and fixtures necessary to make it a steam sawmill in all its parts. *Bigler v. New York Cent. Ins. Co.* (N. Y.) 20 Barb. 635, 636.

In *Blake v. Clarke*, 6 G. Greene, 436, it was held that a conveyance of a "sawmill" conveyed the fee of the land on which the mill stood, and that the land on which the mill stands may be regarded as including land over and upon which the slip, if it has one, or any other necessary projection from the mill, passes, and that the term may also embrace the free use of the head of water

existing at the time of the conveyance, as also a right of way or any other easement which has been used with the mill and which is necessary to its enjoyment. *Gibson v. Brockway*, 8 N. H. 465, 470, 31 Am. Dec. 200.

An attachment of all a debtor's real estate in a certain town was followed by a levy upon a building described as a "sawmill." Held, that the word "sawmill" should be construed to include a circular saw mill, which is in and constitutes a part of the sawmill building. *Newhall v. Kinney*, 56 Vt. 591, 593.

"Sawmill," as used in a conveyance of a sawmill, with the appurtenances, includes the mill chain, dogs, and bars in their appropriate places at the time of the conveyance and incidental and necessary to the operation of the mill. *Farrar v. Stackpole*, 6 Me. (6 Greenl.) 154, 158, 19 Am. Dec. 201.

A "sawmill," as defined by the law of Georgia (Code 1895, § 2809), giving all persons furnishing sawmills with timber, logs, etc., liens on such mills and their product, is not a planing mill or a sash and door factory. There are sawmills which have such attachments, but they are not sawmills for that reason, but because they saw logs and timber, as they are cut from the forest, into the lumber of commerce. It is a mill which deals with saw logs, and these are logs suitable to be cut in a sawmill. As stated in the Standard Dictionary, it is an establishment for sawing logs into lumber by power, often including other wood working machines, such as lathe machines and planing machines. In *re Gosch* (U. S.) 9 Am. Bankr. R. 613, 614, 121 Fed. 604, 605.

#### SAWMILL PLANT.

"Sawmill plant," in a lease of a sawmill, providing that the lessee is to occupy the premises in repair and to build all additional tramways, etc., and to make any addition to the present plant necessary for the conduct of the business of the mill, does not include a stock of goods contained in a commissary store attached to the mill, though such store is embraced in the lease. "Plant," as used in this sense, is, according to Webster, the "fixtures and tools necessary to carry on any trade or mechanical business." The goods in a promiscuous country store cannot with propriety be denominated either fixtures or tools essential to the conduct of the business of a mill to saw and plane lumber. They are, so far as they have any connection with the milling business, to become rather supplies for the hands and others engaged in the prosecution of the work carried on in the forest in felling trees and conveying the logs to mill to be sawed into lumber. *Liberty Land & Lumber Co. v. Barnes*, 1 S. E. 378, 380, 77 Ga. 748.

#### SAY.

A contract for the sale of certain goods, "say" a certain quantity is to be construed to allow a delivery of a quantity approximate to that specifically named, allowing only such a slight variation therefrom as from the circumstances of the case or the nature of the articles may seem reasonable to the court. *Brawley v. United States* (U. S.) 11 Ct. Cl. 522, 532.

In a contract of sale of "say not less than" 100 packs of wool, such words are not words of expectation, showing what the parties supposed the quantities would prove to be, but amounted to a contract to deliver at least that quantity. The words "not less than" distinguished the case from that of *Gwillim v. Daniell*, 2 C., M. & R. 61, 5 Tyr. 644, where the contract was to deliver all the naptha that the vendor might make during the term of two years, "say from 1,000 to 1,200 gallons" per month, where the words were those of expectation only. The word "say," in the present case is merely a word pointing and giving an exception of what went before, and is equivalent to "that is to say," and the construction of the contract is that the vendor had to supply at least 100 packs. *Leeming v. Snaith*, 16 Q. B. 275, 278.

The expression "I say the beads" is sometimes applied to the devotional exercises which are performed on rosaries. *Benziger v. Robertson*, 7 Sup. Ct. 1169, 1170, 122 U. S. 211, 30 L. Ed. 1149.

#### SCAB.

"Scab" is a contagious disease with which sheep are affected. *Mount v. Hunter*, 58 Ill. 246.

"The word 'scab' is one which in the language of the Court of Appeals means that a person does not give honest or fair compensation for labor. It is a word that perhaps has a certain objectionable character," but has in it, when applied to a person, no element of force or intimidation, so as to be an evidence of conspiracy. *People v. Radt*, 71 N. Y. Supp. 846, 848.

"The word 'scab' is one of ancient origin, in its application to persons of disrepute, as will appear from a reference to the Century Dictionary. Among the definitions of the word 'scab' there given, we find the following: 'A mean, paltry, or shabby fellow; a term of contempt.' And again: 'Specifically, in recent use, a workman who is not or refuses to become a member of a labor union, who refuses to join a strike, or who takes the place of a striker; an opprobrious term, used by the workmen or others who dislike his action.' A publication calling

plaintiff a 'scab' is libelous per se." *Prince v. Socialistic Co-op. Pub. Ass'n*, 64 N. Y. Supp. 285, 286, 31 Misc. Rep. 234.

## SCALAWAGS.

The word "scalawags," when applied to hogs, is used to designate hogs fed upon mast, such as peach nuts and acorns. *Bartlett v. Hoppock*, 34 N. Y. 118, 119, 88 Am. Dec. 428.

## SCALE.

"Scale" is a technical term, used in the logging business, which means the measuring of logs afloat in rivers and streams. *State v. Lumbermen's Board of Exchange*, 23 N. W. 838, 33 Minn. 471.

## SCALE BILLS.

The term "scale bills," used in the logging business, means certificates of the measurement of logs, measured while floating in rivers and streams. *State v. Lumbermen's Board of Exchange*, 23 N. W. 838, 33 Minn. 471.

## SCALP.

In an action by a broker in grain to recover from a customer for losses on deals, testimony by the customer that the broker asked him to take a "scalp" to make expenses, and that his understanding of a "scalp" is that it is "a trade for the day, and sold out that evening or the next day, a short trade, to be closed out by a settlement on differences," and of a witness that "a scalp is where we buy in the morning and close it out that night. It is a short deal; a quick sale and a settlement on differences. If a man goes in and buys out a regular sale, with the intention of cleaning out that day or within a day or so, I should consider that a scalp; but if he buys for May, and holds on until the May delivery, that would not be a scalp. A short deal is what I call a scalp"—is sufficient to raise a presumption that the deal was a gambling contract, which the broker was called upon to rebut.—*McCormick v. Nichols*, 19 Ill. App. (19 Bradw.) 334, 336.

## SCALPED TICKET.

A "scalped railway ticket" is one bought from a ticket broker. *Hoffman v. Northern Pac. R. Co.*, 47 N. W. 312, 45 Minn. 53.

## SCALPER.

A scalper is a ticket broker. *Hoffman v. Northern Pac. R. Co.*, 47 N. W. 312, 45 Minn. 53.

A scalper is a dealer in transportation tickets originally purchased by others. *Comer v. Foley*, 25 S. E. 671, 673, 98 Ga. 678.

## SCALPER'S BUSINESS.

A "scalper's business" is the buying and selling of railroad tickets that have been partially used. *Ford v. East Louisiana R. Co.*, 34 South. 585, 586, 110 La. 414.

## SCANDAL.

"Scandal" and "slander" mean the same in the language of the law. *Slarff v. Commonwealth* (Pa.) 2 Bin. 514, 519.

The term "scandal," that protects a person from making answer, has a meaning limited and technical. "Fraud," in the established sense of the word, is not the scandal; but this epithet is applicable to the crime only. Notwithstanding the answer of the defendant by the discovery of a private fraud may tend to cast great reproach on his conduct and character, still he is compellable to make answer; but to the scandal and infamy arising from crime he is never to be accessory by being compelled to make discovery. *Skinner v. Judson*, 8 Conn. 528, 533, 21 Am. Dec. 691.

"Scandal," in a pleading in equity, consists of any unnecessary allegation which bears cruelly upon the moral character of an individual, or states anything which is contrary to good manners, or anything which is unbecoming the dignity of the court to hear. *Kelly v. Boettcher*, 85 Fed. 55, 58, 29 C. C. A. 14.

"Scandal," in pleading, consists in the allegation of anything which is unbecoming the dignity of the court to hear, or is contrary to good manners, or which charges some person with a crime not necessary to be shown in the cause, to which may be added that any unnecessary allegation, bearing cruelly upon the moral character of an individual, is scandalous. 1 Daniell, Ch. Pl. & Prac. (6th Am. Ed.) 347. In a bill by a stockholder against the corporation and its directors to enjoin the enforcement of a contract entered into by them, by which, as alleged, the profits and earnings of the corporation were being fraudulently diverted from its stockholders and paid to one of their number as royalties for the use of a void and worthless patent, and to recover from such defendant sums paid him under the contract, which also alleged that he was practically insolvent, and asked that he be enjoined from transferring his stock in the corporation, further allegations that three others of the defendants, who were sons of such defendant, and with him constituted a majority of the directors, were corruptly influenced by him in their action as direct-

ors, and that they had no business, and were dependent on him for support, and were living in an expensive and extravagant manner at his cost, are of matters which are material, and may be proved in support of the other allegations of fraud and insolvency, and cannot be stricken out as scandalous and impertinent. *Burden v. Burden* (U. S.) 124 Fed. 250, 255.

### SCANDALOUS.

The term "scandalous," as applied to the pleading of scandalous matter, cannot be applied to any matter which is not also impertinent, and therefore separate exceptions to the same matter for scandal and also for impertinence cannot be taken. *McIntyre v. Union College* (N. Y.) 6 Paige, 239, 248.

Facts not material to the decision are impertinent, and, if reproachful, are scandalous. *Woods v. Morrell* (N. Y.) 1 Johns. Ch. 103, 106.

The term "scandalous allegations" is used in the law of equitable pleading to designate matter which is not alone immaterial, but is also reproachful. *Hutchinson v. Van Voorhis*, 35 Atl. 371, 373, 54 N. J. Eq. 439.

Matter in a pleading which is material to the issue, while it may be false, cannot be "scandalous." *Wilmington & W. R. Co. v. Board of Railroad Com'rs* (U. S.) 90 Fed. 33, 34.

### SCANDALUM MAGNATUM.

The offense of "scandalum magnatum" by the old common law consisted of scandalizing the sovereign, his ministers, members of parliament, the courts, and the judges, and certain other persons of high rank. This offense has not existed in this country since the Revolution. *State ex inf. Crow v. Shepherd*, 76 S. W. 79, 83, 177 Mo. 205.

### SCARECROW.

Webster defines "scarecrow" to be "any frightful thing set up to frighten crows or other fowls from corn fields; hence, anything terrifying, without danger; a vain terror." When used by plaintiff in stating that he knew nothing of the arrangement and scarecrow which the defendant railroad had placed near the road, by placing its cars and implements, this does not indicate an arrangement which was unusual or unnecessary in the legitimate transaction of its business, or which it did not have a perfect right to make on its own grounds. *Atchison & N. R. R. v. Lovee*, 4 Neb. 446, 448.

### SCENERY.

A lease of a building, with "scenery" and fixtures for a theater, does not require

the lessor to paint the walls. *Forbes v. Howard*, 4 R. I. 364, 368.

### SCHEDULE.

See "Complete Schedule."

### SCHEME.

Any scheme to defraud, see "Any."

In a prosecution under Rev. St. § 5480, as amended by Act March 2, 1889, c. 393, 25 Stat. 872 [U. S. Comp. St. 1901, p. 3696], making it a criminal offense if any one, having devised or intended to devise any scheme or artifice to defraud, to be effected by use of the mails, shall, in carrying out such scheme or artifice, have either deposited a letter or packet in the post office, it was contended that the phrase "scheme or artifice to defraud" necessarily limits the operation of the statute to such schemes or artifices as are accomplished by deception or trickery adapted to defraud; that only by such means can another be defrauded, within the proper meaning of the statute. It was held that the word "scheme" or "artifice" was not descriptive of the character of the artifice, but rather of the wrongful purpose involved in devising the same and putting it into operation by means of the mail; that the term "artifice" means subtle or deceptive art in contriving, trickery, cunning, strategy, finesse, as to lure by artifice; that "scheme" may be of a broader meaning, and not necessarily involving trickery or cunning. "Scheme" may include a plan or device for the legitimate accomplishment of an object, and hence the term is to define the wrongful purpose of injuring another, which must accompany the thing done to make it criminal; so that a person who has used the mails in a plan to extort money from another by threatening to publish charges against him, accusing him of having committed crimes, unless the sum demanded is paid, is a scheme to defraud within the meaning of the statute. *Horman v. United States* (U. S.) 116 Fed. 350, 351, 53 C. C. A. 570.

A plan formed by two defendants to order merchandise by letters written under a printed heading, describing themselves as W. & Co., wholesale merchants, whereas the firm was pretended and fraudulent, and promising to pay promptly for the same, whereas the defendants intended to obtain the merchandise and not pay therefor, is a "scheme to defraud," as used in Rev. St. § 5480 [U. S. Comp. St. 1901, p. 3696], providing that any one devising a scheme to defraud, to be effected by opening correspondence with another person by means of the post office department, and the placing of any letter in the post office in execution of such scheme, shall be punished by fine and imprisonment. *United States v. Watson* (U. S.) 35 Fed. 358, 359.



## SCHISM.

"Schism," as used in a provision of the constitution for the government of a church congregation, providing that, in case of a schism, the right of possessing the common property of the congregation should devolve on two-thirds majority of its voting members, means a division or separation in a church, or denomination, occasioned by diversity of opinions. *Nelson v. Benson*, 69 Ill. 27, 29.

"Schism" is defined by lexicographers to mean in a general sense division or separation, but appropriately a division or separation in a church or denomination of Christians occasioned by a diversity of opinions; breach of unity among people of the same religious faith. *McKinney v. Griggs*, 68 Ky. (5 Bush) 401, 407, 96 Am. Dec. 360.

## SCHMASCHEN.

Although "schmaschen gloves" are so often of lamb origin that this term is indicative of that origin, it is not universally so, nor far enough so to include kid origin. The term used in the trade includes gloves made from the skins of still-born kids, as well as from the skins of immature lambs. Ladies' gloves, 14 inches or less in extreme length, manufactured from the skins of still-born or immature kids, imported from Germany, described in invoice as "schmaschen, low quality, costing from 14½ to 15.25 marks per dozen," were properly dutiable as schmaschen gloves, at \$1.75 per dozen pair, under schedule M, par. 458, of Tariff Act Oct. 1, 1890, and not as ladies' kid, at \$3.25 per dozen pair, under the same schedule and paragraph, and were not liable to the additional duty of \$5 per dozen pair imposed by the first proviso of said paragraph. *In re Holzmeister* (U. S.) 61 Fed. 645, 647.

## SCHNAPPS.

"Schnapps" is a word of German derivation signifying alcoholic drink in general in Germany and Holland, but indicating a Holland gin in England and America. *Wolfe v. Burke* (N. Y.) 7 Lans. 151, 155.

"Schnapps" is a word which from long use has come to designate a kind of gin manufactured at Schiedam, Holland. *Burke v. Cassin*, 45 Cal. 467, 479, 13 Am. Rep. 204.

## SCHOLAR.

See "No Scholar."

St. 1881, c. 172, providing for the incorporation of a new town out of a portion of the territory of an old one, declaring in section 6 that the annual excess, if any, of maintaining the public schools, shall be as-

certained by commissioners appointed for that purpose on the basis of the "average number of scholars" in the public schools of legal age for a certain year, means the average membership of the public schools as shown by the school register, and not the average attendance upon the schools. "Scholars whose names are upon the register and who are recognized as members of the schools are scholars, though they may be occasionally absent from school." *Inhabitants of Needham v. Inhabitants of Wellesley*, 31 N. E. 732, 139 Mass. 372.

## SCHOLARSHIP.

Webster defines "scholarship" to mean maintenance for a scholar or student, the foundation for the support of a student. *Butts v. McMurry*, 74 Mo. App. 528, 530 (quoting *Webst. Dict.*).

## SCHOOL.

See "Common School"; "Elementary School"; "High School"; "Private School"; "Public School"; "Sunday School"; "Town Schools."

"School" is a generic term, and denotes an institution for instruction or education. *American Asylum of Deaf and Dumb v. Phoenix Bank*, 4 Conn. 172, 177, 10 Am. Dec. 112.

A school is an institution for learning; an educational establishment; an assemblage of scholars; those who attend upon the instruction in a school of any kind; any place or means of discipline, improvement, or instruction. *In re Sanders*, 36 Pac. 348, 349, 53 Kan. 191, 23 L. R. A. 603.

The word "school" is applied to institutions which are confined to some special grades of instruction. This word "school" has become a common dictionary word, which may be appropriated by any person. *Commonwealth v. Banks*, 48 Atl. 277, 278, 198 Pa. 397.

A will which provided that a certain sum should be set apart for the "establishment of a school for the education of children, to be distributed according to the directions of my said executors," means the establishment of a school, either public or private, according to the discretion of the executors named, and does not necessarily mean the establishment of a public charitable school, and, if it does, would leave the plans and details entirely to the discretion of the executors. *Attorney General v. Soule*, 28 Mich. 153, 158.

To take possession of a schoolhouse when there are no pupils present, and forbid the teacher to use the building, though the school is thereby prevented from assembling, is not a violation of Code, § 2592,

making it a misdemeanor to willfully interrupt or disturb a school. *State v. Spray*, 18 S. E. 700, 701, 113 N. C. 688.

#### College.

"School," as used in Comp. St. c. 77, art. 1, § 2, exempting from taxation property used exclusively for school purposes, means any institution of learning, and includes the higher institutions, like colleges, as well as the lower grades of institutions. It is a place for learned intercourse and instruction; an institution for learning; an educational establishment; a place for acquiring knowledge and mental training. *Omaha Medical College v. Rush*, 35 N. W. 222, 224, 22 Neb. 419 (citing Webst. Dict.).

#### Orphan association or asylum.

In 1 Rev. St. p. 388, § 4, subd. 3, exempting schoolhouses from taxation the term "school" relates only to public common schools, and will not include the real estate of a colored orphan association, where colored orphans are boarded and suitably educated until of an age to be bound or apprenticed. *Association for Benefit of Colored Orphans v. City of New York*, 12 N. E. 279, 280, 104 N. Y. 581.

An orphan asylum, whose inmates receive instruction as incidental to their care, but in which no religious instruction is given during school hours, is not a "school or institution of learning," within the meaning of Const. art. 9, § 4, prohibiting the use of public money or property for the maintenance of any school or institution of learning wholly or in part under the control or direction of any religious denomination. In defining an institution, regard must be had to its main and essential features. An orphan asylum is organized mainly for a shelter, or home, for fatherless and motherless children. It takes the place of a home to them, and the state steps in and says it will supply them the same instruction as the common schools offer to more fortunate children. The instruction given is incidental to the main purpose of the asylum. *Sargent v. Board of Education*, 71 N. Y. Supp. 954, 956, 35 Misc. Rep. 321.

#### Private school.

Acts 1850, c. 193, art. 10, § 13, provides a penalty for the willful interruption or disturbance by any person of any teacher or pupils in any school kept in any schoolhouse, place, or construction. This provision appears to have been intended to secure the privileges of imparting and receiving education to all without distinction or interruption. A private school giving instruction in writing embraces a branch of education usually taught in public schools and recognized by law, and is clearly within the purview of the statute to which reference has been

made. The argument which excludes such schools from such protection will also exclude colleges, academies, private schools of every description, and institutions of every sort, with the exception of town and district schools; but the terms of the act will embrace all schools for instruction contributing to education in an enlarged signification. *State v. Leighton*, 35 Me. 193, 198.

As used in Const. art. 9, § 8, providing that "no public money shall ever be appropriated for the support of any sectarian or denominational school, or for any school not under the exclusive control of the officers of the public schools," the term "school" has reference to schools as such in the ordinary acceptance of the term; that is, common and public schools, such as are organized for the sole purpose of disseminating knowledge and imparting scholastic instruction, and does not apply to a corporation, strictly nonsectarian and charitable, conducted for the purpose of reclaiming minors. It was held that where minors, who had been convicted of an infraction of the penal laws of the state, were committed to the custody of such corporation, an order directing their maintenance while in such custody out of the pauper fund of the county was not a violation of the Constitution. *Boys' & Girls' Aid Soc. v. Reis*, 12 Pac. 796, 798, 71 Cal. 631.

#### School of pharmacy.

The term "school" is a generic one. In its broad sense it includes all educational institutions. Generally speaking, "school" and "college" are convertible terms. It is correct to speak of any educational institution as a school. In both England and France the institutions in which pharmacists receive their final education are termed "schools"; and the colleges in pharmacy of this country are so termed by the United States Commissioner of Education. *State Board of Pharmacy v. White*, 2 S. W. 225, 227, 84 Ky. 626.

#### School of stenography.

"School," as used in Const. 1879, art. 207, exempting property used exclusively for colleges or other school purposes from taxation, is to be construed in its ordinary sense. While in its most extensive signification it embraces places where learned men meet for instruction and intercourse, and places where learned members of particular professions associate for special purposes, such as the college of surgeons, and is applied to describe an assemblage of a particular kind or the followers of a particular teacher in theology, science, philosophy, or medicine, it is not used in the Constitution in any of these senses, but for the purpose of describing ordinary schools; that is, educational establishments below the grade of college in which elementary knowledge is imparted, or such institutions as are for the purpose of in-

structing young children, and are known as primary or common schools or academies, and does not include an institution in which stenography and typewriting are exclusively taught. *Lichentag v. Tax Collector of First Dist.*, 15 South. 176, 46 La. Ann. 572.

#### **Singing school.**

To constitute a "school," within the meaning of Act 1857, making it a criminal offense to willfully interrupt or disturb any public, private, or select school while the same is in session, it is essential that there should be a teacher and pupils. A meeting of persons assembled for the purpose of singing together, for their improvement in the art of singing, but without a teacher, is therefore not a school within the statute. *State v. Gager*, 28 Conn. 232, 235.

#### **SCHOOL AGE.**

See "Legal School Age."

#### **SCHOOL APPARATUS.**

See "Apparatus."

#### **SCHOOL BOARD.**

As municipality, see "Municipality."

The words "school board," in statutes, may mean any agent, committee, school board, or board of education intrusted with the hiring of teachers and the management of the prudential affairs of the district. *Pub. St. N. H.* 1901, p. 64, c. 2, § 29.

#### **SCHOOL DAY.**

A "school day," as used in the chapter on Education, consists of six hours. *Comp. Laws N. M.* 1897, § 1537.

#### **SCHOOL DISTRICT.**

See "Organized School District."

A "school district" is a corporation organized for educational purposes. *Hamilton v. San Diego County*, 41 Pac. 305, 306, 108 Cal. 273.

"School districts" are formed for the purpose of aiding in the exercise of that governmental function which relates to the education of children, and to that end the legal voters of each district are intrusted with specified powers of local government, and the trustees whom they elect are made a body corporate to represent the district and its inhabitants. These characteristics mark them as political organizations. *Landis v. Ashworth*, 31 Atl. 1017, 1018, 57 N. J. Law, 509.

A "school district" is an involuntary political or civil subdivision of the state, cre-

ated by general laws to aid in the administration of government. They are but instrumentalities of the state, and the state incorporates them, that they may more effectually discharge their appointed duty. *Farmer v. Myles*, 30 South. 858, 861, 106 La. 333.

"School districts" are corporations created for a special purpose, and have only such powers as are specially granted by legislative enactment and those that are necessarily implied to accomplish the object for which they are created. The specification of these powers by the statute under which they are organized restrains them from the exercise of other powers than those granted and such as must be implied to enable them to effect the object of the grant, and operates to restrain them from the exercise of other powers, and in the discharge of their duties and the exercise of the powers granted they are governed and restrained by the provisions of the law under which they are created. *Farmers' & Merchants' Nat. Bank v. School Dist. No. 53*, 42 N. W. 767, 6 Dak. 235.

"School districts" exist only for the purpose of a general politic government of the state. All the powers with which they are intrusted are the powers of the state, and all the duties with which they are charged are duties of the state. *Travelers' Ins. Co. v. Oswego Tp. (U. S.)* 59 Fed. 58, 64, 7 C. C. A. 609.

"School districts" are mere subdivisions of the state for political purposes, and are mere agencies of the state in the administration of public laws. *Village of Westwood v. Sinton*, 41 Ohio St. 504, 511 (citing *State v. Powers*, 38 Ohio St. 54).

A "school district" is but a subordinate agency of the territory, doing the work of the territory. It is a creature of the Legislature, which may create or abolish it, or change its boundaries without consulting the inhabitants, for any reason that may be satisfactory to it; and it may do this as well through a subordinate agency or officer as by direct legislative act. *School Dist. No. 17 of Garfield County v. Zediker*, 47 Pac. 482, 4 Okl. 599.

Const. 1848, art. 9, § 5, declares that the corporate authorities of counties, townships, cities, towns, villages, and school districts may be vested with power to assess and collect taxes for corporate purposes. Held, that the "school districts" meant by the Constitution were the school districts well known and existing throughout the state, formed for the purpose of maintenance and support of public schools under the general school law, as a part of the system of common schools throughout the state. Hence the Legislature had no power to constitute a private schoolhouse, erected under the pro-

vision of a will of a testator, a district, and provide for the election of trustees, and invest them with taxing powers. *People v. McAdams*, 82 Ill. 356, 360.

By Comp. St. c. 79, § 1, subd. 1, a "school district" is defined as the territory under the jurisdiction of a single school board. *Chicago, B. & Q. R. Co. v. Cass County*, 70 N. W. 955, 960, 51 Neb. 369.

The term "school district," as used in the title on Education, shall be declared to mean the territory under the jurisdiction of a single school board, designated as a "board of directors." *Ballinger's Ann. Codes & St. Wash.* 1897, § 2274.

#### **As body corporate.**

A school district is not a "body corporate," having neither a common seal nor legislative powers, but is a quasi corporation, which may exercise within the prescribed space many of the faculties of a corporation; and an officer thereof, mutilating the books of such district, is not liable under a statute punishing the officer of a body corporate who shall destroy or mutilate the books thereof. *Commonwealth v. Beamish*, 81 Pa. (31 P. F. Smith) 389, 391.

#### **As municipality or person.**

See "Municipality"; "Person"; "Public Corporation."

#### **As quasi corporation.**

"School districts" are not, strictly speaking, municipal corporations, where they have neither a common seal nor legislative powers, both of which are characteristic of such corporations; but they are territorial divisions for the purposes of common school laws, consisting generally of boroughs and townships, though frequently subdivided into smaller districts, and are governed by a board of directors chosen by the people. They belong to that class of quasi corporations to which counties and townships belong, exercising within a prescribed sphere many of the faculties of a corporation, and the directors are invested with various discretionary powers in execution of the school laws, for which they are responsible only to the people, whose representatives they are. *Wharton v. Cass Tp.*, 42 Pa. (6 Wright) 358, 363.

A "school district" is at most an involuntary quasi corporation. It has no voice in its own creation. It is called into being and struck out of existence at the will and dictation of the county superintendent and county board. Its directors and agents have the honors of office thrust on them without solicitation and without compensation. These school districts are mere subdivisions of the county, temporarily segregated and set apart,

with certain powers only, expressly granted by crude statutes subject to ever-varying modifications and amendments by hasty and inconsistent legislation. Judge Bell, in *Harris v. School Dist. No. 10*, 28 N. H. (8 Fost.) 58, well expresses it when he says: "These little corporations have sprung into existence within a few years, and their corporate powers and those of their officers are to be settled by the constructions of the courts on a succession of crude, unconnected, and often experimental enactments." Such corporations have no power derived from usage. They have the powers only expressly granted to them and such as are necessarily implied from the powers granted to enable them to perform the duties imposed by law and no more. Most of the powers allowed to be exercised by the school districts are conferred on the voters assembled in district meetings. *School Dist. No. 61 v. Alderson*, 41 N. W. 466, 469, 6 Dak. 145.

"School districts" are not municipal corporations proper, and, even when invested with corporate capacity and the powers of taxation, are but quasi corporations, with limited powers and liabilities. They exist only for the purpose of the general political government of the state. They are the agents and instrumentalities the state uses to perform its functions. All the powers with which they are intrusted are the powers of the state, and the duties imposed upon them are the duties of the state. *Madden v. Lancaster County* (U. S.) 65 Fed. 188, 191, 12 C. C. A. 566.

School districts, though possessing some corporate functions and attributes, "are primarily political subdivisions, agencies in the administration of civil government, and their corporate functions are granted to enable them to perform their public duties. They are denominated in the books and known to the law as 'quasi corporations,' rather than corporations proper." *Beach v. Leahy*, 11 Kan. 23, 29 (cited in *Knowles v. Board of Education*, 7 Pac. 561, 566, 31 Kan. 692).

The term "municipal corporations," as used in Laws 1871, c. 79, providing for contesting certain elections in municipal corporations, does not embrace school districts; the court observing that, although a school district possesses corporate capacity and is declared in the Constitution to be a body corporate, it does not fall within the definition of a municipal corporation. A school district belongs in the same class as counties and townships, which are quasi corporations, rather than corporations proper. They possess some corporate attributes, but they are special agencies in the administration of civil government, and their corporate attributes are to enable them more readily to perform their public duties. *Freeland v. Stillman*, 30 Pac. 235, 236, 49 Kan. 197.

A school district is a public corporation of a quasi municipal character, possessing such authority as has been conferred by the Legislature, to be exercised in the mode and within the limits prescribed by the statute. *Hughes v. Ewing*, 28 Pac. 1067, 93 Cal. 414.

"School districts" belong to that class of political organizations called quasi corporations, rather than corporations proper. They possess some corporate functions and attributes, but they are primarily political subdivisions, agencies in the administration of civil government, and their corporate functions are granted to enable them to more readily perform their public duties. *State v. Downs*, 57 Pac. 962, 963, 60 Kan. 788.

"School districts" are quasi corporations for certain purposes, and such purposes include the building and repair of schoolhouses. *Andrews v. Estes*, 11 Me. (2 Fairf.) 267, 269, 26 Am. Dec. 521.

A "school district" is a quasi corporation, for the sole purpose of administering the commonwealth system of public education. *City of Pittsburg v. Sterrett Subdistrict School*, 54 Atl. 463, 465, 204 Pa. 635, 61 L. R. A. 183.

"School districts" are quasi corporations of the most limited powers known to the law. *Denman v. Webster*, 73 Pac. 139, 140, 139 Cal. 452.

#### **As precinct.**

See "Precinct."

### **SCHOOL DISTRICT MEETING.**

Pamph. Laws, c. 222, § 2, in reference to "meetings for raising money for building or repairing a schoolhouse," does not include a school district meeting called to see if the district will vote not to defend a suit brought against them for labor and materials in building a schoolhouse. *Davis v. School Dist. in Haverhill*, 43 N. H. 381.

### **SCHOOL DISTRICT OFFICER.**

See "Municipal Officer."

### **SCHOOL DISTRICT TRUSTEE.**

As an officer, see "Officer."

### **SCHOOL DISTRICTS ORGANIZED UNDER SPECIAL ACTS.**

Laws 1885, c. 43, § 1, providing that "school districts organized under special acts" of the Legislature should be exempted from involuntary extinction, means those organized under acts, either general or special, which gave them a special independent and complete organization and officers of their own, having exclusive authority for the superintendence and government of their schools and the administration of all their

school affairs. *Sargent v. Union School Dist.*, 2 Atl. 641, 642, 63 N. H. 528.

### **SCHOOL FACILITIES.**

Laws 1897, p. 134, § 1940, providing that the trustees of any school district may submit to the electors the question whether a tax shall be raised to furnish additional "school facilities," means facilities in addition to or beyond those already possessed by the district, and includes apparatus and appliances for teaching and teachers as well. *State v. Cave*, 52 Pac. 200, 203, 20 Mont. 468.

### **SCHOOL FUND.**

Act March 12, 1875, § 12, providing that auditors shall receive 1 per cent. for managing the "school fund of the county," means the fund which by 3 Gav. & H. St. p. 440, is made a permanent fund not to be diminished, and does not include either the state, special, or local school taxes, the congressional school fund, interest on the common school fund, or taxes distributed to the county. *Hanlon v. Floyd County*, 53 Ind. 123, 124.

Rev. St. art. 988, provides that the county treasurer shall give a bond payable to the county judge, conditioned that such county treasurer shall faithfully execute the duties of his office, and pay over according to law all moneys which shall come into his hands as county treasurer. Article 989 provides that such treasurer shall also give an additional bond to the one required in the above article for the school fund of the county, in a sum double the amount of such school fund, to be estimated by such county judge. Articles 3728, 3729, provide that such treasurer shall execute a bond to secure the available school fund of the county, the amount of the bond to be double the probable amount of such fund which may come into his hands, to be estimated by the county judge, and to be conditioned as prescribed in article 989. Held, that the language, "school fund of the county," as used in article 989, should be construed in connection with the term, "available school fund of the county," as used in articles 3728, 3729, so as to mean the available school fund of the county, and not to embrace both the available and the non-available funds; and hence the duties of the treasurer with regard to the permanent and nonavailable funds, consisting of proceeds of school lands, were covered by the general bond required by article 988. *Kempner v. Galveston County*, 11 S. W. 188, 191, 73 Tex. 216.

### **SCHOOLHOUSE.**

See "Public Schoolhouse."

A schoolhouse is a house appropriated for the use of schools or for instruction, but

usually applies to buildings for subordinate schools, and not to colleges. *Chegaray v. Jenkins*, 5 N. Y. (1 Seld.) 376, 378.

"Schoolhouse," as used in 1 Rev. St. p. 388, § 4, exempting every schoolhouse, court-house, etc., from taxation, means the building provided for the use of our public common schools. *Chegaray v. City of New York*, 13 N. Y. (3 Kern.) 220, 229.

"Schoolhouse," as used in 1 Rev. St. p. 388, providing that every schoolhouse shall be exempt from taxation, etc., includes all schoolhouses, whether used for public or private schools. *Chegaray v. Jenkins*, 5 N. Y. (1 Seld.) 376, 378.

"Schoolhouse," as used in Rev. St. § 1831, prohibiting insurance companies from insuring "schoolhouses" without a majority vote of the members, may include a house or building in which the school is kept, though formerly a dwelling house, and is not restricted in its application to a district schoolhouse. *Luthe v. Farmers' Mut. Fire Ins. Co.*, 13 N. W. 490, 491, 55 Wis. 543.

"House" is said to be synonymous with "messuage," and to embrace an orchard, garden, curtilage, adjoining buildings, and other appendages of a dwelling house. In a grant or devise of a "house," the curtilage will pass, even without the words "with the appurtenances" being added. It is held in this case that the word "schoolhouse" included the site. *City of Topeka v. State*, 67 Pac. 559, 561, 64 Kan. 6.

"Schoolhouses," as used in Comp. St. § 1885, providing that the board of school trustees shall have power to build or remove schoolhouses, when directed by a vote of the district to do so, does not mean simply the house, but refers rather to the school, including the general equipment, furniture, maps, charts, globes, and pupils and teacher. *State v. Marshall*, 32 Pac. 648, 649, 13 Mont. 136.

The word "schoolhouse," in 2 Hill's Code, p. 662, § 46, which defines burglary as an unlawful entry with intent to commit a felony of an office, shop, store, warehouse, malthouse, stillhouse, mill, factory, bank, church, schoolhouse, railroad car, barn, stable, ship, steamboat, and water craft, or any building in which goods, merchandise, or valuable things are kept for use, sale, or deposit, means any schoolhouse, without regard to whether any valuable things are kept therein or not, as the latter clause of the statute only refers to buildings not specifically designated. *State v. Sufferin*, 32 Pac. 1021, 6 Wash. 107.

The term "schoolhouse," as used in all laws relative to the employment of labor, shall mean any building or premises in which public or private instruction is af-

forded to not less than ten pupils at one time. *Rev. Laws Mass. 1902*, p. 917, c. 106, § 8.

#### As dwelling house.

See "Dwelling—Dwelling House."

#### As place of worship.

See "Place of Worship."

#### As public building or improvement.

See "Public Building"; "Public Improvements."

#### As a public house.

A "schoolhouse" is a public house, within the meaning of Pen. Code, art. 356, prohibiting the playing of cards in a public house; and the fact that at times it is not temporarily occupied as such, or that it may be occupied temporarily for any other than school purposes, does not, when temporarily vacant, or when so occupied for other purposes, make it any less a public house during the time it is actually dedicated to school purposes as such. If the house was being occupied during the week for school purposes, it was none the less a public house on Sunday, whether occupied at all, or whether used on that day for religious services. *Cole v. State*, 13 S. W. 859, 28 Tex. App. 536, 19 Am. St. Rep. 856.

### SCHOOLHOUSE FURNITURE

See "Furniture."

### SCHOOL LANDS.

As public lands, see "Public Land."

### SCHOOL LAWS.

Laws which provide a system of education, and create and designate the officers by and through whom the system is to be administered, are known as "school laws." *District Tp. of City of Dubuque v. City of Dubuque*, 7 Iowa (7 Clarke) 262, 286.

### SCHOOL MATTERS.

Laws 1885, c. 211, giving women the right to vote at any "election pertaining to school matters," means the act of choosing a person to fill an office or employment in school matters; otherwise, such election would not pertain or relate to school matters. An election for the choosing of any school officers or school employes would be an election pertaining to school matters, but the choosing or selecting of any other officers would not. The mere fact that a city, county, or state officer may, as incident to his office, be required to do some act which may more or less remotely affect schools, does not

make the election of such officer one pertaining to school matters. The act of the person so choosing or selecting by vote or ballot must itself relate to school matters. *Brown v. Phillips*, 36 N. W. 242, 247, 71 Wis. 239.

### SCHOOL MONTH.

A "school month," as used in the chapter on Education, consists of four weeks of five days each. *Comp. Laws N. M.* 1897, § 1557.

A "school month" shall consist of four weeks, of five days each, of six hours per day. *Rev. St. Okl.* 1903, § 6200.

In every contract between a teacher and board of trustees or board of education, a "school month" shall be construed and taken to be twenty days, or four weeks of five school days each. *Gen. St. Minn.* 1894, § 3695.

A "school month" shall consist of not less than twenty school days, exclusive of holidays, and shall be taught for not less than seven hours each day, including intermissions and recesses. *Rev. St. Tex.* 1893, art. 3910.

A "school month" shall consist of all the days of the calendar month, except Saturdays, Sundays, and legal holidays. *Rev. St. Wyo.* 1899, § 609.

### SCHOOL OFFICER.

The term "officers of schools," as used in *Const. art. 7, § 8*, which provides that the Legislature may provide by law that any woman at the age of 21 years and upward may vote at an election held for the purpose of choosing any "officers of schools" or concerning any measure relating to schools, and may also provide that any such woman shall be eligible to hold an office pertaining solely to the management of schools, is used convertibly with "any office pertaining solely to the management of schools"; that is, the latter is in the nature of a definition of the term, and hence "officer of schools" means one whose office pertains solely to the management of schools. *State v. Gorton*, 23 N. W. 529, 530, 33 *Minn.* 345.

### SCHOOL PURPOSES.

Buildings exclusively used for school purposes, see "Exclusively Used."

The constitutional provision that the Legislature might exempt from taxation "property for school purposes" should not be construed to mean property used for schools, in the sense that only such property might be exempted which was directly or immediately subject to use in the school, but to include property contributing to purposes of a school, made to aid in the education of persons. *Northwestern University v. People*, 99 U. S. 309, 324, 25 L. Ed. 387.

A tax for heating and repairing purposes is a tax for school, and not for building, purposes. Such words refer to the building of schoolhouses only, within the meaning of 3 *Starr & C. Ann. St.* p. 1194, limiting taxes levied in any one year to a certain per cent. for "school purposes" and a certain per cent. for "building purposes." *Chicago & A. R. Co. v. People*, 45 N. E. 122, 123, 163 *Ill.* 616.

"School purposes," as used in a warning of a city meeting, providing that the meeting was called to vote upon the question of raising money for school purposes for the ensuing year, means the ordinary and current expenses in sustaining the existing schools of the city, and does not include the proposition of raising money for the purpose of erecting a high school building. *Allen v. City of Burlington*, 45 *Vt.* 202, 211.

Land owned and used by a proprietor of a private school in such a manner as to enable him to conveniently and cheaply supply the table of a boarding house kept by him for pupils, though contiguous to and immediately connected with land used exclusively for school purposes, is not property used for school purposes, within the meaning of *Const. Tex. art. 8, § 2*, empowering the Legislature to exempt from taxation all buildings used exclusively and owned by persons for school purposes. *St. Edwards College v. Morris*, 17 S. W. 512, 82 *Tex.* 1.

The use of the words "school purposes and on which to erect schoolhouses" in a dedication of property to public use, describing the purpose of the dedication as being for school purposes and on which to erect schoolhouses, operates to limit the use of the property to that of erecting schoolhouses thereon and using it for school purposes. *Village of Van Wert v. Town of Van Wert*, 18 *Ohio St.* 221, 226, 98 *Am. Dec.* 114.

### SCHOOL SUPPLIES.

*Sess. Laws* 1891, p. 334, c. 46, was entitled "An act to provide cheaper text-books and for district ownership of the same," and section 10 of the act provided that the provisions of the act should include all other school supplies. Held, that the phrase "school supplies" meant maps, charts, globes, and other apparatus necessary for use in schools. *Affholder v. State*, 70 N. W. 544, 545, 51 *Neb.* 91.

### SCHOOL TEACHER.

As laborer, see "Laborer."

As servant, see "Servant."

A school teacher, in regard to a pupil intrusted to his care by a parent or guardian, stands in loco parentis, and can exercise the same authority as the parent, and is responsible in the same manner. The rules of law

which are applicable to the parental control are also to be applied to the school teacher, and where a teacher used only reasonable force in chastising a child, and only sufficient to maintain the discipline of the school, she should not be punished for an assault. *Commonwealth v. Seed* (Pa.) 5 Clark, 78, 79.

A school teacher is neither a laborer, clerk, servant, nurse, or other person, within the meaning of the statute providing that in all cases within the jurisdiction of a justice of the peace, where any action is brought by any laborer, clerk, servant, nurse, or other person for compensation claimed due for personal services performed, the plaintiff, if successful, shall be entitled to recover as part of the costs a judgment against the defendant for an attorney's fee. *School Dist. No. 94 v. Gautier*, 73 Pac. 954, 957, 13 Okl. 194.

### SCHOOL TOWN.

The use of the words "school town," in an action against a town in which it is designated as a school town, is sufficient to show that the action is against the town in its capacity as a municipal corporation for school purposes. *Town of Noblesville v. McFarland*, 57 Ind. 335, 338.

### SCHOOL WEEK.

A school week shall consist of five days. Rev. St. Wyo. 1899, § 609.

### SCHOOLING.

"Schooling," as used in a bequest for the use and benefit of certain families in their "schooling," etc., has a broader and more comprehensive meaning than the mere payment of school bills. *Birchard v. Scott*, 39 Conn. 63, 69.

A bequest to a school district, to be used for schooling the children, is to be construed as a charitable bequest. *Heuser v. Harris*, 42 Ill. 425.

### SCIENCE.

See "Christian Science."

"Science" is the knowledge of many, orderly and methodically arranged, so as to become attainable by one. *Jackson v. Waldron* (N. Y.) 13 Wend. 178, 205.

The very notion of "science" springs from the recognition of the existence of general truths or laws to which the relation of things and their operation upon each other conform. These laws or truths, ascertained by the investigation of men devoted to particular departments of inquiry, constitute "science." *Harris v. Panama R. Co.*, 16 N. Y. Super. Ct. (3 Bosw.) 7, 13.

The term "science," as used in the definition of an expert as one possessed of sci-

ence and skill, requires a definition not limited to the precise terms of its derivation, "knowledge" in a general sense (for that would be to exclude immediately the function of the expert, which is to express an opinion, not positive knowledge); but the term must be considered as implying and requiring special and peculiar knowledge. The science which an expert should be required to possess and employ on a given subject implies that special and peculiar knowledge acquired only by a course of observation and study, and the expenditure of time, labor, and preparation in a particular employment and calling of life. *Dole v. Johnson*, 50 N. H. 452, 454.

There is a distinction between "philosophy" and "science." "Philosophy" has reference to the fundamental part of any science; to general principles connected with a science, but not forming part of it. "Science," on the other hand, signifies knowledge, co-ordinated, arranged, and systematized. It is knowledge gained by systematic observations, experiment, and reasoning. In *re Massachusetts General Hospital* (U. S.) 95 Fed. 973, 976.

### Rifle shooting.

"Science," in its broadest sense, is knowledge; the knowledge of many methodically digested and arranged, so as to be attainable by one; a body of principles and deductions to explain the nature of some matter, as mental science, moral science, physical science, etc. Rifle shooting is not a science. Science depends upon abstract or speculative principles. An art, as distinguished from science, relates to practice or performance. *Vredenburg v. Behan*, 33 La. Ann. 627, 637.

### Surgery.

In the use of the word "science," it cannot be denied that practical surgery is ordinarily thus spoken of. Webster's Dictionary describes surgery as a "branch of medical science." *United States v. Massachusetts General Hospital* (U. S.) 100 Fed. 932, 938, 41 C. C. A. 114.

### SCIENTIFIC BOOK.

Printed sheets of an English work on anatomy, imported unbound and comprising all of the book, except the first few pages, which had been printed in this country by an American publisher, were admissible free of duty, under paragraph 410 of the free list in the tariff act of 1890, as a scientific book. *Macmillan Co. v. United States* (U. S.) 116 Fed. 1018.

### SCIENTIFIC INSTITUTION.

"Scientific institutions," as used in Laws 1885, p. 176, exempting from taxation such real estate of scientific institutions as is oc-



cupied by them for the purposes for which they were incorporated, includes the school known as the "Detroit Home and Day School," which was incorporated under an act to establish, maintain, and conduct a seminary of learning; its only business being the maintenance of such a seminary with the usual studies pursued, its existence being met by tuition charges, and its real estate being all occupied by the school buildings. All general educational establishments have universally been known as "scientific institutions." A "scientific institution," under the language of all civilized countries, means an institution for the advancement or promotion of knowledge, which is the English rendering of "science." *Detroit Home and Day School v. City of Detroit*, 43 N. W. 593, 594, 76 Mich. 521, 6 L. R. A. 97.

"Scientific," as used in Pub. St. c. 11, § 5, cl. 3, as amended by St. 1889, c. 465, exempting from taxation corporations organized for literary, benevolent, charitable, and scientific purposes, means such an institution as is devoted either to the sciences generally, or to some department of science as a principal object, and not merely as an unimportant incident to its important objects. The term may not be limited to the physical sciences, but cannot be construed to include theosophy; and hence a corporation having for its paramount object the dissemination of theosophical ideas and the procuring of converts thereto, is not a scientific institution within the meaning of the statute, since, if there is any connection between theosophy and any kind of science, it is only incidental to the study and promulgation of the speculative philosophy. *New England Theosophical Corp. v. Board of Assessors*, 51 N. E. 456, 457, 172 Mass. 60, 42 L. R. A. 281.

Act 1882, § 2, providing that all "scientific or literary colleges or universities," organized under certain acts, which should have reported to the regents within a certain time, were declared legally incorporated, cannot be construed to include a medical college. *People v. Gunn*, 96 N. Y. 317, 323.

#### SCIENTIFIC INSTRUMENT.

"Scientific instruments" may be said to be such as are specially designed for use and principally employed in any branch of science. Such use may be for the purpose of observation, experiment, or instruction, or it may be a use in connection with the professional practice of a particular science. The use of surgical instruments by a surgeon in the practice of his profession is as much a strictly scientific use as when it is employed in clinics and training schools, or for the purpose of experiment. In *re Massachusetts General Hospital* (U. S.) 95 Fed. 973, 976.

"Scientific instrument," as used in the free list of Tariff Act Oct. 1, 1890, is intend-

ed to refer to the intrinsic character of the thing itself, and means any instrument which, in ordinary definition or the acceptance of experts, would fall within that category; and in cases arising under the statute, what is or what is not such an instrument is to be determined as a question of fact according to the nature of the thing itself, and not necessarily according to the nature of the use for which it is principally employed. *United States v. Presbyterian Hospital* (U. S.) 71 Fed. 866, 868, 18 C. C. A. 338.

#### SCIENTIFIC SOCIETIES.

"Scientific societies," as used in the Act of 1848, entitled "An act for the incorporation of scientific societies," and authorizing any five or more persons possessing the qualifications prescribed by the act to associate themselves for scientific purposes, cannot be construed to include societies for the purpose of carrying on medical or other colleges, or any institution whatever which is primarily and exclusively educational, and especially one in which a compensation is demanded for the instruction furnished. In a certain sense a medical college may be termed a "scientific institution," as it is designed to give instruction in the science of medicine; but the idea most readily suggested by the use of the term "scientific" is that the Legislature intended merely to authorize individuals to associate themselves together for the purpose of mutual co-operation in scientific investigation and pursuits. *People v. Cottrill* (N. Y.) 27 Hun, 344, 345.

#### SCIENTER.

"Scienter," as applied to the keeper of a vicious dog, means no more than a reasonable cause to apprehend that he might commit the injury complained of. *Duval v. Barnaby*, 77 N. Y. Supp. 337, 338, 75 App. Div. 154.

#### SCILICET.

See "Videlicet."

#### SCINTILLA OF EVIDENCE.

A scintilla of evidence means a spark. *Cunningham v. Union Pac. Ry. Co.*, 7 Pac. 795, 797, 4 Utah, 206.

"A mere scintilla of evidence, if it means anything, means the least particle of evidence; evidence which, without other evidence, is a mere trifle." *Offutt v. World's Columbian Exposition*, 51 N. E. 651, 652, 175 Ill. 472.

#### SCIRE FACIAS.

"The cases in which scire facias is employed are divided into two classes. One

class is where the writ is the commencement of an original action, as to repeal letters patent, charters (as a charter of pardon), and the like. In the other class it is a judicial writ, to carry on a suit in which some other person has acquired an interest, to revive a judgment, or for like purpose." *Knapp v. Thomas*, 39 Ohio St. 377, 383, 48 Am. Rep. 462.

A scire facias is styled a "judicial writ," viz., a writ for the purpose of effectuating what has already been decided, or, in case of bail, to compel the bail to perform that which he hath solemnly undertaken of record. *State v. Canfield*, 23 South. 591, 595, 40 Fla. 36, 42 L. R. A. 72 (citing *Delano v. Jopling*, 11 Ky. [1 Litt.] 117).

A scire facias is a common-law remedy to revive a judgment, though it is not so to revive a suit pending, nor is it at common law a remedy to revive a suit, and, if it can issue for that purpose, it must be by statute. *Portevant v. Pendleton's Adm'rs*, 23 Miss. (1 Cushm.) 25, 41.

A scire facias is always founded upon a record and issues from, and is made returnable to, the court where the record is kept. Without legislation the courts acquire no jurisdiction by process of scire facias over disputed questions relative to grants. A scire facias, when employed to revoke a grant, only reaches such matter as appears upon the face or within the body of the grant. *Walker v. Wells*, 17 Ga. 547, 551, 63 Am. Dec. 252.

"Scire facias" is a judicial writ, founded upon a record, and, when brought to enforce the payment of money, it must be for a specific sum, or perhaps, in addition, interest or exchange, as an incident to the debt. It will not lie upon the record of an order for the payment of alimony pending a suit for divorce, when a resort to evidence dehors would be necessary to ascertain the amount due. A married woman cannot maintain an action at law against her husband in any case, except for the purpose of enabling her to recover and enjoy her separate property. *Chestnut v. Chestnut*, 77 Ill. 346, 349.

A scire facias is a writ calling on a defendant to show cause why a judgment then existing against him should not be executed. The judgment to be rendered on the scire facias is nothing more than that execution issue. One court of concurrent jurisdiction only can carry into effect the judgment of another by issuing an execution on a judgment obtained by the other. *Boylan v. Anderson*, 3 N. J. Law (2 Penning.) 529.

A writ of scire facias is a judicial writ, grounded in whole or in part upon matter of record, grantable by the court ordinarily as a matter of course when a judgment has been rendered, but where, from the death of par-

ties or otherwise, execution has not been sued out, and where such execution is necessary to enable the party who has a judgment to obtain the benefit of it. *Sigourney v. Stockwell*, 45 Mass. (4 Mete.) 518, 521.

A writ of scire facias occupies the place and performs the office of both a writ of summons to bring defendant to the court and a declaration or petition, and it should be good and sufficient for each purpose, and must contain a prayer asking for a proper judgment. *State v. Baughman* (Mo.) 74 S. W. 433, 434.

A scire facias is in the nature of a declaration, and it should contain upon its face such a statement of facts as to justify the process in respect to the form in which it issues and the persons who are made parties to it. *Lyon v. Ford*, 20 D. G. 530, 535.

A scire facias is a proceeding or writ founded on some matter of record, and the rule is without exception that the record must be complete in itself, and no testimony is admissible aliunde for the purpose of making out a case. The object of the proceeding, though strictly statutory, is to vivify or vitalize what otherwise would lie dormant upon the record. *Kenosha & R. R. Co. v. Sperry* (U. S.) 14 Fed. Cas. 336, 337.

A writ of scire facias is a judicial writ, and must be signed by a judge or a clerk. *Walsh v. Haswell*, 11 Vt. 85, 88.

The office of a scire facias is to secure the right to take execution on the original judgment and to remove the bar of that right raised by a year and a day having elapsed since the last execution was taken. *Slayton v. Smilie*, 66 Vt. 197, 198, 28 Atl. 871.

A scire facias is a judicial writ, and the recital of the record on which it is founded is sufficient. *Dimond's Ex'rs v. Allen* (Vt.) 1 Tyler, 10, 11.

A writ of scire facias is a judicial writ, usually intended to carry into effect a judgment already rendered, and for this reason it must issue from the same court where the record is. The statute of Vermont has made an innovation on this principle, so far as to provide that a writ may issue from another justice, or from the county court in some cases, notwithstanding the record is not before them. *Gilson v. Gay*, 10 Vt. 326, 330.

Scire facias is a proceeding applicable to the revocation and annulment of grants made by the crown improperly, or forfeited by the grantee thereof. *People v. Miner* (N. Y.) 2 Lans. 396, 398.

Scire facias is a judicial writ, founded on some matter or proceeding of record, a judgment, recognizance, or letters patent, and on some matters incidental thereto, a regular and judicial statement of which is to fur-

ther and accomplish the end and intent of that record, by insuring its proper operation in behalf of parties legally interested therein. Co. Litt. 524, note 1. It is a proper process when a judgment has been obtained, and execution remains to be done, but cannot be issued, by reason of events subsequent to the rendition of judgment, in the ordinary mode. *Pillsbury v. Smyth*, 25 Me. (12 Shep.) 427, 432.

The phrase "scire facias" embraces two classes of cases: First, those cases which are in nature and in fact original actions, such as sci. fa. to set aside letters patent or recognizances of various courts; and second, sci. fa. on a judgment against parties. These are not original suits, but are merely ancillary. A scire facias on a judgment to procure execution against the party to said judgment is not an original suit, but a continuation of the former action. *State Treasurer v. Foster*, 7 Vt. 52, 53.

A scire facias is a writ. It is sometimes the commencement of a new action, as when it is issued to repeal a patent, vacate a charter, and the like; there being no action on which it can be founded. It is in other cases the continuation of a suit, as when brought to revive a judgment after a year and a day from its rendition, or on the marriage or death of parties. If it be a writ, it must be well tested and signed by the clerk. A proceeding under this writ is somewhat in the nature of a criminal information in England. It is a substitute for an indictment or presentment in certain designated cases. *State v. Scott*, 32 Tenn. (2 Swan) 332, 335.

#### **As an action or suit.**

A scire facias is an action. It also is a suit. *Milsap v. Wildman*, 5 Mo. 425. See, also, *Chestnut v. Chestnut*, 77 Ill. 346, 349; *White v. Washington School Dist.*, 45 Conn. 59, 61. Contra, see *Heath v. Bates*, 70 Ga. 633, 636.

Sci. fa. is a judicial writ, and, because the defendant may plead thereto, it is considered an action. *Grey v. Jones*, 2 Wils. 251; *Fenner v. Evans*, 1 Term R. 267; 2 Tidd, Prac. 1090; *Betts v. Johnson*, 35 Atl. 489, 490, 68 Vt. 549.

Although for certain purposes a scire facias is treated as an action, it is nevertheless always founded on some judgment, recognizance, bond, or other judicial proceeding, which it must recite, or at least so much thereof as will show the liability of the defendant. *Gregory v. Chadwell*, 43 Tenn. (3 Cold.) 390, 392.

Scire facias is a judicial writ in the nature of an action, and must pursue the record on which it is founded. It is a judicial

writ to have execution on a judgment or debt of record. *State v. Kinne*, 39 N. H. 129, 137.

This writ is a judicial one, founded on some matter of record, such as a judgment, letters patent, or the like, to enforce the execution of which, or to vacate and set them aside, and as the defendant may plead thereto. It is considered in law as an action. *Bowie v. Neale*, 41 Md. 124, 135.

A scire facias is in the nature of an original action, and defendant may plead to it in bar of an execution. The action is a substitute for the action of debt on the judgment. A judgment against a municipal corporation may be revived by scire facias. *Walter v. Conyngham Tp. (Pa.)* 1 C. P. Rep. 27.

A scire facias is an action to which the defendant may plead any legal matter of defense. *Dickson v. Wilkinson*, 44 U. S. (3 How.) 57, 59, 11 L. Ed. 491.

A scire facias to revive a judgment is an action to which defendant may plead. Such scire facias may be issued as well after as before the expiration of the lien of the judgment, and against the representatives of a deceased defendant. *Hubbard v. Bolls*, 7 Ark. (2 Eng.) 442, 443.

Scire facias to revive a judgment is an action, within the meaning of the statute of limitations requiring "all actions to be commenced within 16 years." *Gibbons v. Goodrich*, 3 Ill. App. (3 Bradw.) 590, 594.

A scire facias to revive a judgment is not an action, within the meaning of the statute giving either party a change of venue in any civil cause before a justice of the peace. *Sutton v. Cole*, 55 S. W. 1052, 1053, 155 Mo. 208.

A scire facias to revive a judgment is not a suit, but it is a judicial writ founded on a matter of record. *Challenor v. Niles*, 78 Ill. 78, 79.

#### **As a civil proceeding.**

A scire facias is the process for carrying a recognizance in a criminal case into execution; and, while it is sometimes denominated a "suit," it is only so to the extent that the defendant may plead to it. A scire facias upon a recognizance in a criminal prosecution is not a civil proceeding, so as to entitle the party to remove such a cause to a federal court under the judiciary act and the Constitution of the United States. It is judicial, rather than original, in its nature; for, when final judgment is rendered, the whole record is considered as one. *State v. Murmann*, 28 S. W. 2, 3, 124 Mo. 502. See, also, *Gray v. Thrasher*, 104 Mass. 373, 375.

A scire facias for the enforcement of a judgment is a civil action. *Humiston v. Smith*, 21 Cal. 129, 134.

**As the continuation of a proceeding.**

A scire facias is only the continuation of a former suit, and not an original proceeding. *Coomes v. Moore*, 57 Mo. 338, 341.

Scire facias is generally to obtain execution on a judgment. It is not an original suit, but a continuation of the former one. No damages are allowed, nor were costs until St. 8 & 9 Wm. III, c. 11. The judgment is that the plaintiff have execution, and the execution issues on the original judgment. *Betts v. Johnson*, 35 Atl. 489, 490, 68 Vt. 549.

The writ of scire facias is a common-law writ. It is not the commencement of a civil action, but is a mere continuation of an original proceeding to enforce the collection of a debt confessed. A proceeding by scire facias, therefore, on a recognizance, does not entitle the surety therein to a jury trial; Const. art. 2, § 28, providing that the right of trial by jury shall remain inviolate, and the Revised Statutes providing that as to issues of fact in an action for recovery of money only there must be a trial by jury. *State v. Hoeffner*, 28 S. W. 1, 124 Mo. 488.

Scire facias is only a continuance of a former suit, and not an original proceeding. It is not the commencement of an action, to which the statute of limitations can be pleaded. A scire facias to revise a judgment is therefore not a suit on the judgment, in which the plaintiff recovers the amount of the original judgment, with interest and costs. The proper entry is to award execution for the amount of the original judgment, with interest from its rendition and costs. *Humphreys v. Lundy*, 37 Mo. 320, 323 (quoted and approved in *Sutton v. Cole*, 55 S. W. 1052, 1053, 155 Mo. 206).

The proceeding by writ of scire facias to revive a personal judgment is statutory. It has its origin in the statute of Westminster II (St. 13 Edw. I, c. 45). It is not an original proceeding, but a mere continuance of the former suit; a supplementary remedy to aid in the recovery of the debt evidenced by the original judgment. *Adams v. Savage*, 3 Salk. 321; 2 Bac. Abr. 598; *McGill v. Perrigo* (N. Y.) 9 Johns. 259; *Humphreys v. Lundy*, 37 Mo. 320, 323. Its purpose is not to raise the issue of the validity of the original judgment, but to offer the debtor an opportunity to show, if he can, that the former judgment has been paid, satisfied, or released, and, if he cannot, to avoid the statute of limitations against the judgment and its lien, if it have one, and to give the creditor a new right of enforcement from the date of the judgment of revival. Its effect, when it results in a new judgment, is to avoid the statute of limitations, to set it running again from the date of the judgment of revival, and to reinstate the old judgment, and any lien which it evidences as of the date of the judgment of re-

vival. 2 Cooley, Bl. Comm. 3, 656; *Walsh v. Bosse*, 16 Mo. App. 231, 233; *Merchants' Mut. Ins. Co. v. Hill*, 17 Mo. App. 590, 593; *Fagan v. Bently*, 32 Ga. 534; *Farrell v. Gleeson*, 11 Clark & F. 702, 712. It is not a substitute for the action of debt upon the judgment, but is an independent, concurrent remedy, of which the creditor may avail himself, regardless of such an action. *Lafayette County, Mo., v. Wonderly* (U. S.) 92 Fed. 313, 314, 34 C. C. A. 360.

A proceeding by scire facias on a forfeited recognizance, whatever may have been held in other jurisdictions, is considered in Missouri as a mere continuation of an original proceeding to enforce the collection of a debt confessed. The writ is a common-law writ. It is not the commencement of a civil or new action within the meaning of the Code. *State v. Hoeffner*, 28 S. W. 1, 124 Mo. 488.

A writ of scire facias is a judicial writ, and issues only from the court in which the judgment was rendered; and it is not regarded as a judicial suit, but is in one sense a continuation of the former action, and, when an execution is obtained, it is for the purpose of executing the original judgment. *Gibson v. Davis*, 22 Vt. 374, 375.

**As similar to foreclosure.**

It is held that the remedy by scire facias accomplishes precisely the same thing as foreclosure. They both seek the same end, namely, the conversion of the mortgaged premises into money and the extinguishment of the equity of redemption. The latter is called "equitable foreclosure," and the former may be called "legal foreclosure," because they are in effect the same. *Van Vranklin v. Roberts*, 29 Atl. 1044, 1046, 7 Del. Ch. 16.

**As an original proceeding.**

A scire facias is a new and independent action, referring to the former proceeding, but wholly distinct from it. *Greenway v. Dare*, 6 N. J. Law (1 Halst.) 305, 306.

Where a judgment was obtained against the land of the judgment debtor in the hands of a terre-tenant, although, as against the judgment debtor, a scire facias proceeding was a continuation of the original proceeding in which the judgment was obtained, yet as against the terre-tenant, who was an entire stranger, the scire facias must be regarded as so far a new proceeding that everything necessary to co-exist to affect his rights must appear in the writ. *Bish v. Williar*, 59 Md. 382, 384.

A scire facias, although a judicial process, so far partakes of the nature of an action that the defendant may appear and plead to it in the same manner as to an ac-

tion founded on the original writ, and the judgment thereon is a new judgment. *Weaver v. Boggs*, 38 Md. 264. It has been held in several cases that the writ is in the nature of a declaration, and that it must "contain upon its face such a statement of facts as to justify the process in respect to the form in which it issues and the persons who were made parties to it." *Wright v. Ryland*, 48 Atl. 163, 165, 92 Md. 645, 53 L. R. A. 702 (citing *Prather v. Manro* [Md.] 11 Gill & J. 265).

A scire facias, although a judicial writ, so far partakes of the nature of an original action that the defendant is entitled to plead to it any defense which goes to show that his liability has been discharged or extinguished. If a scire facias is issued against an original defendant or his administrator to revive a judgment, and he is summoned, a judgment of fiat against him operates as a conclusive estoppel upon him against thereafter asserting any defense to the original judgment which he neglected to plead to the sci. fa. *Hadaway v. Hynson*, 43 Atl. 806, 809, 89 Md. 305 (citing *Starr v. Heckart*, 32 Md. 271, 272).

"A scire facias is deemed a judicial writ founded on some matter of record, as judgments, recognizances, and letters patent, on which it lies to enforce the execution of them, or to vacate or set them aside; and, though it be a judicial writ or writ of execution, yet it is so far in the nature of an original action that the defendant may plead to it, and it is in that respect considered as an action. 8 Bac. Abr. 'Scire Facias,' (A). But for some purposes it is considered only as a continuation of the original action." *Heath v. Bates*, 70 Ga. 633, 636.

A scire facias is a judicial writ, issued to enforce the execution of some matter of record on which it is usually founded; but, though a judicial writ or writ of execution, is so far an original that the defendant may plead to it. As it discloses the facts on which it is founded, and requires an answer from the defendant, it is in the nature of a declaration, and the plea is properly to the writ. *Winder v. Caldwell*, 55 U. S. (14 How.) 434, 442, 14 L. Ed. 487.

Scire facias is deemed a judicial writ, though unlike other judicial writs, as, for example, the ordinary writs of execution. It is so in the nature of an original that the defendant may plead to it; so that the proceeding is considered an action, and is embraced in a release of actions. But it is said on the highest authority that when it is founded on a recognizance its purpose is as in case of judgments, to have execution; and although it is not a continuation of a former suit, as in the case of an execution, yet, not being a commencement or foundation of an action, it is not an original writ, but a ju-

dicial writ, and at most only in the nature of an original action. *Pullman's Palace Car Co. v. Washburn* (U. S.) 66 Fed. 790, 792.

Scire facias is usually resorted to, and must be brought, in the court where the record remains, because it is founded upon the recognizance, and must be considered as flowing from it and partaking of its nature. While it is so far original that the defendant may plead to it, it is judicial, rather than original, and its real office is to carry into effect the interlocutory judgment; and, when final judgment is rendered, the whole is to be taken as one record. *State v. Dwyer*, 39 Atl. 629, 630, 70 Vt. 96 (citing *Bac. Abr. tit. "Scire Facias"*).

Scire facias is a judicial writ founded on some matter of record, as judgments and recognizances, and as having certain peculiar principles applicable to it; yet it is spoken of as an original writ, and the defendant may plead to it as to an action. *Commonwealth v. Stebbins*, 70 Mass. (4 Gray) 25, 26.

In England "a scire facias is an original action when it is issued to repeal letters patent." 2 Rap. & L. Law Dict. 1153. It is the proper remedy to be pursued in the event a grant has been improvidently made to one not entitled thereto. Though one who has filed a caveat to an application for a headright warrant, fraudulently obtains from the state a grant to the land in controversy, and thus prevents the applicant, who would otherwise have been entitled thereto from receiving such a grant, the latter cannot, in his own name and right, maintain against the former a proceeding by scire facias for the purpose of setting aside and canceling the grant so fraudulently obtained. *Calhoun v. Cawley*, 104 Ga. 335, 336, 30 S. E. 773.

A scire facias is a judicial writ, used to enforce the execution of some matter of record on which it is usually founded; but, though a judicial writ, it is so far an original one that defendant may plead to it. *Winder v. Caldwell*, 55 U. S. (14 How.) 434, 443, 14 L. Ed. 487.

#### As process.

See "Process."

#### As a substitute for action on the judgment.

A scire facias is a judicial writ, the use of which the statute has authorized to keep in force and effect a judgment already rendered. It is said to be a statutory substitute for the common-law action on the judgment, which was formerly necessary to be brought, if execution was not issued within a year and a day. *Kratz v. Preston*, 52 Mo. App. 251, 254 (quoted and approved in *Sutton v. Cole*, 55 S. W. 1052, 1053, 155 Mo. 206).

**SCOLD.**

See "Common Scold."

**SCOPE.**

"Scope," as used in an instruction that, if a certain person was acting within the scope of his duty as supervisor of a road district at the time of opening a certain fence, the verdict should be in his favor, means design, aim, purpose, or intention, and renders the instruction erroneous. *Linblom v. Ramsey*, 75 Ill. 246, 251.

**SCOPE OF AGENCY.**

The phrase "within the scope of his agency" cannot properly be restricted to what the parties intended in the creation of the agency, nor can the question be determined by the authority intended to be conferred by the principal. As stated in some of the cases, we must distinguish between the authority to make the representations which amount to a fraud, and the authority to transact the business in the course of which the fraudulent act was committed. The scope of the agent's authority reaches out, and permits him to do such acts and things as are directly connected with and essential to the business in hand. He may not do everything that his principal may do; but, where the matter in controversy becomes a necessary part of the transaction under consideration, then we may say that it falls within the scope of his agency. *Matteson v. Rice*, 92 N. W. 1109, 1111, 116 Wis. 328.

The phrase "within the scope of the agency," as used to define the liability of the principal for the acts of his agent, cannot be restricted to what the parties intended in the creation of the agency; for that would exclude negligence, as no agent is appointed for the purpose of being negligent, any more than for the purpose of acting fraudulently. The question cannot be determined by the authority intended to be conferred by the principal. Where principals authorize their agent to make a settlement of an indebtedness due them, which the agent did, they are bound by the settlement made, though not in all respects in accordance with their instructions; the debtor having no knowledge of such instructions. *Whaley v. Duncan*, 25 S. E. 54, 58, 47 S. C. 139.

**SCOPE OF AUTHORITY.**

The phrase "scope of authority," in the law of agency, means those acts proper for the accomplishment of the end in view by means of the agency, or such as are usual in matters of that kind. *First Nat. Bank v. Nelson*, 38 Ga. 391, 402, 95 Am. Dec. 400.

The phrase "scope of authority," as used in the statement of the principle that cor-

porations are liable civilly for damages occasioned by the torts of their officers and agents committed while acting within the scope of their authority, is one which it is difficult to precisely define. In his work on Agency Mr. Mechem says, in a clear exposition of the subject: "But while, as has been seen, authority is often to be implied from the conduct of the parties, yet it is a necessary and logical limitation upon the construction of such an authority that the power implied shall not be greater than that fairly and legitimately warranted by the fact. The reason of this rule is so apparent and so just that it needs no argument to support it. If the agency arises by implication from acts done by the agent with the tacit consent or acquiescence of the principal, it is to be limited in its scope to acts of a like nature. If it arises from the general habits of dealing between the parties, it must be confined in its operation to dealings of the same kind. If it arises from a previous employment of the agent in a particular business, it is in like manner to be limited to that particular business. In other words, an implied agency is not to be extended by construction beyond the obvious purpose for which it is apparently created." In *Reynolds v. Witte*, 13 S. C. 5, 36 Am. Rep. 678, it is said that authority to commit a fraudulent act and the authority to transact the business in the course of which the fraudulent act was committed must be distinguished. "Tested by reference to the intention of the principal, neither negligence nor fraud is within the scope of the agency, but, tested by the connection of the act with the property, is as much within the scope of the agency as negligence in allowing others to take it. The proper inquiry is whether the act was done in the course of the agency and by virtue of the authority as agent. If it was, then the principal is responsible, whether the act was merely negligent or fraudulent." In a recent English case (*Stevens v. Woodward*, 6 Q. B. Div. 318) it is said: "Although a definition is difficult, I should say the act for which the master is to be held liable must be something incident to the employment for which the servant is hired and which it is his duty to perform." *Fitzgerald v. Fitzgerald & Mallory Const. Co.*, 62 N. W. 899, 903, 44 Neb. 463.

**SCOPE OF BUSINESS.**

"Scope of the business" may be generally described as including what is reasonably necessary for the successful conduct of the business, measured by the nature of the business and the usages of those engaged in the same occupation in the same locality, and subject to be enlarged, also, by the known habits and conduct of the particular firm itself. *Sparks v. Flannery*, 30 S. E. 823, 824, 104 Ga. 323 (citing 1 Bates, Partn. § 315).

"Scope of the business," as the term is used with relation to the power of partners

to bind the firm generally, includes what is reasonably necessary to the successful conduct of the business in which they are actually engaged. *Brooks-Waterfield Co. v. Jackson* (Ky.) 53 S. W. 41, 42, where it is held that a contract of partnership for the conduct of an ordinary country store did not as a matter of law imply an authority to deal in the partnership name in the business of buying and selling leaf tobacco.

### SCOPE OF EMPLOYMENT.

The phrase "acting within the scope of his employment" means while on duty. Thus, where a passenger on a street car had an altercation with a motorman, and, after alighting from the car and depositing certain bundles which he carried on the sidewalk, returned to the car, whereupon the motorman left the car and assaulted him, the motorman was not acting within the scope of his employment at said time. *Palmer v. Winston-Salem Ry. & Electric Co.*, 42 S. E. 604, 605, 131 N. C. 250.

"Scope of employment," as used in the statement that the master is liable for the negligence of his servant while acting within the scope of the employment, includes those acts which are fairly incident to the employment, or, in other words, which the master has set in motion, so that the master is liable for all injuries resulting from the execution of the employment. Any act directed or authorized by the master is included within the scope of the employment, but the acts of the agent, willfully and intentionally done without the command or authorization of the master, are not. *Goodloe v. Memphis & C. R. Co.*, 18 South. 166, 107 Ala. 233, 29 L. R. A. 729, 54 Am. St. Rep. 67.

"Scope," as used in the statement that a railroad company is liable to a trespasser for injuries received by being willfully thrown from a train by its servants, acting within the scope of their employment, signifies the extent, or, so to speak, the sweep, of their authority, and is not limited to acts in the interest of, or the prosecution of the business of, the employer. *Southern Ry. Co. v. Wildman*, 24 South. 764, 766, 119 Ala. 565.

### SCOT.

The term "scot" is commonly applied to sewers' rates on marsh lands. *Waller v. Andrews*, 3 Mees. & W. 312, 318.

### SCOT AND LOT.

"Scot and lot" was a customary contribution laid upon all subjects according to their ability. *Frieszleben v. Shallcross* (Del.) 19 Atl. 576, 578, 9 Houst. 1, 8 L. R. A. 337.

The phrase "scot and lot" is used to designate "certain duties which must be paid by those who claim to exercise the elective fran-

chise within cities and boroughs before they are entitled to vote." *McCafferty v. Guyer*, 59 Pa. (9 P. F. Smith) 109, 116 (citing *Holt-house Law Dict.*).

### SCOURED WOOL.

"Scoured wool," as used in the tariff acts, imposing a specific duty on scoured wool, includes wool imported scoured, though not in a form ordinarily known in commerce as "scoured wool." The term includes wool tops, consisting of fragments of torn wool which have been prepared for spinning. *United States v. Patton* (U. S.) 46 Fed. 461, 464.

### SCOUTS.

"Scouts," as used in Act of May 17, 1865, declaring that scouts or single soldiers, if disguised in the dress of the country or clothed in the uniform of either army, who shall wrongfully take property by threats or violence, shall suffer death, means persons who in times of war are sent out to gain information and bring in tidings of the movements and conditions of the enemy. *Vaughn v. State*, 43 Tenn. (3 Cold.) 102, 107.

### SCOW.

As a barge, see "Barge."

As a building, see "Building."

A "scow" is a vessel. *The Hezekiah Baldwin* (U. S.) 12 Fed. Cas. 93; *The Kate Tremaine* (U. S.) 14 Fed. Cas. 144; *The Ou-rere* (U. S.) 18 Fed. Cas. 728; *The Bob Connell* (U. S.) 1 Fed. 218, 219; *New England Marine Ins. Co. v. Dunham*, 78 U. S. (11 Wall.) 1, 20 L. Ed. 90; *Eudner v. Greco* (U. S.) 3 Fed. 411, 413; *Adams v. Farmer* (N. Y.) 1 E. D. Smith, 588, 589. Contra, see *Hicks v. Williams* (N. Y.) 17 Barb. 523.

### SCRAMBLING POSSESSION.

The term "scrambling possession" means a struggle for possession on the land itself, not such a contest as is waged in the courts. *Spiers v. Duane*, 54 Cal. 176, 177.

Where the landlord obtains possession by seizing the tenant and throwing him to the ground, and holding him there while his father enters the property and locks and bolts the doors, it is what the books characterize as "scrambling possession," and confers no rights whatever upon the landlord, and particularly no right to defend the possession thus gained by further acts of violence and force. *Lobdell v. Keene*, 88 N. W. 426, 428, 85 Minn. 90.

A possession obtained by an act of trespass in building a fence is not such possession as will support an action of forcible entry and detainer against a claimant who

destroys the fence. This possession is of a sort which the court says has been aptly called a "scrambling possession." *Dyer v. Reitz*, 14 Mo. App. 45, 46.

## SCRAMMING CONTRACT.

"One that confers the right to mine and gather such ore as may be left within the limits of a mine or pit that has been opened and mined before." *Davie v. Lumberman's Min. Co.*, 53 N. W. 625, 626, 93 Mich. 491, 24 L. R. A. 357.

## SCRAP IRON.

"Scrap iron," is all waste or refuse iron which has been in actual use and is only fit for remanufacture, without reference to whether it is new or old. *Schlesinger v. Beard*, 7 Sup. Ct. 546, 547, 120 U. S. 264, 30 L. Ed. 656.

"Scrap iron," as used in Rev. St. § 2504, imposing a duty on wrought scrap iron of every description, and providing that nothing shall be deemed scrap iron except waste or refuse iron that has been in actual use and is fit only to be manufactured, does not include iron rails that have never been in use, though they are old and rusty, and are in fact intended by the importer to be manufactured. *Dwight v. Merritt*, 11 Sup. Ct. 768, 769, 140 U. S. 213, 35 L. Ed. 450.

## SCRAP TOBACCO.

"Scrap tobacco" is that part that falls when stripping the tobacco to prepare the leaf to go into cigars. In the process of manufacturing cigars they take tobacco in the leaf, put it first on racks to dry, then in barrels to sweat, and then put it on the cigar maker's table. In all this handling—racking, barreling, taking out, and putting on the table—there is always more or less breakage of the tobacco leaf; and the particles which fall in handling, and those which are broken from the leaf in the process of stemming, make this "scrap tobacco." *United States v. Schroeder* (U. S.) 93 Fed. 448, 449, 35 C. C. A. 376.

## SCRAPE.

The term "scrape" is used to designate crude turpentine, which is formed on the body of the tree. It is personal property, and belongs to the person who has lawfully produced it by cultivation. *Lewis v. McNatt*, 65 N. C. 63, 65.

## SCRAWL.

As a seal, see "Seal."

A mere flourish at the end of the signature, not made by way of seal, is not a

"scrawl by way of seal," within the Missouri statute providing that the signer of a sealed instrument must affix a "scrawl by way of seal" to his name to constitute it a sealed instrument. *Grimsley v. Riley's Adm'rs*, 5 Mo. 280, 282, 32 Am. Dec. 319.

## SCREENED COAL.

"Screened coal," as used in an agreement by which plaintiff was to pay a certain sum for each ton of "screened coal" mined and removed from certain land, means coal which has been passed through screens, no matter what its size, and does not mean any particular size or grade of coal known among dealers as "screened coal." *Mercer Min. & Mfg. Co. v. McKee's Adm'r*, 77 Pa. (27 P. F. Smith) 170, 172.

## SCREWED.

"Screwed" ordinarily and correctly means fastened with screws, pressed with screws, forced; but it may, however, when spoken in certain localities, involve the charge of whoredom and import sexual intercourse. *Miles v. Vanhorn*, 17 Ind. 245, 247, 79 Am. Dec. 477.

The word "screwed" does not of itself import sexual intercourse, but it may in certain localities be used to impute a charge of whoredom; and where that is the case a complaint for slander founded on such use of the word should affirmatively allege its import at the time and place of its use. *Miles v. Vanhorn*, 17 Ind. 245, 247, 79 Am. Dec. 477.

## SCRIP.

See "Soldier's Additional Homestead Scrip"; "Dividend in Scrip."

Warrants or other like orders drawn on a city treasury are usually termed "scrip." *City of Alma v. Guaranty Sav. Bank* (U. S.) 60 Fed. 203, 207, 8 C. C. A. 564.

It has been the practice in the land office in Michigan, where lands have been appropriated or granted for the purpose of aiding in the drainage of swamp lands, whenever the contractor doing the work has so performed any portion of it as to obtain its acceptance by the proper officer, and that officer has reported to the land office, to credit the contractor on the books of the office with the number of acres of swamp lands to which such performance entitles him under the contract, and this credit is what is termed "scrip," although no certificate or other written evidence of the right of the party is issued. The lands, not having been selected, cannot be described or identified, and until such selection is made this credit, called "scrip," has been construed as assignable in whole or in part to other parties, and they



have made selections. *Wait v. State Land Office Com'r*, 49 N. W. 600, 601, 87 Mich. 353.

## SCRIVENER.

As agent, see "Agent."

A business which is not known now, or at least not ordinarily existing. He was a party who performed the conjoint duties of a banker, a broker, and an attorney. *River Clyde Trustees v. Duncan*, 25 Eng. Law & Eq. 19, 23.

## SCROFULA.

"Scrofula," within the meaning of a question in an application for a life policy whether the applicant's parents, etc., have been afflicted with consumption, scrofula, insanity, epilepsy, disease of the heart, or other hereditary disease, is to be construed only as an inquiry whether such relatives have been afflicted by such disease in a hereditary form; the word "other" in the question plainly indicating that the inquiry is so limited. *Gridley v. Northwestern Mut. Life Ins. Co.* (U. S.) 11 Fed. Cas. 2, 8.

## SCROLL.

As a seal, see "Seal."

## SCRUB.

Some of the meanings of the word "scrub" as given by Webster are: "Something small and mean." "Close, low growth of bushes." "Low underwood." "Mean; dirty; contemptible; scrubby." Under these definitions, "scrub oaks" can hardly be said to be timber which the government forbids a person to cut from its lands. *O'Hanlon v. Denver*, 22 Pac. 407, 408, 81 Cal. 60, 15 Am. St. Rep. 19.

## SCULPTOR.

"Sculptor," as used in Rev. St. § 2504, Schedule M, imposing a tariff on the productions of a sculptor, means one whose occupation is to carve wood, stone, or other materials into images or statues. *Viti v. Tutton* (U. S.) 14 Fed. 241, 246.

## SEA.

See "Accidents of the Sea"; "At Sea"; "Beyond Seas"; "Branch of the Sea"; "Gone to Sea"; "High Seas"; "Inland Sea"; "Main Sea."

Under an insurance policy, insuring against losses caused "directly by a sea," it was held that losses caused by a storm,

which produced a general commotion of the sea, were not insured against; a distinction being made between "a sea" and "the sea," the first being limited to effect of one wave, for "sea," as defined by Webster, means "a wave, a billow—as to 'ship a sea'; the swell of the ocean in a tempest; motion or agitation of the water's surface." Falconer's *Marine Dictionary*, by Burney, says: "'Sea' is variously applied by sailors to a single wave, to the agitation produced by a multitude of waves in a tempest, or to their particular progress or direction. Thus, they say: 'We shipped a heavy sea.' 'There is a quiet sea in the offing.' 'The sea sets to the southward.' Hence a ship is said to 'head the sea,' when her course is opposite to the direction or setting of the surges." This is given after "sea" is defined as a separate word to mean "that vast tract of water encompassing the whole earth, more properly called 'ocean,' and also as another word 'more properly used for a particular part of the ocean, as the Irish Sea, Mediterranean Sea," etc. *Snowdon v. Guion*, 50 N. Y. Super. Ct. (18 Jones & S.) 137, 143.

Waters within the ebb and flow of the tides are considered the "sea." In *re Gwin's Will* (N. Y.) Tuck. 44, 45 (citing *Gilpin's R* 526); *Baker v. Hoag* (N. Y.) 3 Barb. 203, 206

Lord Hale, in defining what the "sea" is, says: "It is either that which lies within the body of the county, or without. That arm or branch of the sea which lies within the fauces terræ is, or at least may be, within the body of a county; and that part which lies not within the body of the county is called the main sea or ocean. The sea includes the ebb and flow of the tide on the seacoast. What is the sea has nothing to do with the bounds of counties, but is ascertained by high and low water mark." *De Lovio v. Bowit* (U. S.) 7 Fed. Cas. 418, 428; *United States v. Grush* (U. S.) 26 Fed. Cas. 48, 51; *United States v. Rodgers*, 14 Sup. Ct. 109, 111, 150 U. S. 249, 37 L. Ed. 1071 (quoting *De Jure Mar.* c. 4).

"The word 'sea' has received too strict and too frequent a definition in our common law and in the admiralty courts, as well as in the books and discussions of international jurisprudence, to permit its extension to our fresh water lakes in exact or technical usage. The acts of Congress regulating commerce and navigation, and the cases and discussions, English and American, upon the extent and character of national sovereignty and of admiralty jurisdiction, from Coke and Hale down to the case of *The Thomas Jefferson*, 10 Wheat. 428, and other more recent cases in the Circuit Courts of the United States, all prove that the ebbing and flowing of the tide water or immediate communication with the ocean are essential to the legal character of a sea." *Cole v. White* (N. Y.) 28 Wend. 511, 516.

"In other matters than crimes connected with admiralty jurisdiction, it may be important at times to discriminate between the sea and the high sea; but I apprehend that in crimes the seas, or the high seas, or the ocean, means much the same." *United States v. New Bedford Bridge* (U. S.) 27 Fed. Cas. 91, 120.

"Sea," as defined by the admiralty courts, means not only the "high sea," but arms of the sea, waters flowing from it into ports and havens, and as high up rivers as the tide ebbs and flows. *Waring v. Clarke*, 46 U. S. (5 How.) 441, 463, 12 L. Ed. 226.

#### In boundaries.

When the sea or a bay is named as a boundary, the line of ordinary high-water mark is always intended, where the common law prevails. *United States v. Pacheco*, 69 U. S. (2 Wall.) 587, 599, 17 L. Ed. 865.

When the terms "sea" and "shore" are used in a deed to designate one boundary of a parcel conveyed, they describe that side of the beach on which the sea coincides with it, and include the beach to high-water mark. *Snow v. Mt. Desert Island Real Estate Co.*, 24 Atl. 429, 430, 84 Me. 14, 17 L. R. A. 280, 30 Am. St. Rep. 331.

Any boundary at tide water, by whatever name, whether sea, harbor, or bay, includes the land below the high-water mark, as far as the grantor owns; but a boundary of that land, whether described as shore, beach, or flats, excludes it. *City of Boston v. Richardson*, 95 Mass. (13 Allen) 146, 155.

"Sea," as used in a grant of land described as being bounded by the sea, will be construed to mean low-water mark of the sea. *Paine v. Woods*, 108 Mass. 160, 169.

A grant by the Mexican government in California of land bordering "to the west on the sea" included only the lands above high-water mark, and did not cover the tide lands. *Coburn v. San Mateo County* (U. S.) 75 Fed. 520, 527 (citing *Bissell v. Henshaw* [U. S.] 3 Fed. Cas. 466; *Seabury v. Field* [U. S.] 21 Fed. Cas. 903).

For all the ordinary purposes of a boundary, where the ocean, or a bay or other body of water affected by the flux and reflux of the tide, is made a limit, the words "seashore" and "sea," in the absence of any showing to the contrary, appear to be practically synonymous. *Coburn v. San Mateo County* (U. S.) 75 Fed. 520, 528.

#### SEA BEACH.

The "sea beach" is all that place which is covered by the waters of the sea when at its highest point during all the year. *United Land Ass'n v. Knight*, 23 Pac. 267, 270; *Id.*, 24 Pac. 818, 821, 85 Cal. 448.

#### SEA GROUND.

"Sea ground" is either the ground bordering on the sea or covered with the sea. In a deed, the word "ground" is sufficient to pass the soil, and the word "sea," annexed to it, only shows where it is situated. *Scrutton v. Brown*, 4 Barn. & C. 485.

A deed purporting to pass "all that and those sea grounds, oyster layings, shores, and fisheries" passes the soil, and not merely an easement. *Scrutton v. Brown*, 4 Barn. & C. 485.

#### SEA LETTER.

"Sea letter," as used in the New York statutes, means a certificate of ownership granted to unregistered vessels belonging to citizens of the United States. *Sleight v. Hartshorne* (N. Y.) 2 Johns. 531, 540 (overruling *Sleight v. Rhinelander* [N. Y.] 1 Johns. 192, 203).

#### SEA MOSS.

Worcester describes Irish moss, or sea moss, as "a species of seaweed (*Chondrus crispus*) whose gelatinous qualities render it valuable as an article of food." The Imperial Dictionary, in describing sea moss, describes it as "a marine plant of the genera *corallina*." The Encyclopedia Britannica says: "Irish moss, or carrageen, is a seaweed (*Chondrus crispus*) which grows abundantly along the rocky parts of the Atlantic coasts of Europe and North America. It is collected for commercial purposes on the west and northwest of Ireland, and in very large quantities on the coast of Plymouth county, Massachusetts, U. S. It is used for food, medicine, and a thickener for printing calico and for finning beer." Sea grass, used for making mattresses and upholstery purposes, and which is an entirely different article from sea moss, and is not known commercially as sea moss, is not dutiable as such, but is entitled to free entry as "moss, sea weeds, and vegetable substances, crude or unmanufactured, not otherwise specially provided for." *In re F. W. Myers & Co.* (U. S.) 123 Fed. 952, 955.

#### SEA SERVICE.

To constitute sea service, three things are necessary: The service must be performed at sea, under the orders of a department, and in vessels employed by authority of law. *United States v. Barnett*, 17 Sup. Ct. 286, 287, 165 U. S. 174, 41 L. Ed. 675.

Services performed by a naval officer on a training ship while at anchor in an arm of the sea are "sea services," within Rev. St. § 1571 [U. S. Comp. St. 1901, p. 1079], providing that "no services shall be regard-

ed as sea services," except such as shall be performed at sea, under orders of a department, and in vessels employed by authority of law. *United States v. Symonds*, 7 Sup. Ct. 411, 412, 120 U. S. 46, 30 L. Ed. 537.

"Sea service," within the meaning of Rev. St. § 1556, relative to the pay of officers of the navy while performing services at sea, includes services of an officer as the executive officer of a training ship, situated in a harbor and cruising and moving about under her own power, with her machinery and equipment in order, perfectly seaworthy, and capable upon short notice of being used in a protracted cruise; the duties of the officer being more arduous and confining than those of officers of similar grade in foreign waters. *United States v. Bishop*, 7 Sup. Ct. 413, 120 U. S. 51, 30 L. Ed. 538.

"Sea service," within the meaning of the statute relative to the pay of naval officers while at sea, includes service in a training ship anchored in a navy yard and used as a naval recruiting station, which communicates with the shore by a rope and a boat running along the same, and which is capable of going to sea, but not with safety; and an officer thereon is entitled to sea pay, where the regulations require him to quarter and mess on board, to wear uniform and live apart from his family, and his duties are similar to those prescribed in cruising. This is true, although the term "sea service," as used in the Navy Department, has not been considered, since 1843, to include the duty on a receiving ship. *United States v. Strong*, 8 Sup. Ct. 1021, 1022, 125 U. S. 656, 31 L. Ed. 823.

"Sea service," within the meaning of Rev. St. § 1556, relative to the pay of naval officers while engaged in sea service, applies to a vessel always afloat on tide water, which is frequently ordered to sea, and at all time ready to obey such orders, and which keeps the officers and crew messing and sleeping on board, and maintains the regulations and discipline of a man-of-war at sea. *McRitchie v. United States* (U. S.) 23 Ct. Cl. 23.

#### SEA STORES.

"Sea stores," as used in laws directing a manifest of a ship's cargo to be made out, together with the name or names of the passengers, distinguishing between cabin or steerage passengers, or both, and the baggage and packages belonging to each, together with an account of the remaining sea stores, if any, means such articles of provisions and stores as were put on board by the captain, and not consumed on the voyage, but remaining on hand at its termination. *United States v. Twenty-Four Coils of Cordage* (U. S.) 28 Fed. Cas. 276, 279.

"Sea stores," as used in Act Cong. March 2, 1790, § 23, requiring a manifest of a vessel's cargo, enumerating certain articles, together with an account of the remaining sea stores, if any, does not include articles purchased for the ship, to be used as part of her tackle and apparel, and as part of her equipment for her navigation; but it means the provisions taken on board for the use of the passengers and crew, and not such articles as the anchors, cables, spars, and cordage of the ship. *United States v. Twenty-Three Coils of Cordage* (U. S.) 28 Fed. Cas. 290, 291.

#### SEABOARD.

"Seaboard" means the country bordering on the sea, and "sea," as defined in the *Century Dictionary*, is "a more or less distinctly limited or land-locked part of the ocean, having considerable dimensions." *American Fisheries Co. v. Lennen* (U. S.) 118 Fed. 869, 873.

#### SEAGOING.

A vessel is not shown to be seagoing by the mere fact that it carries a mast and sail, as they may be used upon any kind of a vessel, even upon a raft, and are often seen upon canoes and other small craft. *Hodges v. Williams*, 95 N. C. 331, 336, 59 Am. Rep. 242.

The term "seagoing vessel," in Rev. St. § 1597, in reference to the pay of persons in the naval service, which provides that no person not actually attached to and doing duty on board a seagoing vessel, except, etc., shall be allowed a ration, does not include a receiving ship at anchor. *Frary v. United States* (U. S.) 24 Ct. Cl. 114, 117.

#### SEASHELLS.

"Seashells" are the hard, organized substance forming the exterior covering and protection of certain marine animals, and these hard, bony coverings are not changed from their natural state by having these animals and adventitious and foreign matter clinging to them removed. They are no part of the shell, and the natural state of the shell remains after the removal takes place. *Schoenemann v. United States* (U. S.) 119 Fed. 584, 587, 56 C. C. A. 104.

#### SEASHORE.

For all the ordinary purposes of a boundary, where the ocean or a bay or other body of water affected by the flux and reflux of the tide is made a limit, the words "seashore" and "sea," in the absence of any showing to the contrary, appear to be practically synonymous. *Coburn v. San Mateo County* (U. S.) 75 Fed. 520, 528.

**As high tide line.**

The use of the term "seashore" as a boundary of land is to be construed as fixing the boundary of the land at the high tide line. *More v. Massini*, 37 Cal. 432.

The term "seashore" extends as far toward the land as the tide flows. *Commonwealth v. Alger*, 61 Mass. (7 Cush.) 53, 90.

**Land between high and low tide.**

"Seashore," as defined by Bouvier, is "that space of land on the borders of the sea which is alternately covered and left dry by the rising and falling of the tide, or, in other words, that space between high and low water mark." *Church v. Meeker*, 34 Conn. 421, 424.

In *Blundell v. Catterall*, 5 Barn. & Ald. 268, Mr. Justice Holroyd says: "By the common law, the seashore is confined to the flux and reflux of the sea at the ordinary tides, meaning the land covered by such flux and reflux." *Attorney General v. Chambers*, 27 Eng. Law & Eq. 242, 248.

"Seashore" must be understood to be the margin of the sea in its usual and ordinary state. Thus when the tide is out, low-water mark is the margin of the sea; and when the tide is full, the margin is high-water mark. The seashore is therefore all the ground between ordinary high-water mark and low-water mark. It cannot be considered as including any ground always covered by the sea; for then it would have no definite limit on the seaboard. Neither can it include any part of the upland, for the same reason. This definition of the shore seems to result necessarily from its nature and situation. *Storer v. Freeman*, 6 Mass. 435, 439, 4 Am. Dec. 155; *Lapish v. Bangor Bank*, 8 Me. (8 Greenl.) 85, 89.

The shore of the sea is that part of the land covered by water in its greatest ordinary flux, the ports, bays, roadsteads, and gulfs, and the rivers, although they may not be navigable, their beds, mouths, and the salt marshes. *United Land Ass'n v. Knight* (Cal.) 23 Pac. 267, 270 (citing *Hall*, Mex. Law, 448-503; *Civ. Code Mex.* art. 802).

**Land covered by highest flood tide.**

The term "seashore" was said by Justinian to be "that tract of land over which the greatest water flood extends itself." *Morgan v. Nagodish*, 3 South. 636, 637, 40 La. Ann. 246.

Sir Matthew Hale in *De Jure Maris*, c. 6, speaking of the seashore, says: "It is certain that that which the sea overflows either at high spring tides or at extraordinary tides comes not under the denomination of 'littus maris.'" *Littlefield v. Maxwell*, 31 Me. 134, 139, 1 Am. Rep. 653.

"Seashore" is that space of land over which the waters of the sea spread in the highest water during the winter season. *Civ. Code La.* 1900, art. 451.

**SEASIDE RESORT.**

See "Resort."

**SEAWORTHY—SEAWORTHINESS.**

See, also, "Unseaworthy."

The term "seaworthy," as used in the law of marine insurance, means that "the ship must be in such condition when the policy attaches as to resist ordinary peril, and to accomplish the voyage under ordinary risks." *Draper v. Columbia Ins. Co.*, 11 N. Y. Super. Ct. (4 Duer) 234, 239.

Seaworthiness requires that the ship shall be in a fit state as to repair, equipment, crews, and in all other respects to encounter the ordinary perils of the contemplated voyage. *The Aggl* (U. S.) 93 Fed. 484, 490; *The Titania* (U. S.) 19 Fed. 101, 105.

"Seaworthy," as used in a policy of insurance, means such a condition of strength and soundness as to resist the ordinary action of the sea, wind, and waves during the contemplated voyage; and a ship is "seaworthy" in this sense when her hull, tackle, apparel, and furniture are in such a condition of soundness and strength as to stand the ordinary action of the sea and weather. *The Orient* (U. S.) 16 Fed. 916; *The Titania* (U. S.) 19 Fed. 101, 105; *Sumner v. Caswell* (U. S.) 20 Fed. 249, 251; *The Orient* (U. S.) 16 Fed. 916; *The M. J. Cummings* (U. S.) 18 Fed. 178, 183; *Gibson v. Small*, 4 H. L. Cas. 418.

"To constitute seaworthiness in the hull of a vessel in respect to cargo, the hull must be tight, staunch, and strong, so as to be competent to resist all ordinary action of the sea, and to prosecute and complete the voyage without damage to the cargo on deck." *Dupont de Nemours v. Vance*, 60 U. S. (19 How.) 162, 167, 15 L. Ed. 584 (quoted in *The Lillie Hamilton* [U. S.] 18 Fed. 327, 330; *The Arctic Bird* [U. S.] 109 Fed. 167, 169).

"Seaworthiness" means reasonable fitness for the voyage. *The Millie B. Bohannon* (U. S.) 64 Fed. 883, 884.

A ship is seaworthy when reasonably fit to perform services and to encounter the ordinary perils of the voyage contemplated by the parties to the policy. *Civ. Code Cal.* 1903, § 2682; *Rev. Codes N. D.* 1899, § 4552; *Civ. Code S. D.* 1903, § 1898.

**As requiring compasses.**

To constitute a vessel seaworthy she must be furnished with compasses suitable

for the voyage. Where there are several correct compasses, and one compass for any cause deviates, if a competent master, by the exercise of ordinary care and skill; can discover the deviation, and correct the deviating compass by comparison with others, and be thus able to steer the proper course, the ship in this respect is seaworthy. *Lord v. Goodall S. S. Co. (U. S.) 15 Fed. Cas. 884, 887.*

**As requiring competent master, officers, and crew.**

The warranty of seaworthiness implied in a marine policy requires that the insured vessel shall have a competent master and mate, and a sufficient crew for the particular voyage. *Hutchins v. Ford, 19 Atl. 832, 834, 82 Me. 363.*

The term "seaworthiness" includes the requirement that the ship shall have competent master and officers according to the service upon which she is employed. *Draper v. Commercial Ins. Co., 21 N. Y. 378, 380.*

Among other things required to constitute "seaworthiness" within the meaning of a marine insurance policy, it is requisite that the ship should have a competent master and officers, according to the service on which she is employed. It is not necessary that the master or any of the subordinate officers or crew should be a citizen or citizens of the United States, nor that the ship itself should be registered under the laws of Congress, nor is there anything prohibiting the shipowner from sailing his vessel from any port of the United States to any other in the world without a registry, and an insurance on the vessel or cargo for any such voyage is not invalid if there is no other objection to its seaworthiness than its nonregistry; and where the actual navigation and discipline of a vessel are intrusted by the owner to a competent sailing master, implied warranty of seaworthiness in this respect is satisfied, though another person, having no nautical skill, and who in fact only acted as supercargo, is named in the registry as master. *Draper v. Commercial Ins. Co., 21 N. Y. 378, 380.*

**As determined by customs of port of sailing.**

The question of seaworthiness is to be determined with reference to the customs and usages of the port or country from which the vessel sails, the existing state of knowledge and experience, and the judgment of prudent and competent persons versed in such matters. *The Titania (U. S.) 19 Fed. 101, 105; La Fernier v. Soo River Lighter & Wrecking Co., 89 N. W. 353, 357, 129 Mich. 596.*

"It would not be a just or safe rule in all cases to take that standard of seaworthi-

ness exclusively which prevails in the port or country where the insurance is made. \* \* \* It seems to me that, where the policy is underwritten upon a foreign vessel belonging to a foreign country, the underwriter must be taken to have knowledge of the common usages of trade in such country as to equipments of vessels of that class for the voyage on, which she is destined. He must be presumed to underwrite upon the ground that the vessel shall be seaworthy in her equipments according to the general custom of the port, or at least of the country, to which she belongs." *Tidmarsh v. Washington Fire & Marine Ins. Co. (U. S.) 23 Fed. Cas. 1197, 1198.*

**As fit for particular cargo or voyage.**

The term "seaworthy," when applied to a vessel, means that she is suitable for the service in which she is employed. *Haulenbeek v. Hunt, 63 N. Y. Supp. 405, 406, 49 App. Div. 47.*

In an action on a policy of insurance of a vessel "at and from Perry, to stop at Eastport, and at and thence to the southern port," etc., the vessel then being in process of construction at Perry, and the policy to take effect "as soon as water-borne." It appeared that it was customary, when vessels were launched at Perry, to tow them to Eastport, a distance of three miles, and there furnish them with rigging, etc., and prepare them for the voyage, as was done in this case. The court said: "The defendants rely upon the want of seaworthiness. They say the barque was not seaworthy at Perry; that she never sailed from Perry as a finished vessel; nor, from the contract, viewed in the light of the surrounding facts, could it have been expected that she should. But she was seaworthy in the sense that she was fit for the service in which she was for the time engaged. She was in a fit condition at Perry to go to Eastport in the usual way. She was in a fit condition before she left Eastport to go to New York." *Cobb v. New England Mut. Marine Ins. Co., 72 Mass. (6 Gray) 192, 199.*

In considering the rule that it is the duty of the owner of vessels insured to keep them seaworthy, the court said: "Seaworthiness applies to the intended uses and purposes to which the vessel is to be applied. So, whilst a vessel is insured at a port, a state of repair and equipment is sufficient which would be unseaworthiness for going to sea. But she must be in such condition as to be in reasonable security." A ship in a state incapable of performing the voyage is thus put in contradistinction to seaworthiness, thereby considering a vessel capable of performing her voyage as seaworthy to the purpose of being the subject of a contract of insurance. This she may be, though very far from that condition of complete equip-

ment necessary to constitute seaworthiness for the commencement of a long voyage in distant seas, far remote from places of repair, supply, and relief. *Paddock v. Franklin Ins. Co.*, 28 Mass. (11 Pick.) 227, 232.

"In *Small v. Gibson*, 3 Eng. Law & Eq. 290, 299, it was held in the Exchequer Chamber that the word 'seaworthy' did not mean a state completely fit for sea navigation, but included in it a fitness for present navigation, either on a sea or river, if about to sail or sailing on either, and a condition of repair and equipment for the port." *Hathaway v. Sun Mut. Ins. Co.*, 21 N. Y. Super. Ct. (8 Bosw.) 33, 55.

"The term 'seaworthy,' as used in the law and practice of insurance, does not mean, as the term would seem to imply, capable of going to sea, or of being navigated on the sea. It imports something very different and much more, namely, that she is sound and strong in all respects, and equipped, furnished, and provided with officers and men. When applied to a voyage, the nature, length, and extent both of time and place became fixed by the description of the voyage. It usually commences at a time and place and under such circumstances that all these things may be provided for. Then the term 'seaworthy' becomes intelligible and definite, and means sufficient for such a vessel and voyage." *Capen v. Washington Ins. Co.*, 66 Mass. (12 Cush.) 517, 536.

"Seaworthiness," within the meaning of the rule that an insured vessel must be seaworthy, means seaworthy for such a voyage as she was engaged in at the time of a loss. *Adderly v. American Mut. Ins. Co. of Baltimore* (U. S.) 1 Fed. Cas. 166, 167.

Where a vessel which was chartered for the transportation of wheat in bulk, under a warranty that she should be tight, staunch, and strong, and in every way fitted for the voyage, it was essential that the vessel should be a good sea risk for the merchandise specified as cargo. *The Vesta* (U. S.) 6 Fed. 532, 533.

In an implied warranty of a shipment, in a contract for carriage of goods by sea, that the ship is seaworthy for the particular voyage and cargo, the word "seaworthy" means more than the bare words; that is, that she was safe for the crew to venture to sea on. But, as between shipper and consignee, it means that she can carry the merchandise safely to its destination, excepting certain dangers of the sea. *The Nellie Floyd* (U. S.) 116 Fed. 80, 82.

Where the owner of a vessel charters her or offers her for freight, he is bound to see that she is seaworthy and suitable for the service for which she is to be employed. If there be defects, known or not known, he

is not excused. He is obliged to keep her in proper repair, unless prevented by perils of the sea or unavoidable accidents. *Work v. Leathers*, 97 U. S. 379, 380, 24 L. Ed. 1012.

The term "seaworthy," as applied to a raft insured as being seaworthy, means that it is so constructed that it is capable of withstanding the strain of navigation on the voyage insured against by the defendant. *Moore v. Louisville Underwriters* (U. S.) 14 Fed. 226, 232.

A vessel, to be "seaworthy," must be fit in design, structure, condition, and equipment to carry the cargo she has undertaken to transport; and if she fails in any of these particulars, she is not seaworthy. *Insurance Co. of North America v. North German Lloyd Co.* (U. S.) 106 Fed. 973, 975.

#### As covering latent defects.

The term "seaworthy" relates to defects, both known and unknown. *Haulenbeek v. Hunt*, 63 N. Y. Supp. 405, 406, 49 App. Div. 47.

Under the covenant of a charter party that the vessel is "tight, staunch, and strong," the owners are answerable for latent, as well as visible, defects whereby the cargo is damaged. *Hubert v. Recknagel* (U. S.) 13 Fed. 912, 913.

Where actual defects, though latent, are established by the proofs—that is, such defects as at the time when the vessel sailed would, if known, have been considered as rendering the vessel unseaworthy for the voyage, such as rotten timbers, defective machinery, leaks, etc.—such defects, though latent, are covered by the implied warranty of seaworthiness, and are at the risk of the ship and her owner, and the policy does not attach. 2 Arn. Ins. c. 4; 1 Pars. Mar. Ins. 369; Abb. Shipp. 340; 3 Kent, Comm. 205; *Lee v. Beach*, 1 Park, Ins. 468; *Quebec Marine Ins. Co. v. Commercial Bank*, L. R. 3 P. C. 234; *Work v. Leathers*, 97 U. S. 379, 24 L. Ed. 1012; *The Vesta* (U. S.) 6 Fed. 532; *Hubert v. Recknagel* (U. S.) 13 Fed. 912. But this principle cannot be applied to cases where, all the circumstances being known, the vessel would still be deemed by competent persons and according to existing knowledge and usage entirely seaworthy and reasonably fit for the voyage, although subsequent experience might recommend additional precautions. It was not long ago held (*Amies v. Stevens*, 1 Strange, 128), and is laid down in Abb. Shipp. § 389, as elementary law, that, if a vessel reasonably fit for the voyage be lost by a peril of the sea, the merchant cannot charge the owner by showing that a stouter ship would have outlived the peril. This principle applies equally to the storage of the cargo. *The Titania* (U. S.) 19 Fed. 101, 105, 106, 107.

**As requiring proper rigging.**

In order that a boat should be seaworthy, it is not necessary that it should be provided with everything that would be convenient and pleasant to have on the boat in its voyage; but it is necessary that it should be provided with everything which will tend to make it reasonably safe for the voyage which it is intended to make. Merely because a voyage can or may be made without certain of the rigging does not imply that she is seaworthy; but a vessel should be provided with all the masts and rigging which that vessel ordinarily carries, which are reasonably necessary for the movement of that vessel. The vessel should be put in that condition which prudent and reasonable seafaring men would require in order to encounter the perils and dangers which might be expected. *Seaman v. Enterprise Fire & Marine Ins. Co.* (U. S.) 21 Fed. 778, 780.

**As requiring proper stowage of cargo.**

Proper stowage of articles which, on becoming loose, may imperil the safety of the ship, is one of the elements of seaworthiness as regards the implied warranty in favor of the insurer or the shipper of goods; but where a ship becomes unseaworthy during severe weather, or one part of the cargo does damage to another part, from a consideration of the result the ship is not to be pronounced unseaworthy when she sailed, nor is the cargo necessarily to be held improperly or insufficiently stowed. *The Titania* (U. S.) 19 Fed. 101, 105.

**As a relative term.**

"Seaworthy" is a relative term, not an absolute one; and, when it is held that it is a condition precedent to an insurance policy taking effect that the vessel be seaworthy, it is not intended to mean that a vessel 14 years old must be understood as being equally sound as a new vessel with a higher rate; and where such a vessel was abandoned, though reported seaworthy by an official surveyor shortly before the voyage, the question of seaworthiness was one for the jury. *Osborne v. New York Mut. Ins. Co.*, 6 N. Y. Supp. 103, 104, 53 Hun, 633.

The term "seaworthy" is a relative one, and is always construed in reference to the voyage in which a vessel is to be engaged. The same vessel may be seaworthy for one voyage, and entirely unseaworthy for another. If any loss happens to the shipment in consequence of the neglect of the owner to furnish a suitable vessel, the latter is responsible for such loss, although the defect may be a latent one and unknown to him. He implicitly warrants that his vessel is suitable to the service in which he undertakes to employ her. *Collier v. Valentine*, 11 Mo. 299, 300, 306, 49 Am. Dec. 81.

The term "seaworthy" is relative. A ship leaky in her deck may be seaworthy for

carrying stone, iron, coal, and very many other things even more valuable in respect to avoiddupois. But it cannot legitimately be contended that a ship is seaworthy, as to perishable articles, when it leaks in such a manner and degree as to cause damage to a very large proportion of such articles, by a process plain to all on board and obvious throughout the voyage; the damage to flour, in this case itself, in several instances, in the form of paste oozing through the cracks of the barrels. A ship may be seaworthy as to one sort of cargo and unseaworthy as to another. When a customary and well-known article of commerce is received on board ship and carried on a voyage, the master guarantees the seaworthiness of his ship for taking charge of that article. As to her cargo, seaworthiness is that quality of a ship which fits it for carrying safely the particular merchandise which it takes on board. The ship is impliedly warranted to be seaworthy quoad that article; and, if damage occurs in consequence of the unfitness of the ship for carrying that article, the ship is liable, and cannot exonerate itself by proving the non sequitur that it is capable of carrying safely and without damage some other article of a different character. *The Thames* (U. S.) 61 Fed. 1014, 1022, 10 C. C. A. 232.

**As seaworthy at port.**

Generally speaking, under a policy of insurance "while at and from a certain port," the ship will be sufficiently seaworthy to give an inception to the risk if she be in such a state while "at" the port as to be capable of being moved from one part of the harbor to another for the purpose of repair. *Cobb v. New England Mut. Marine Ins. Co.*, 72 Mass. (6 Gray) 192, 200.

**As seaworthy on leaving port.**

The term "seaworthy" implies that the vessel is properly officered, manned, and equipped when she leaves port. *Lord v. Goodall S. S. Co.* (U. S.) 15 Fed. Cas. 884, 888.

Seaworthiness in port or for temporary purposes, such as mere change of position in harbor, or proceeding out of port, or lying in an offing, may be one thing, and seaworthiness for a whole voyage quite another; but every ship, at the commencement of the voyage insured, must possess all the qualities of seaworthiness and be managed by a competent master and crew. *McLanahan v. Universal Ins. Co.*, 26 U. S. (1 Pet.) 170, 184, 7 L. Ed. 98.

By "seaworthiness," of which there is a presumption with regard to a vessel when she undertakes a voyage, is meant that the ship shall be in a fit state as to repair, equipment, crew, and in all other respects to encounter the ordinary perils of a contemplated voyage, or, in the language of some of the authorities, that the ship is in a condition in

all respects to render it reasonably safe where it happens to be at the time referred to, or, as expressed by others, that the ship was at the commencement of the voyage in such a state as to be reasonably capable of performing it. *La Fernier v. Soo River Lighter & Wrecking Co.*, 89 N. W. 353, 357, 129 Mich. 596.

## SEAL.

See "Corporate Seal"; "Great Seal"; "Private Seal"; "Public Seal"; "Under Seal."

At common law a seal consisted of an impression upon wax or wafer, or some other tenacious substance capable of being impressed. *Allen v. Sullivan R. Co.*, 32 N. H. 446, 449; *Coit v. Millikin* (N. Y.) 1 Denio, 376, 377; *Bank of Rochester v. Gray* (N. Y.) 2 Hill, 227, 229; *Town of Solon v. Williamsburg Sav. Bank*, 114 N. Y. 122, 132, 21 N. E. 168, 169; *State ex rel. West v. Thompson*, 49 Mo. 188, 189; *Alt v. Stoker*, 127 Mo. 466, 471, 30 S. W. 132; *Cochran v. Stewart*, 59 N. W. 543, 544, 57 Minn. 499; *Bradford v. Randall*, 22 Mass. (5 Pick.) 496, 497; *Osborn v. Kistler*, 35 Ohio St. 99, 102.

At common law, and in early times, a seal, no doubt, meant an impression made on wax, or other thing that would receive and retain an impression; for seals were introduced by the Normans, and used, in fact, as a signature at a time when each man had his signet and a certain coat of arms or engraving on it. *Cromwell v. Tate's Ex'r* (Va.) 7 Leigh, 301, 304, 30 Am. Dec. 506.

Wax, wafer, or something susceptible of receiving an impression, is necessary by the law of New Jersey to constitute a seal, except in cases of instruments for the payment of money, to which a scroll or other device has by statute the same force as wax. *Ferrine v. Cheeseman*, 11 N. J. Law (6 Halst.) 174, 178, 19 Am. Dec. 388.

It is not necessary that a seal should be made of wax. The impression, and not the wax, makes the seal. Whether the impression was intended for a seal is a question of fact for the jury, whether made of wax, ink, or otherwise. If the body of an instrument does not show the intention to make a scroll and seal, it may be shown by the scroll itself, or by evidence aliunde. *Rolph v. Gist* (S. C.) 4 McCord, 267, 270.

A substance affixed to instruments more tenacious than wax or wafer, dedicated and declared by the company to be their seal, and bearing the title of a corporation and the year of its charter, as authorized by a body of directors, constitutes a corporate seal. At common law a different rule prevailed. The impression of a seal was not a seal, but a

seal was defined to be "cera impressa," and an impression on paper, and not on wax, would be no seal. *Woodman v. York & C. R. Co.*, 50 Me. 549, 551.

Though some courts have made the discovery that a seal can be made, not only without any distinct impression, but with wax or anything in any way susceptible of impression, yet it is a principle of common sense and recognized by the Legislature that wax, or something in the nature of wax, and susceptible of receiving an impression, is necessary to constitute a seal; for by the act concerning obligations it is enacted that any instrument for the payment of money, to which the person making the same shall affix a scroll, or ink, or other device, by way of seal, shall be taken to be of the same force and obligation as if it were actually sealed with wax. *Hopewell Tp. v. Amwell Tp.*, 6 N. J. Law (1 Halst.) 169, 175.

What is the private seal of an individual? Does an impression furnish any criterion whether it be his seal or not. It is true that some few gentlemen have seals which impress their family coat of arms, and some have such as impress the initials of their names; but these are rare indeed compared with the body of the community, who have no seals. In truth, it is unimportant whether this adoption be of wax or of scroll. Lord Coke, in his second Institute, in a commentary on a statute which speaks of seals, says: "A seal is wax with an impression." But there is neither an act of Parliament nor an adjudged case to bind the court. It was his opinion, only, founded probably on the practices of that day; and, if that gives a binding rule, we may, by going further back, discover a period of time when the impression was made with the eye tooth. There was some utility in that custom, since the tooth was the man's own, and furnished a defense in case of forgery. Scrolls have been substituted for seals in this country. The party acknowledges the scroll to be his seal, and as such this court will consider it. *Jones v. Logwood* (Va.) 1 Wash. 42, 43.

A seal is not necessarily of any particular form or figure. When not of wax, it is usually made in the form of a scroll; but the letters "L. S." or the word "Seal," inclosed in brackets or some other design, is in frequent use. *Hacker's Appeal*, 121 Pa. 192, 202, 15 Atl. 500, 501, 1 L. R. A. 861.

A seal is a particular sign made to attest in the most formal manner the execution of an instrument. *Code Civ. Proc. Cal.* 1903, § 1930; *Ann. Codes & St. Or.* 1901, § 763; *Rev. St. Utah* 1898, § 3397.

The private seal of a person, other than a corporation, to any instrument or writing, shall consist of a wafer, wax, or other similar adhesive substance affixed thereto, or of



paper or other similar substance affixed thereto, by mucilage or other adhesive substance, or of the word "Seal," or the letters "L. S.," opposite the signature. A seal of a court, public officer, or corporation may be impressed directly upon the instrument or writing to be sealed, or upon wafer, wax, or other adhesive substance affixed thereto, or upon paper or other similar substance affixed thereto by mucilage or other adhesive substance. An instrument or writing duly executed, in the corporate name of a corporation which shall not have adopted a corporate seal, by the proper officers of the corporation under their private seals, shall be deemed to have been executed under the corporate seal. Laws N. Y. 1892, c. 677, § 13.

Wherever an official or a corporate seal is required to be affixed to any instrument or writing, an impression of such seal upon either wax, wafer, or other adhesive substance, or upon the paper or material on which such instrument is written, shall be alike valid and sufficient. Bates' Ann. St. Ohio 1904, § 4.

Under 1 Wag. St. p. 269, § 5, providing that every instrument of writing expressed on the face thereof to be sealed, and to which the person executing the same shall affix a scroll by way of seal, shall be deemed to be sealed, a common-law seal is sufficient, in the absence of statutory scroll. Alt v. Stoker, 127 Mo. 466, 471, 30 S. W. 132.

#### **Impression without wax.**

A seal stamped upon paper of sufficient tenacity to retain the impression is a seal within the strictest rules of the common law. Ross v. Bedell, 12 N. Y. Super. Ct. (5 Duer) 462, 465.

Wax was used for the purpose of a seal when an instrument was sufficiently executed for delivery by the seal alone of a party executing it; but when his signature became as essential, or even more essential, than the seal, wafers largely, and perhaps generally, took the place of wax, and now, instead of making the impression of the seal on any adhesive substance affixed to the paper, from which the intention or act of the party is declared in writing, the practice is general to have the official seals applied with a strong pressure upon the paper itself. Bradley v. Northern Bank of Alabama, 60 Ala. 252, 253.

An impression upon paper alone is not a seal, except where it has been made so by statute. The seal of another state, affixed to a copy of an act of its Legislature for the purpose of authenticating the same, to be recognized in the courts of the state of New York, must be a common-law seal. Coit v. Millikin (N. Y.) 1 Denio, 376, 377.

Bonds purporting not only in words to be sealed, but bearing on their face an impression stamped like a seal into the very texture of the paper, which, whatever it may be, ordinarily is, as is obvious from inspection, a tenacious substance as susceptible of impression as even wafer or wax, or as clay, iron, or silver, are sealed. The bonds were intended to be sealed instruments, and the omission, if it be one, of wax and wafer, was a mere oversight, and can now be supplied by the application by the court of a small quantity of wax, or according to the established rule in equity by treating that as already done which it is so manifest was intended, and, if necessary, in justice and fair dealing ought to be done. The whole discussion on this point every sensible man must admit, were it not for some unfortunate dicta in the books, would look very much like childish trifling. Curtis v. Leavitt (N. Y.) 17 Barb. 309, 318.

In Arkansas the presence of wax is not necessary to give validity to a seal, and the fact that a public officer in Wisconsin did not use wax is sufficient to raise the presumption that such was the law of Wisconsin also. Therefore, where a deed executed in Wisconsin was attested by the seal of a court stamped upon the paper, instead of wax, the deed was properly sealed. Pillow v. Roberts, 54 U. S. (13 How.) 472, 473, 14 L. Ed. 228.

Under the New Hampshire statutes, the word "seal" is construed to include an impression upon paper alone, as well as an impression made by means of wax or wafer affixed thereto. An impression of the seal of a railroad corporation, made upon the instruments issued by it as bonds and purporting to be under seal, is a sufficient seal to make the instruments specialties, on which debt may be maintained. Allen v. Sullivan R. Co., 32 N. H. 446, 449.

From Lord Coke's definition of a seal, and the interpretation generally given it by the courts, wax is merely used as a general term to denote any substance capable of receiving and retaining an impression, and, as any instrument may be used for the purpose, the impression upon paper itself, without the use of any other substance, would be sufficient. Swink v. Thompson, 31 Mo. 336, 339.

By statute in many states it is provided that when the seal of a court, public officer, corporation, or person is required to be affixed to any paper or instrument, the word "seal" shall include an impression of such seal upon the paper alone, as well as upon wax or a wafer affixed thereto. See Rev. St. Okl. 1903, § 2812; Pol. Code Cal. 1903, § 14; Code Civ. Proc. Cal. 1903, § 14; Pen. Code Cal. 1903, § 7, subd. 18; Rev. Codes N. D. 1899, § 5139; Civ. Code S. D. 1903, §

2473; *Comp. Laws Mich.* 1897, § 50, subd. 14; *Gen. St. Kan.* 1901, § 7342, subd. 14; *Pol. Code Idaho* 1901, § 14; *Rev. St. Wis.* 1898, § 4971; *Code N. C.* 1883, § 3765, subd. 8; *Pol. Code Mont.* 1895, § 13; *Pen. Code Mont.* 1895, § 7; *V. S.* 1894, § 17; *Code Iowa* 1897, § 48, subd. 14; *Gen. St. Minn.* 1894, § 255, subd. 13; *Rev. Laws Mass.* 1902, p. 89, c. 8, § 5, subd. 19; *Pub. St. N. H.* 1901, p. 63, c. 2, § 11; *Pub. St. R. I.* 1882, p. 78, c. 24, § 14; *Rev. St. Me.* 1883, p. 59, c. 1, § 6, subd. 15; *U. S. Comp. St.* 1901, p. 4; *Code Va.* 1887, § 5; *Code W. Va.* 1899, p. 132, c. 13, § 15; *Pen. Code Ga.* 1895, § 2; *Pen. Code Ariz.* 1901, par. 7, subd. 18; *Rev. St. Utah* 1898, § 2495.

#### **Blank space.**

A place for a seal, indicated by a printed blank, is not a seal, and signing before it cannot imply a seal in that place where none is made; for sealing necessarily implies some act of him who is alleged to have sealed an instrument. *Bennet v. Allen* (Pa.) 20 Phila. 423, 424.

#### **Mark with ink.**

A mark with ink, acknowledged by the maker of a deed to be his seal, is sufficient to create a specialty, though no wax, wafer, or other similar substance be used. *United States v. Coffin* (U. S.) 25 Fed. Cas. 485.

#### **Notary public's seal.**

A seal of a notary public bearing his name and the words "Notary Public," is a seal within Act Cong. Sept. 16, 1850, providing for the taking of oaths, affirmations, or acknowledgments by state officers, when certified under the hand and official seal of such officers. *Goodyear v. Hullihen* (U. S.) 10 Fed. Cas. 696, 698.

The seal of a notary public attesting his certificate need not be impressed on wax. It is sufficient if it be impressed on the paper. *Meyers v. Russell*, 52 Mo. 26.

Where a protest bore the signature of a person assuming to act as a notary, with the impression of a notary on the paper, but without any wafer or wax, it cannot be regarded as sealed. *Carter v. Burley*, 9 N. H. 558, 567.

#### **Paper affixed with mucilage.**

Bouvier defines a seal to be an impression. *Bouv. Dict.* Mucilage being a substance sufficiently adherent and capable of receiving and retaining an impression, a bit of paper affixed with mucilage and stamped on with a permanent impression is good as a common-law seal. *Gillespie v. Brooks* (N. Y.) 2 Redf. Sur. 349, 366.

The impression of a seal may be made by annexing any piece of paper and stamp-

ing some figure or device upon it. *Bradford v. Randall*, 22 Mass. (5 Pick.) 496, 497.

#### **Printed fac simile.**

The fac simile of a seal of a corporation, printed on blank forms of obligations prepared to be executed by the corporation at the same time when the blank is printed and by the same agency, is not a seal at common law; nor will such forms, when executed by the corporation, be contracts under seal, although the language of them calls for a seal. *Bates v. Boston & New York Cent. R. Co.*, 92 Mass. (10 Allen) 251, 253.

Where a seal is printed, the signature opposite to it is an adoption of it. *Giles v. Mauldin* (S. C.) 7 Rich. Law, 11, 12.

#### **Printed word "Seal."**

The word "Seal," printed between brackets in an attachment bond, adopted by the parties as their seal or scroll, is a sufficient sealing of the instrument. *Underwood v. Dollins*, 47 Mo. 259, 262.

Where the maker of a note uses a printed blank, and writes his name to the left of the printed word "Seal," so as to bring the latter into the usual place for a seal, he adopts it as his seal, and no other is necessary. *Lorah v. Nissley*, 27 Atl. 242, 156 Pa. 329.

It is held that the word "Seal," with a brace at each end, printed at the same time the blank was printed, does not constitute a seal, within the legal definition of the word, or such as is required by the usage, practice, and common or statute law of the state of Maine. *Manning v. Perkins*, 29 Atl. 1114, 86 Me. 419.

The word and sign "[Seal]," after the signature of the signer of a note, manifests his intention to adopt such as his seal, even though there were no words in the body of the note, as "Witness my hand and seal," or the like, to indicate that it was intended to be under seal; and while the note was prepared by filling out a printed form with "[Seal]" printed thereon, the fact that he signed his name opposite such characters was an adoption of them according to their import. *McLaughlin v. Braddy*, 41 S. E. 523, 524, 63 S. C. 433, 90 Am. St. Rep. 681.

The word "Seal," between brackets, written or printed on an instrument, is not a seal. *Bishop v. Globe Co.*, 135 Mass. 132, 137.

#### **Private or public seal.**

The seal required by *Rev. St.* 1849, c. 15, § 109, providing that the clerk of the county supervisors shall execute in the name of the county as clerk, under his hand and seal, tax deeds, means, not the seal of the county, but the seal of the clerk executing

the deed. The rule is that, where the statute is silent respecting the manner of sealing the deed, the private seal of the person executing it is to be used. *Eaton v. North*, 20 Wis. 449, 450.

Civ. Code, § 606, requiring that in effectment the jury shall sign and seal their respective assessments and valuations, and deposit the same with the clerk before the first day of the next term after the order therefor was made, meant that the assessments and valuations should be placed in an envelope or other inclosure and be sealed, and it was not intended that the word "Seal" should mean either a private or public seal of the jury, or any of the members thereof; for no such seal is known to the law. *Bradley v. Rogers*, 5 Pac. 374, 377, 33 Kan. 120.

#### **Ribbon.**

A horizontal slit in the parchment upon which a conveyance is written, with a ribbon drawn through it, opposite the name of the justice before whom the acknowledgment was made, is not a sufficient seal to constitute a deed. *Duncan v. Duncan* (Pa.) 1 Watts, 322.

#### **Scrawl or scroll.**

From the earliest period of our judicial history a scrawl has been considered as a seal. It is not necessary that the scrawl must be adopted by the obligor, nor is a declaration in the body of the bond or single bill necessary to make it a seal. It is sufficient if it be affixed to the bond or bill at the time of its execution and delivery. *Thrasher v. Everhart* (Md.) 3 Gill & J. 234, 246.

"A seal, according to Lord Coke (3 Inst. 169), is wax with an impression. By our statute (Rev. Laws, p. 305) 'a scroll, or ink, or other device,' in certain cases, is made of the same force as a wax seal, if the same has been affixed 'by way of seal.' If, then, an instrument is shown to us with a seal in fact—that is, with wafer or wax—affixed to it, the law pronounces it a deed; and that, whether anything is said in the instrument about a seal or not. It is pronounced a deed, because it has an actual seal on it. But when a writing is shown to us, with only a scroll or the flourish of a pen at the end of or under the name, we cannot declare it a deed, unless it appears to the court that the scroll or flourish was designed for and put there 'by way of seal.' When, therefore, a writing, with nothing but a blot, or scroll, or flourish after the name, is shown in court, we are bound to consider and treat it as a simple contract only, unless it appears by the writing itself, or by the *his testibus* clause, that the party making it intended to do so under his hand and seal." *Corlies v. Vannote*, 16 N. J. Law (1 Har.) 324, 328.

"Any mark made by a pen in imitation of the seal may be construed as a seal. The usual mode is to make a circular, oval, or square mark opposite to the name of the signer; but the shape is immaterial. Something, however, there must be intended for a seal, and the writing must be delivered as a deed. *Taylor v. Glaser* (Pa.) 2 Serg. & R. 502, 503.

A scrawl with the pen of "L. S." at the end of the name is not a seal; a seal being an impression on wax or wafer, or some other tenacious subject capable of being impressed. *Warren v. Lynch* (N. Y.) 5 Johns. 239, 245.

A scroll, made by a scrivener on an instrument in other respects a perfect deed, is not a "seal," such as is required by the usage, practice, and common or statute law of the state. *McLaughlin v. Randall*, 66 Me. 226, 227.

Under a charter provision authorizing the mayor to take acknowledgments and certify the same under the seal of the city, where the city in fact provided no seal, though he might adopt as an official seal a scrawl or other device, and his certificate that it was the seal of the city would be sufficient, it would be otherwise where the acknowledgment stated, "Given under my hand and private seal, there being no official seal of office provided." *Geary v. City of Kansas*, 61 Mo. 378, 379.

An instrument having a scroll, and not a seal of wax or wafer, is not a sealed one according to the principles of the common law; and a release executed in Pennsylvania and having a scroll in place of a seal will not be regarded as a sealed instrument in this state, in the absence of a showing of the laws of Pennsylvania. *Wain v. Wain*, 22 Atl. 203, 204, 53 N. J. Law, 429.

"The use of the seal was originally the means of distinguishing the person; for every individual was supposed to have his peculiar seal. The act of impressing with a seal, importing greater deliberation, might also be considered as adding to the evidence of its being the act of the party. It was a symbol of solemnity, which gave a greater effect to the instrument. This may be considered as a second use of the seal. There could be no other use in impressing with the tooth; for, when the teeth were gone, there was nothing with which to compare the impression. Yet this species of sealing would seem to have been in use; for in an old deed by William the Conqueror to a certain Rawdon, an ancestor of the present Earl of Moira, and which is in old English verse, we have the attestation of sealing in these words: 'In token that this thing is sooth, I bite the white wax with my tooth.' *European Magazine*, for 1811. But both these uses have in a great degree

come to nothing. For, as to the first, no person is distinguished by a seal, or supposed to be so distinguished; and as to evidence of deliberation, it amounts to nothing, since the circumflex of a pen has come to be considered an equivalent to wax, or to a wafer impressed with a seal. Not even a circumflex or circle is thought necessary, but some curve of the parabola, or something like it, in a flourish or scrape of the pen. It was a bold advance in thus reducing the symbol to a shadow, and I am not able to trace when or where it began. But it would be going a step beyond to dispense with it altogether, and to say that even the name shall not remain; for though it is maxim that when the reason of a thing ceases the law with regard to it ceases also, yet this image of technical distinction is so interwoven with our rules of law that I am not able to say that the judiciary power can restrain or abridge." *Cooper v. Rankin* (Pa.) 5 Bin. 613, 616.

"Sealing" at common law was an impression on wax or wafer, or some other tenacious substance capable of being impressed; but here that is not necessary. The Arkansas statute declares that every instrument of writing expressed on the face thereof to be sealed, and to which the person executing the same shall affix a scroll by way of seal, shall be deemed and adjudged to be sealed. *Floyd v. Ricks*, 14 Ark. 286, 295, 58 Am. Dec. 374.

Under the statutes of Indiana an ink seal, commonly called a "scroll," has the same effect as if it were made with wafer or wax. *Vanblaricum v. Yeo* (Ind.) 2 Blackf. 322, 323.

In New York, a private seal cannot be made with a mere scroll on paper around the letters "L. S." There must be an impression upon the paper with intent to seal it. *Town of Solon v. Williamsburgh Sav. Bank*, 114 N. Y. 122, 132, 21 N. E. 163, 169.

The common-law seal has never been in common use in Ohio. In executing deeds, mortgages, and other instruments in writing required by law to be sealed, scribes almost universally use blank forms, with spaces in which the scrawl seal is printed. To hold that parties executing such instruments do not adopt such printed devices as their seals by signing their name in front of them would lead to disastrous consequences. A device of such a character is a scrawl seal, and under the statute of Ohio has the effect of a common-law seal. *Osborn v. Kistler*, 35 Ohio St. 99, 102.

In the Southern and Western states, generally, we believe, a mere scrawl attached to the name has been held a seal, and the question has sometimes been decided in reference to the common law, and in other cases according to local custom or usage.

Formerly, in England, wax or some such tenacious substance was no doubt much used, but we do not think it was indispensable; and in this country, especially in this state, we are confident usage and custom have dispensed with it, and have sanctioned the use of the scrawl. Under Rev. Code 1855, p. 338, § 1, requiring the clerk of court to affix his official seal to all process issued by him, and, "if none be provided, then his private seal," a mere scrawl affixed to the end of his name is sufficient. *Swink v. Thompson*, 31 Mo. 336, 338.

To authenticate a public record by the private seal of an officer, the seal should be of wax or other tenacious substance. A scroll is not sufficient. *Gates v. State*, 13 Mo. 11, 12.

By the laws of Wisconsin, where the deed in question was made, a scroll or any device by way of seal has the same effect as the actual seal. But in New York such a device, without a wafer or wax, is not to be deemed a seal. So, in an action brought in New York for breach of a covenant of seisin in such deed, where the only seal was a scroll, the instrument must be treated as an unsealed instrument, and the action should be of assumpsit, and not covenant. *Le Roy v. Beard*, 49 U. S. (8 How.) 451, 12 L. Ed. 1151.

It is enacted in Mississippi that any instrument to which the person making the same shall affix a scroll by way of a seal shall be adjudged actually sealed. In the case of *McRaven v. McGuire*, 17 Miss. (9 Smedes & M.) 34, a deed was sealed by a circular scroll containing the word "seal," and it was held that whenever it is manifest that a scroll is intended to be used by way of a seal it must have that effect. From this decision it is deducible that any affixture to an obligor's name in an instrument, and in the locus sigilli, manifestly intended to be used by way of a seal, is sufficient to have that effect. *Whittington v. Clarke*, 16 Miss. (8 Smedes & M.) 480, 485.

A seal is not necessarily of any particular form or figure, and in the absence of statute to the contrary the scroll or rectangle, containing the word "Seal," attached to the lease of a corporation, will be deemed to be its proper and common seal. *Jacksonville, M. & P. Ry. & Nav. Co. v. Hooper*, 16 Sup. Ct. 379, 381, 160 U. S. 514, 40 L. Ed. 515.

Where a tax deed as recorded purports to have been executed by the county clerk in behalf of the state and county, and duly witnessed and acknowledged, and recites that the clerk has subscribed his name officially and affixed the seal of the county board, it is admissible in evidence of title, though the only representation of a seal therein is a scroll near the clerk's name with

the word "Seal" written within it. *Putney v. Cutler*, 11 N. W. 437, 438, 54 Wis. 66.

The law requiring a bill of exceptions to be sealed does not contemplate the adoption by the judge signing such bill of a seal other than or different from the private seal of such judge, and a bill of exceptions sealed by the judge with his private seal is a compliance with the law; and a scroll affixed to any writing by way of seal will constitute a private seal. *Morgenson v. Middlesex Min. & Mill. Co.*, 17 Pac. 513, 514, 11 Colo. 176.

A scroll after a name attached to a deed is not a seal. *Douglas v. Oldham*, 6 N. H. 150, 154.

An instrument containing such a clause as "Witness my hand and seal," or "Sealed with my seal," is held properly to show that a scroll or device following the signature is intended as a seal; and it is also held that the device "[Seal]," after and opposite the signature of the maker of a promissory note, operates as a seal, though there is no reference to a seal in the body of the instrument. *Brown v. Jordhal*, 19 N. W. 650, 651, 32 Minn. 135, 50 Am. Rep. 560.

"A seal, according to Lord Coke, is wax with an impression. By our statute (Rev. Laws, p. 305) a scroll or ink or other device is made of the same force, if affixed by way of a seal." *Corlies v. Varhote*, 16 N. J. Law (1 Har.) 324, 328.

The seal of a private person may be made in like manner as a public seal, or by the scroll of a pen, or by writing the word "Seal" against his name. *Pen. Code Ariz.* 1901, par. 7, subd. 18; *Pen. Code Cal.* 1903, § 7, subd. 18; *Pen. Code Mont.* 1895, § 7.

In all other cases (except where seal of court or public officer is required) the word "seal" may include a scroll printed or written. *Rev. St. Utah* 1898, § 2495.

With the exception of official seals, a scrawl or any other mark intended as a seal shall be held as such. *Pen. Code Ga.* 1895, § 2.

When the seal of a natural person is required to a paper, he may affix thereto a scroll by way of seal, or adopt as his seal any scroll, written, printed, or engraved, made thereon by another. *Code W. Va.* 1899, p. 132, c. 13, § 15.

In any case in which the seal of any natural person shall be required to a paper, it shall be sufficient for such person to affix to such paper a scroll by way of seal. *Code Va.* 1887, § 5 [1 *Code Va.* 1904, p. 7, § 5, subd. 12].

#### Wafer without impression.

The common-law seal, which was an impression on wax or wafer, or some other tenacious substance capable of being im-

pressed, has become well-nigh obsolete; the statutory scrawl by way of seal having almost entirely superseded it. Yet a seal of the one or the other sort is still requisite to constitute a document a sealed instrument; and a wafer attached to an instrument is a valid seal, though no impression was made on the wafer, the impression made by the attempt to cause cohesion, though not apparent, being a sufficient impression to comply with the requirement of the law. *Pease v. Lawson*, 33 Mo. 35, 39.

A wafer placed at the end of a name, with a piece of paper on it, or without the piece of paper, and without any impression, is a seal. The impression of a distinctive corporation seal on an instrument calling for the seal of the corporation is also a seal. *Corrigan v. Trenton Delaware Falls Co.*, 5 N. J. Eq. (1 Halst. Ch.) 52, 56.

#### Written word "Seal."

The word "Seal," written opposite the signature, is equivalent to a seal. *Whitley v. Davis' Lessee*, 31 Tenn. (1 Swan) 333, 335.

A promissory note containing only the word "Seal," surrounded by a scroll, appended to the signature of the maker, is not a "sealed instrument." *Blackwell v. Hamilton*, 47 Ala. 470.

The word "seal" is now regarded as a sufficient "sealing" to an instrument to entitle it to record within a statute requiring instruments to be sealed in order to be entitled to record. *Cochran v. Stewart*, 59 N. W. 543, 544, 57 Minn. 499.

In copying a writ or summons, the fac simile of a seal cannot well be made, and to do it would require more skill than pertains to the profession generally. By long usage and the general understanding of legal writers "L. S." is regarded as the true representation of a seal in a copy of all legal precepts. If the word "seal" were written in the place of the seal on the writ or summons, it would not be a true copy; for no such writing is upon the writ or summons. Whether we might receive that as a sufficient representation is not necessary to say; but we have no hesitancy in deciding that the letters "L. S." are the proper designation and copy of the seal. *Smith v. Butler*, 25 N. H. (5 Fost.) 521, 524.

By the common law a seal was an impression on wax or wafers, and so it was generally in the colonies of this country while they were under English law. Afterwards in many states, usually by statute but sometimes by decisions of the courts impressions upon paper and ink scrolls were recognized as seals; and more recently there has been a general tendency to abolish seals altogether. In Rhode Island in 1857 it was enacted that the seal of a court or public

officer might be an impression of such official seal upon paper, as well as upon wax or wafer. And in 1872 the section was extended to read: "Whenever a seal is required to be affixed to any paper, the word 'Seal' shall be construed to include an impression of such seal, made with or without the use of wax or wafer on paper." These changes did not abolish seals, but simply allowed the impression of seals on paper where a seal was required. They did not recognize the validity of a scroll, or the mere use of the word "Seal." Where a seal is not required by law, the law remains as before—that the seal shall be a common-law seal, or at least by analogy a seal impressed upon paper or a paper affixed as a seal. Hence the addition to the signature on an instrument of a scroll, with the word "Seal" written therein, does not make the instrument a sealed instrument. *Providence Telegram Pub. Co. v. Craham Engraving Co.*, 52 Atl. 804, 805, 24 R. I. 175.

The word "seal" has the same force and effect as a scroll, within the meaning of Code 1849, c. 143, § 2 [Code Va. 1904, p. 1453, § 2841], declaring that any writing to which the person making it shall affix a scroll by way of seal shall be of the same force as if it were actually sealed. *Lewis' Ex'rs v. Overby's Adm'r* (Va.) 28 Grat. 627, 628.

A scroll, with the word "Seal" written in it, is a seal. So a note having a scroll, with the word "Seal" written in it, opposite the name of one of the payees, and a scroll without anything written in it opposite the other, is a sealed instrument. *Muckleroy v. Bethany*, 23 Tex. 163, 164.

A contract in writing, having a scroll annexed, besides the signature, and the word "Seal" written in the scroll, but there being in the body of the instrument no recognition of the scroll as a seal, was not an instrument under seal, but merely a simple contract. *Cromwell v. Tate's Ex'r* (Va.) 7 Leigh, 301, 304, 30 Am. Dec. 506.

## SEALED.

See "Signed and Sealed."

"The word 'sealed' has acquired an enlarged meaning, even when applied in the law. In the earlier times wax, upon which some impression was made, was understood by the act of sealing. Gradually, however, \* \* \* some symbol adopted by the maker in lieu of the actual seal was allowed in law, and this, it seems to us, ought to be the crucial test in such matters, namely, the adoption by the party who is required to seal of something in its stead." 18 St. at Large, p. 373, § 3, provides that every deposition taken in pursuance of the provisions of the act shall be retained by the officer taking it until he delivers it into the court for which it is

taken, or that it shall be by such officer sealed up and directed and forwarded to such court, either by mail or express, and remain under his seal until opened in court, etc. Held, that a deposition transmitted in a sealed envelope, securely fastened together with mucilage, or some other adhesive matter or substance, and not appearing to have been tampered with in any way, was not sealed within the meaning of the statute, the terms of which required the use of sealing wax with a notarial seal, or the writing of the notary's name upon the envelope or across the flap of the same after sealing it. It is then seen that the package sent to the court is his work. *Travers v. Jennings*, 17 S. E. 849, 850, 39 S. C. 410.

A bottle containing milk, seized by the milk inspector, on the top of the cork of which was placed sealing wax, which did not extend over the mouth of the bottle, so that the bottle was not made air-tight, will not be deemed to be "sealed up," within St. 1884, c. 310, § 4, providing that a portion of the sample of milk seized by an inspector shall be sealed up, to be delivered to defendant or his attorney in case a complaint is made. *Commonwealth v. Lockhardt*, 10 N. E. 511, 144 Mass. 132.

The requirement in Gen. St. p. 436, § 4, that depositions taken shall be "sealed up" by the magistrate taking them, is satisfied by fastening the envelope containing the deposition by means of gum, and does not require that the deposition shall be sealed up by placing upon it a wafer, wax, or some other substance upon which the magistrate must impress a seal. *Morgan v. Jones*, 44 Conn. 225, 227.

## Mormon marriage.

Plaintiff, in an action to recover dower interest in the estate of a decedent, claimed that she and decedent were husband and wife. They were both Mormons, and the marriage, if any, was made according to the ceremonies of the Mormon Church, known as "sealing," or the "sealing ceremony." This ceremony, it appears, is the only marriage authorized by the Mormon Church. It was contended, however, that there were two forms of sealing ceremony—one sealing for time, or an earthly marriage, and the other sealing for eternity, or the celestial marriage; and it was contended on the part of the decedent's executor that the ceremony between decedent and plaintiff was the form of sealing ceremony known as "celestial marriage." The marriage covenant, as known in the Mormon Church, is based on the revelation to Joseph Smith, in which he declared that all covenants, contracts, bonds, vows, etc., that are not "entered into and sealed by the Holy Spirit of Promise, of him who is anointed, both as well for time and for all eternity, \* \* \* are of no efficacy, virtue, or force, in and after the resurrection

from the dead; for all contracts that are not made unto this end have an end when men are dead." In paragraph 18 of the Revelation it is said: "And again, verily I say unto you, if a man marry a wife, and make a covenant with her for time and for all eternity, if that covenant is not by me, or by my word, which is my law, and is not sealed by the Holy Spirit of Promise, through him whom I have anointed and appointed unto this power, then it is not valid, neither of force when they are out of this world, because they are not joined by me, saith the Lord, neither by my word." In paragraph 19, it is said: "Again, verily I say unto you, if a man marry a wife by word, which is my law, and by the new and everlasting covenant, and it is sealed unto them by the Holy Spirit of Promise, by him who is anointed, unto whom I have appointed this power and the keys of this priesthood, \* \* \* ye shall come forth in the first resurrection, \* \* \* and shall inherit thrones, kingdoms, principalities, and powers and dominions—all heights and depths. Then it shall be written in the Lamb's Book of Life that he shall commit no murder whereby to shed innocent blood." When it affirmatively appears that if the marriage is by the new and everlasting covenant, and is sealed as provided in the revealed law, it shall be of force forever. "The revelation is not that the covenant must be sealed merely for time, nor yet alone for eternity, but both 'for time and all eternity,' in order to possess efficacy, virtue, and force after death. The penalty for disobedience as to this injunction is that the guilty party shall be 'damned.' It is thus clear, according to the revealed law, that to be sealed was to be married for time and eternity, and that the sealing ceremony is a marriage ceremony which is good at common law; the part referring to eternity, as we have seen, being regarded simply as surplusage." Thus Brigham Young, speaking on the subject of marriage or sealing said: "The Lord says: 'Let my servants and my maidens be sealed, and let their children be sealed'"—thus indicating that there was but one ceremony of sealing, so that the word used is used in the sense of "marriage," and such ceremony between the parties constituted a marriage. *Hilton v. Roylance*, 69 Pac. 660, 664, 25 Utah, 129, 58 L. R. A. 723, 95 Am. St. Rep. 821.

#### SEALED AND SIGNED.

The words "Sealed and signed," affixed at the end of a note, and following the signature of the maker and a scroll for his seal, with the letters "L. S." written across it, is equivalent to the words "Witness my hand and seal." *Humphries v. Nix*, 77 Ga. 98.

#### SEALED INSTRUMENT.

A guaranty under a seal, written at the bottom of a bond, though bearing a relation

to the bond, is a separate contract of the guarantor, and makes the guarantor a principal to a sealed instrument within the statute of limitations. *Coleman v. Fuller*, 11 S. E. 175, 105 N. C. 328, 8 L. R. A. 380.

An act provided that any instrument for the payment of money, to which the person making the same shall affix a scroll, or ink or other device, by way of seal, shall be taken and adjudged to be of the same force and obligation as if it were actually sealed with wax, and that such instrument shall be regarded as a sealed instrument, etc. Held, that the words "sealed instrument," as used in the statute, do not include an indenture of apprenticeship to which is affixed a mere scroll or scribble for a seal. "The act does not say that a scroll, or ink or other device, affixed, shall be a seal, but that, being affixed by way of seal, they shall have the same force and obligation as a seal. This, however, is only in the case of instruments for the payment of money, of which an indenture of apprenticeship is not one. Hence such indenture of apprenticeship is not a sealed instrument, within the meaning of the statute." *Overseers of Poor of Hopewell Tp. v. Overseers of Poor of Amwell Tp.*, 6 N. J. Law (1 Halst.) 169, 176.

The mere expression, "Sealed with our seals," occurring in an instrument, does not render it a sealed instrument. But where three of the signatures to an instrument were written opposite printed seals, and the fourth was just below such signatures, but without any seal opposite the name, the question as to the meaning of the expression, and as to whether the fourth signer intended to adopt the seal above, was a question for the jury. *Templeton v. Commonwealth (Pa.)* 8 Atl. 167, 168.

#### Bond or deed.

See "Bond"; "Deed."

#### SEALED NOTE.

A sealed note is an unconditional bond under seal. *Tracy v. Talmage* (N. Y.) 9 How. Prac. 530, 536, 18 Barb. 456, 462.

#### SEALED VERDICT.

A verdict is either privy or public, and a privy verdict is where the judge has left or adjourned the court, and the jury, being agreed, in order to be delivered from their confinement, obtain leave to give their verdict privily to the judge out of court. Such a verdict is of no force unless afterwards affirmed by a public verdict given openly in court, whereat the jury may vary from the privy verdict; so that a privy verdict is indeed a mere nullity, and it is held that a sealed verdict partakes of all the characteristics of a privy verdict, and is no verdict in

itself, but must be affirmed by the jury in open court. *Young v. Seymour*, 4 Neb. 86, 89.

## SEAM.

As used in reference to mines, the term "seam" is often used synonymously with "stringer," and is commonly understood by miners to be a crack or crevice filled by mineral deposit, occurring in the country rock, and by means of which the prospector anticipates being led to an ore body or deposit of commercial value, so that a discovery of a seam makes a location valid in law. *McShane v. Kenkle*, 44 Pac. 979, 982, 18 Mont. 208, 33 L. R. A. 851, 56 Am. St. Rep. 579.

## SEAMAN.

See "British Seamen"; "Merchant Seamen."

Chinese seamen as laborers, see "Chinese Laborer."

A seaman is defined by Webster to be a sailor; a mariner; a man whose occupation is to assist in the management of ships at sea. *Doughten v. Vandever*, 5 Del. Ch. 51, 73.

As used in Rev. St. § 4601, making it a punishable offense to harbor any seaman belonging to any vessel, the word "seaman" is not unlimited, but must be taken in connection with section 4612, providing that the word "seaman" shall be taken to be one employed on a vessel belonging to any citizen of the United States. *United States v. Minges* (U. S.) 16 Fed. 657.

"Seaman," as used in 17 Stat. 273, providing the punishment for any seaman who has been lawfully engaged and who has committed certain enumerated offenses, applies to seamen engaged on foreign vessels in American waters, and not only to those employed on American vessels. *United States v. McArdle* (U. S.) 26 Fed. Cas. 1042.

"Seaman," as used in Act June 26, 1884, c. 121, § 10, 23 Stat. 55, as amended by Act June 19, 1886, c. 421, § 3, 24 Stat. 80, amended by Act Dec. 21, 1898, c. 28, § 24, 30 Stat. 763 [U. S. Comp. St. 1901 p. 3078], making it unlawful to pay any seaman wages in advance, means those Americans who practice or are employed in navigation, or whose avocation is that of mariner. To construe the statute as applying to those persons only who ship or engage to ship on American vessels would give too narrow a construction to it. *United States v. Nelson* (U. S.) 100 Fed. 125, 126.

One who does not ship for a voyage, but only for a temporary moving of the barge from one place in the harbor to another, in a case where it was not expected to earn freight, or in any way engage in commerce,

where no shipping articles were signed, and no special employment given, was not a "seaman," within the rules of law making the master liable for the medical treatment of seamen. *The John B. Lyon* (U. S.) 33 Fed. 184, 187.

A warranty in an insurance policy that the ship would carry "30 seamen, besides passengers," means 30 persons belonging to the ship's company, including cook, surgeon, employés, etc., and does not mean only able seamen. *Bean v. Stupart*, 1 Doug. 11.

All persons employed in the navigation of a ship, or upon a voyage, other than the master and mate, are to be deemed seamen, within the provisions of the Civil Code. Civ. Code Cal. 1903, § 2049; Rev. Codes N. D. 1899, § 4151; Civ. Code S. D. 1903, § 1504.

In the construction of the title relating to merchant seamen, every person (apprentices excepted) who shall be employed to serve in any capacity on board of any vessel belonging to any citizen of the United States shall be deemed and taken to be a "seaman." U. S. Comp. St. 1901, p. 3120.

The term "seaman," wherever employed in legislation relating to the marine hospital service, shall be held to include any person employed on board in the care, preservation, or navigation of any vessel, or in the service, on board of those engaged in such care, preservation, or navigation. U. S. Comp. St. 1901, p. 3324.

### Barge employé.

A barge, without sails or rudder, used for transporting brick, on which men are employed in loading, carrying, or delivering brick, is subject to a lien for wages of the men employed in such transaction as seamen. *Disbrow v. The Walsh Brothers* (U. S.) 36 Fed. 607, 608.

### Cook.

A cook on a vessel is a "seaman," and as such is subject to the captain's orders. *Allen v. Hallet* (U. S.) 1 Fed. Cas. 472, 473; *Bean v. Stupart*, 1 Doug. 11.

### Cooper.

A cooper is a seaman in contemplation of law, though he has peculiar duties on board ship. He is so treated in the shipping articles, and is, like common seamen, bound to do ordinary ship's duty, such as standing watch, assisting in navigation, handling sails, etc. He receives an extraordinary compensation for his duties as cooper, not as superseding, but as adding to, the common seaman's duty. *United States v. Thompson* (U. S.) 28 Fed. Cas. 102.

### Engineer.

The engineer of a tugboat employed in the Delaware Bay and river is a "seaman."



and as such is entitled to the right of any benefits conferred on seamen by maritime law, such as being entitled to be cured at the expense of the ship of any sickness. *Holt v. Cummings*, 102 Pa. 212, 48 Am. Rep. 199.

#### **Fireman.**

A fireman on board a steamer is a "seaman," and as such is entitled to medical treatment at the expense of the ship for injuries received in the service of the ship. *The North America* (U. S.) 18 Fed. Cas. 339.

#### **Fisherman.**

One who shipped as a fisherman on a voyage to Behring Sea and return, and instead of being paid monthly was to receive compensation for his services at the rate of \$25 for each 1,000 fish caught by him, was not a "seaman," within Rev. St. § 4536 [U. S. Comp. St. 1901, p. 3082], relating to wages. *Telles v. Lynde* (U. S.) 47 Fed. 912, 916.

"Seamen," as used in Rev. St. § 4523 [U. S. Comp. St. 1901, p. 3075], providing that all shipments of seamen made contrary to the provisions of any act of Congress shall be void, etc., refers only to merchant seamen. It does not include fishermen, who ship on a "lay" or for a share in the catch. *The Cornelia M. Kingsland* (U. S.) 25 Fed. 856, 857.

The term "seamen" within the rule that sick seamen are to be cured at the master's expense, includes fishermen on mackerel voyage in licensed and enrolled vessels, though an account is kept of the catchings of each man, who is paid accordingly. *Knight v. Parsons* (U. S.) 14 Fed. Cas. 776, 777.

#### **Mate.**

The mate of a vessel is the first officer under the master, and is not a seaman or mariner, who are the crew, within 1 Stat. 134, providing for the government and regulation of seamen in the merchant service. *Ely v. Peck*, 7 Conn. 239, 242.

#### **Pilot.**

"Seamen" includes a pilot, he being a person employed in the navigation of a vessel, and his claim for wages is within the contemplated jurisdiction. *The Mary Elizabeth* (U. S.) 24 Fed. 397.

#### **Raftsmen.**

Raftsmen are not "seamen," so as to be entitled to sue in rem in admiralty. In re Raft of Cypress Logs (U. S.) 20 Fed. Cas. 169, 170.

#### **River sloop hand.**

A hand on board a sloop of over 50 tons burden, plying on the Hudson river between

New York and the Catskills, is a "seaman," within Act Cong. July 20, 1790, providing remedy for the recovery of "seamen's" wages. *Martin v. Acker* (U. S.) 16 Fed. Cas. 884.

#### **Steam dredge employé.**

Persons employed on a steam dredge, without motive power, engaged in deepening navigable waters, and capable of being towed from place to place, and on her scows in such work, are "seamen," within Rev. St. § 4612 [U. S. Comp. St. 1901, p. 3120], declaring that every person who shall be employed or engaged to serve in any capacity on board of any vessel belonging to any citizen of the United States shall be deemed and taken to be a seaman. *Saylor v. Taylor* (U. S.) 77 Fed. 476, 477, 23 C. C. A. 343.

### **SEARCH.**

See "Bona Fide Search"; "Complete Search of Title."

An allegation in an indictment against a person for conspiring to injure an officer while in the act of searching for a distillery means the whole trip or enterprise, from the start until a final abandonment. Simply discontinuing the search for the night, with intent to resume it again in the morning, would not be abandoning the enterprise or search, within the meaning of the allegation. *United States v. Johnson* (U. S.) 26 Fed. 682, 689.

In Gen. St. 1878, c. 70, § 2, allowing certain fees to a clerk for a search of the records or files in his office of each year, the search referred to is limited to a search for some particular paper or record, or to ascertain some particular fact; and where an order is given to the clerk to search for judgments against several persons he is entitled to the fee for searching the files and records for each year in respect to judgments against each such person. *Church v. St. Paul & N. P. Ry. Co.*, 23 N. W. 860, 33 Minn. 410.

Where a charge by an officer is authorized for "searching" the records and files, it would seem that the duty to make a search and the giving out of information derived thereby is embraced in these terms. We are unable to give force to the suggestion that the transcription from legal documents or from the files as made up from time to time did not require a search, nor can we force a distinction between such searches and the examination required to make the statements to the abstract men and agencies upon the theory that a search involves the looking for something that was not previously known, but would have to be found. But, on the other hand, the word "search," as used in this statute, should be

treated as equivalent of any examination the clerk must make to give an accurate report thereof. *Hennepin County v. Dickey*, 90 N. W. 775, 778, 86 Minn. 331.

### SEARCH WARRANT.

A search warrant is an order in writing, in the name of the state, signed by a magistrate and directed to a peace officer, commanding him to search for personal property and bring it before the magistrate. Rev. St. Utah 1898, § 5081; Pen. Code Cal. 1903, § 1523; Code Cr. Proc. S. D. 1903, § 594; Pen. Code Idaho 1901, § 5783; Rev. St. Okl. 1903, § 5670; Comp. Laws Nev. 1900, § 4595. It may be issued, first, when the property is stolen or embezzled; second, when it is used as a means of committing a felony; third, when it is in the possession of any person with an intent to use it as a means of committing a public offense, or in the possession of another to whom he may have delivered it for the purpose of concealing it or preventing its being discovered. *People v. Noelle*, 1 N. Y. Cr. R. 252, 268 (citing Code Cr. Proc. § 792).

A search warrant is a written order, issued by a magistrate and directed to a peace officer, commanding him to search for personal property, to seize the same, and to bring it to such magistrate; or it is a like written order commanding a peace officer to search a suspected place, where it is alleged stolen property is commonly concealed, or implements kept for the purpose of being used in the commission of any designated offense. Code Cr. Proc. Tex. 1895, art. 343.

### SEASON.

See "Close Season."

An agreement dated June 5, 1883, requiring the erection of buildings to be put up, part during the "season" of 1883, and part during the "season" of 1884, means that season of the year as to which, by reason of the severely rigorous climate of the latitude, such work as the building of houses is necessarily confined—in Dakota being from the 1st of April until the 1st of December of each year—and does not refer alone to a period of the year subsequent to the 5th of June. *Sarles v. Sharlow*, 37 N. W. 748, 751, 5 Dak. 100.

The word "season," in a contract employing plaintiff to purchase and deliver corn during the coming season, will be construed to be used in reference to the period within which it is customary to purchase corn at the place where plaintiff is employed, and it will be presumed that the meaning of the term was well known in such locality. *Myers v. Walker*, 24 Ill. 133, 134, 136.

The court, in construing a contract for the services of an actor during a season, said that it was a question for the jury whether the term "season" was used to designate the customary theatrical season of 30 weeks. *McIntosh v. Miner*, 65 N. Y. Supp. 735, 737, 53 App. Div. 240.

### SEAT.

The word "seat," when applied to machinery, means the part on which another thing rests, as a valve seat. *Safety Oiler Co. v. Scovill Mfg. Co.* (U. S.) 110 Fed. 203, 204 (citing 3 Knight, Mech. Dict. 2084).

#### In stock exchange.

As capital, see "Capital."

As personal property, see "Personal Property."

As property, see "Property."

A seat in a stock exchange is a personal privilege of being and remaining a member of a voluntary association, with the assent of the associates. It is a mere right to belong to the association, which cannot be transferred without the consent of the association. *City & County of San Francisco v. Anderson*, 36 Pac. 1034, 103 Cal. 69, 42 Am. St. Rep. 98 (citing *Lowenberg v. Greenebaum*, 99 Cal. 162, 33 Pac. 794, 21 L. R. A. 399, 37 Am. St. Rep. 42).

### SEAT OF JUSTICE.

"Seat of justice" means the county seat; the place where the courthouse and county officers are located; the place where the chancery, circuit, and county courts are held, and where the county records are kept. Bouv. Law Dict. The county seat or county town is the chief town of a county, where the county buildings and courts are located, and the county business transacted. Black, Law Dict. County seat; a county town; the chief town of a county, where the county business is transacted; a shire town. Webst. Dict. County seat; the seat of government of a county; the town in which the county and other courts are held, and where the county officers perform their functions. Cent. Dict. The term "seat of justice," as used in Rev. St. 1899, § 9055, providing that the recorder shall keep his office and records at the seat of justice in each county, means "county seat" and not the courthouse itself. *Babcock v. Hahn*, 75 S. W. 93, 94, 175 Mo. 136.

The term "seat of justice," as used in territorial acts of Michigan, meant the place of holding the circuit courts, and did not necessarily mean the same thing as "county seat." The term was designated for the place of doing the county business, where the county courts were held and the county of-

ices located. *Whallon v. Gridley*, 16 N. W. 876, 880, 51 Mich. 503.

Const. art. 10, § 4, providing that the "seat of justice" of any county shall not be removed without the concurrence of two-thirds of the qualified voters of the county, means what is commonly called the county seat; that is, the place where the court-house, jail, and the county offices are located, where the chancery, circuit, and county courts are held, and where the county records are kept. *Ellis v. State*, 20 S. W. 500, 502, 92 Tenn. 85.

### SEATED LANDS.

"Seated land," as used in the tax laws, means land which is used for residence or cultivation, or for the purpose of making profit in any manner. *Earley v. Euwer*, 102 Pa. 338, 340.

"Seated land," as used in the tax laws, is land that is occupied, cultivated, improved, reclaimed, farmed, or used as a place of residence. The question whether a tract of land is seated or unseated depends upon what is done or being done upon it, or upon the appearance which it may present to the eye of the assessor. Seated lands are those on which are such permanent improvements as indicate a personal responsibility for its taxes, but the building of a cabin on land as a shelter for miners, which is afterwards abandoned and altogether disappears, and an occasional digging of coal by a trespasser, even under color of title, is not sufficient to seat a tract of land, so as to invalidate a sale thereof for taxes as unseated. *Stoetzel v. Jackson*, 105 Pa. 562, 567.

Residence without cultivation, or cultivation without residence, or both, constitutes "seated land," and as such it is exempt from the operation of law which regulates the sale of unseated lands for the payment of taxes. When the land is seated, the person is only liable for the tax; but when it is unseated there is no personal liability, but the tax is laid specifically on the land, but not on the person of the owner. *Kennedy v. Daily* (Pa.) 6 Watts, 269, 272.

Residence upon land with a bona fide intention to hold it as owner, or for the owner, and performing labor on it, such as mining coal, raising ore, and the like in the character of the owner, would undoubtedly give the land a seated character; while, on the other hand, the temporary residence of a trespasser to take all the timber, although it might justify treating the land as seated, and a call on him for the taxes, being in possession, would not fix upon the land a seated character after he had left it. *Lackawanna Iron & Coal Co. v. Fales*, 55 Pa. (5 P. F. Smith) 90, 98.

### SECLUSION.

Seclusion means voluntary confinement or retreat from social life, as the remaining at home for a long period by one who had been paralyzed, which had affected his mind, but whose condition was known by few. *Jurgens v. Ittman*, 16 South. 952, 955, 47 La. Ann. 367.

#### Reclusion distinguished.

The words "seclusion" and "reclusion" have quite different meaning. The former signifies a voluntary, the latter an involuntary, confinement. *Phelps v. Reinach*, 38 La. Ann. 547, 551.

### SECOND.

See "In the Second Instance."

The word "second," as added to a person's name, is no part of the name, but only an addition or description used to designate the individual referred to; and, where no addition is required by law, an error in it cannot invalidate. Therefore the enrollment in a militia of "L. C., Jr.," as "L. C., Second," is valid; "junior," and "second" being synonymous, and also being no part of the name. *Cobb v. Lucas*, 32 Mass. (15 Pick.) 7, 9.

### SECOND APPLICATION.

Wag. St. p. 1040, § 8, providing that, whenever either party to an action shall make a "second application" for a continuance thereof on account of the absence of a material witness, the affidavit shall set forth the name of the witness and the facts he is expected to prove, if the court require it, means the next application after one which is granted. "An application which is refused is not to be counted as an application." *State v. Maguire*, 69 Mo. 197, 203.

### SECOND COUSIN.

Where a will made a bequest to testator's "second cousins" of the name of S. and to the issue of such of them as were dead, but testator had no second cousins of such name, but had first cousins once removed of that name, they were entitled to the bequest, as it is very common for persons to call the children of their first cousins their second cousins. *Slade v. Fooks*, 9 Sim. 386, 387.

"Second cousins," as used in a will bequeathing a fund in trust for testator's second cousins, cannot be construed to include a first cousin once removed. Those only who have either the same great-grandfather or the same great-grandmother are second cousins to each other. *Corporation of Bridgnorth v. Collins*, 15 Sim. 538, 541.

In a bequest of the residuary funds to a testator's first and second cousin and the children of his kinsman G., the legal construction of the words "second cousin" could not be restricted by the bequest to the children of the kinsman G., who were shown to be first cousins twice removed, on the appearing that such fact was not known to the testator. *Charge v. Goodyer*, 3 Russ. Ch. 140.

Bequests to "first and second cousins" included three first cousins once removed and a great-niece, where the only relatives left by the testator were such cousins and niece and one first cousin. *Mayott v. Mayott*, 2 Brown, Ch. 125.

### **SECOND MORTGAGE.**

A second mortgage is a mortgage without intervening liens between it and the first mortgage. *Appeal of Green*, 97 Pa. 342, 347.

### **SECOND OF EXCHANGE.**

The words "second of exchange, first unpaid," in a bill of exchange which had been discounted in good faith, do not import knowledge to the indorsee that the bill was one of a set. *Bank of Pittsburg v. Neal*, 63 U. S. (22 How.) 96, 110, 16 L. Ed. 323.

### **SECOND TERM OF COURT.**

The expression "second term of the court," as used in Prac. Act, § 18 (2 Starr & C. Ann. St. p. 1783), providing that, if no declaration shall be filed 10 days before the second term of the court, defendant shall be entitled to a judgment as in case of nonsuit, means the next term after the term to which the process, which has become effective by service, is returnable. *English v. Wilkins*, 45 N. E. 287, 163 Ill. 542.

### **SECONDARILY LIABLE.**

The person "primarily liable" on an instrument is the person who by the terms of the instrument is absolutely required to pay the same. All other parties are "secondarily liable." Ann. Codes & St. Or. 1901, § 4592; Code Supp. Va. 1898, § 2841a [2 Code Va. 1904, p. 1489, § 2841a, subd. 192]; *Bates' Ann. St. Ohio* 1904, § 3178a.

### **SECONDARY BATTERY.**

"Secondary battery" is an electrical engineering term, and means "one which has no original power of developing the current, and is active only when rendered so by sending a current through it from an independent source of electrical energy." *Electrical Accumulator Co. v. Brush Electric Co.* (U. S.) 52 Fed. 130, 2 C. C. A. 682.

A "secondary battery" is one which has no original power of developing the current of electricity, and is active only when rendered so by sending a current elsewhere generated through it. When such a battery is charged from an outside source, it becomes capable of giving back a current, due to the energy which has been stored in it. A secondary battery and a primary battery "differ as a spring differs from a reservoir." In a secondary battery the electrodes are of the same materials, and electro-motively similar, and the plates are insoluble in the battery fluid. In a primary battery the electrodes are of different materials, and differ electro-motively, and the positive plate is dissolved in the battery fluid. *Brush Electric Co. v. Milford & H. St. R. Co.* (U. S.) 58 Fed. 387, 388.

### **SECONDARY EASEMENT.**

A "secondary easement" is one which is appurtenant to the primary or actual easement. *Tooth v. Bryce*, 25 Atl. 182, 189, 50 N. J. Eq. 589.

Every easement includes what are termed "secondary easements"; that is, the right to do such things as are necessary for the full enjoyment of the easement itself. But this right is limited, and must be exercised in such reasonable manner as not to increase the burden upon the servient estate. *North Fork Water Co. v. Edwards*, 54 Pac. 69, 70, 121 Cal. 662.

### **SECONDARY EVIDENCE.**

The term "secondary evidence" includes parol evidence of the contents of judicial records, unless such records have been lost or destroyed. *Williams v. Davis*, 56 Tex. 250, 253.

"When a record or an office paper is lost or destroyed, if its former existence is satisfactorily shown, secondary evidence of its contents will be received. Sometimes existence and contents may be presumed, if the record is ancient; but in all cases it is, like other documents, the subject of secondary evidence of the highest grade that the party can introduce." *Baucum v. George*, 65 Ala. 259, 260, 266 (quoting 1 Greenl. Ev. § 509).

Before "secondary evidence" of a private writing can be received, a party must in general show the loss or destruction of the original, or that he has used reasonable efforts and the means which were accessible to him to find the writing or to procure its production; and if it appears to be in the hands of an adverse party, notice to produce it is necessary, in order to lay foundation for the introduction of secondary evidence. *Roberts v. Dixon*, 31 Pac. 1083, 1084, 50 Kan. 436.

"Secondary evidence" is that which is inferior to primary. Thus, a copy of an instrument or oral evidence of its contents is secondary evidence of the instrument and contents. Code Civ. Proc. Cal. 1903, § 1830.

Secondary evidence is such as from necessity in some cases is substituted for stronger and better proof. Civ. Code Ga. 1895, § 5164.

Secondary evidence is a copy of the original writing or object, or oral evidence thereof. Ann. Codes & St. Or. 1901, § 683.

### SECONDARY FRANCHISE.

The "secondary franchises" of a corporation are the peculiar privileges or rights which it may have received from the Legislature under its charter or incorporating act, or from a municipal corporation under an ordinance by way of a license. They are in the nature of property, and do not revert to the state upon the death of the corporation, but, being vendible, pass to a receiver or other representative of the corporation, among its other assets, to be administered for the benefit of its creditors, and the corporation may make a valid sale thereof. State v. Topeka Water Co., 60 Pac. 337, 341, 61 Kan. 547.

While the primary franchise of an incorporated company to be a corporation can never be alienated without legislative permission, yet what are termed the "secondary franchises," such as the right of a railroad company to collect fares or of a toll road company to exact tolls, may under some of the authorities be transferred under an assignment of the tangible property of a corporation, when that property can be fully enjoyed by the grantee only by the exercise of such secondary franchise. Virginia Canon Toll Road Co. v. People, 45 Pac. 398, 399, 22 Colo. 429, 37 L. R. A. 711.

### SECONDARY RIGHT.

See "Remedial Right."

### SECONDHAND GOODS.

The term "secondhand goods," when used in an ordinance requiring dealers in secondhand goods to take out a license, is broad enough to include secondhand furniture. State v. Segel, 62 N. W. 1134, 60 Minn. 507.

Chicago City Ordinances, c. 21, § 1, declaring that any person who keeps a store or place of business for the purchase or sale of secondhand clothing or garments of any kind, or secondhand goods, wares, or merchandise, is a dealer in secondhand goods, does not include a person engaged in buying and selling old books, since books, like paint-

ings, may have a peculiar value for the reason that they are old, and cannot with any degree of accuracy be classed with old metals, rags, and cast-off clothing. Eastman v. City of Chicago, 79 Ill. 178, 179.

### SECONDHAND MACHINERY.

Secondhand machinery is such machinery as has been previously used by another person. Maxwell v. Bastrop Mfg. Co., 14 S. W. 35, 36, 77 Tex. 233.

### SECONDHAND STORE.

A junk shop is defined to be a place where junk is bought and sold, and junk seems to consist of odds and ends, such as old metal, ropes, rags, etc. Every junk shop, it is said, is a secondhand store; but not every secondhand store is a junk shop. The term "secondhand store," if not qualified or limited, would include any store in which any kind of secondhand goods are dealt in, as for example, secondhand furniture or secondhand books; but stores in which these articles are dealt in would not necessarily be junk shops. The word "junk," which is of nautical origin, originally meant old or condemned cable and cordage, cut into small pieces, which, when untwisted, were used for various purposes on the ship. Hence the word afterwards came to mean worn-out or discarded material in general. A store in which furniture, both new and secondhand, is exclusively dealt in, is held not to be a junk shop within the meaning of the city ordinance. City of Duluth v. Bloom, 55 Minn. 97, 56 N. W. 580, 21 L. R. A. 689.

### SECRECY.

The word "secrecy," as used with reference to a conveyance to one in a position of trust and confidence under circumstances of secrecy, has usually been applied to active efforts by the beneficiary to exclude persons whose presence would have been natural, not to mere absence of such proclamation as is not usual with those freely making conveyances. Vance v. Davis (Wis.) 95 N. W. 939, 941.

### SECRET ASSAULT.

To constitute a secret assault, within Laws 1887, c. 32, prescribing a punishment for a secret and malicious assault with a deadly weapon, the assault need not be made in such a manner as tends to conceal from the public the identity of the assailant; but it is sufficient if it is maliciously made with a deadly weapon with intent to kill, and in such a manner as to prevent the person assailed from seeing the assailant or repelling the attack. State v. Jennings, 10 S. E. 249, 104 N. C. 774.

**SECRET PARTNERSHIP.**

A secret partnership is a partnership where the existence of certain persons as partners is not avowed or made known to the public by any of the partners. Where all of the partners are publicly made known, whether it be by one or all of the partners, it is no longer a secret partnership; for this is generally used in contradistinction to notorious and open partnership. It makes no difference in this particular whether the business of the firm be carried on in the name of one person only, or of him and company. *United States Bank v. Binney* (U. S.) 28 Fed. Cas. 811, 814 (cited in *Deering v. Flanders*, 49 N. H. 225, 227).

Where the business of a firm is conducted entirely in the name of one of the partners, the other partner is a secret or dormant partner. *Stubbings v. O'Connor*, 78 N. W. 577, 580, 102 Wis. 352.

A dormant or secret partner is one whose connection with the firm is really and professedly concealed from the world. *Civ. Code Ga.* 1895, § 2623.

**SECRETE—SECRETION.**

A statement that plaintiff "secreted" money under the till, stating that "these are not times to be robbed," did not import anything injurious to the plaintiff's character, and was not actionable per se. *Kelly v. Partington*, 5 Barn. & Adol. 645, 651.

**Concealment synonymous.**

See "Concealed—Concealment."

**As hide.**

"Secrete," as used in a statute giving a right to attach where defendants had "attempted to secrete or dispose of their property," meant "to hide; put it where the officer of the law would probably not be able to find it." Mr. Webster defines the word: "To hide; to conceal; to remove from the observation or the knowledge of others, as to secrete stolen goods." The word is employed in this sense in the statute. An affidavit under the statute stating that defendants had disposed of and secreted their property was inconsistent and contradictory; the ordinary meaning of the words being entirely different, and constituting separate grounds for attachment. *Pearre v. Hawkins*, 62 Tex. 434, 437.

"Secreted," as used in *Sess. Laws* 1867, p. 110, c. 76, authorizing an attachment whenever the plaintiff shall make affidavit that the defendant has "assigned, secreted, or disposed of" his property with intent to delay or defraud his creditors, means hidden in fact. *Guile v. McNanny*, 14 Minn. 520, 522 (Gil. 391, 393), 100 Am. Dec. 244.

"Secretion," as used in *Comp. Laws*, c. 32, § 28, prohibiting the fraudulent sale, transfer, secretion, or disposal of property with intent to defraud creditors, means to deposit in a place of hiding, or concealment of the property for such purpose. *Herold v. State*, 31 N. W. 258, 261, 21 Neb. 50, 51.

The word "secrete," in the statute making it a ground for attachment that the debtor has secreted his property with intent to defraud creditors, means to hide it or to put it where the officer of the law will probably not be able to find it. *Hopkins v. Nichols*, 22 Tex. 206, 210.

To transfer property is to place it in the hands of another. To secrete property is to hide it, or to put it where the officer of the law will probably not be able to find it. *Culbertson v. Cabeen*, 29 Tex. 247, 248. It seems quite obvious that it can no more be said that to transfer property to defraud one's creditors, when we speak with legal accuracy, imports the same fact as to dispose of it, than does the transfer and secreting of it. To dispose of property evidently conveys a broader significance than to transfer or secrete it. *Carpenter v. Pridgen*, 40 Tex. 32, 34.

**As purposely withhold.**

Under *Pen. Code*, § 230, making the "secreting" of public records an offense, the mere inaction on defendant's part, when it is his duty as Secretary of the Senate to transmit the bill secreted to the other branch of the Assembly, where he purposely withholds it, whether by putting it in his desk or otherwise withholding, and purposely refrains from transmitting it as required, constitutes a secretion of the bill. *State v. Bloor*, 52 Pac. 611, 613, 20 Mont. 574.

**As unlawfully make away with.**

"Secreting," as used in reference to secreting property by a debtor as ground for an attachment, does not mean hiding alone, but any making away with the property which shall put it unlawfully out of the reach of creditors. One may secrete property by putting legal impediments in the way of creditors. Citing *Gault v. Dupault*, 4 Can. Leg. N. 321. The three agencies of fraud—assigning, disposing of, and secreting—are legally identical and equivalent. *Sturz v. Fischer*, 36 N. Y. Supp. 893, 894, 15 Misc. Rep. 410 (citing *Gault v. Dupault*, 4 Can. Leg. N. 321).

**SECRETLY.**

A statute provides that it shall not be lawful for any person in this state to carry arms "secretly on or about their person," etc., and that this law shall not be so construed as to prevent any person from carrying arms openly outside of all their clothes.

Held, that carrying arms on the person, partially concealed, is a violation of the law. *Sutton v. State*, 12 Fla. 135, 137.

### SECRETLY CONFINED.

Pen. Code, § 211, providing that one who willfully confines or kidnaps another, with intent to cause him without authority of law to be "secretly confined" or imprisoned within the state, is guilty of kidnapping, means that the words naturally and ordinarily import—that is, a secret confinement; and hence the public taking of a daughter to the hospital by her father, and her public detention there, does not constitute the crime of kidnapping. *People v. Camp*, 21 N. Y. Supp. 741, 745, 66 Hun, 531.

### SECRETARY.

See "Private Secretary."

A "secretary" is an official scribe; an amanuensis or writer; a person employed to write orders, records, and the like. The term is practically synonymous with "clerk," so that a town authorized to appoint a clerk may appoint a secretary. *Griffin v. Town of Corydon (Ky.)* 44 S. W. 629.

The "secretary" of a corporation is one of the general managing agents of the company, and when in the discharge of the duties of his office he represents the corporation itself. Therefore the representations by him in the course of the business of the corporation are binding on it. *Hanover Nat. Bank v. American Dock & Trust Co.*, 26 N. Y. Supp. 1055, 1059, 75 Hun, 55.

The terms "clerk" and "secretary," as applied to subordinate ministerial functionaries, are by popular usage synonymous terms, and are frequently used interchangeably. "Secretary" is defined as a person employed to write orders, letters, dispatches, public or private papers, records, and the like; an official scribe, amanuensis, or writer. A "clerk" is defined as one who is employed to keep records and accounts; a scribe; a penman; an accountant, as the clerk of the court. *State v. Currie*, 3 N. D. 310, 315, 55 N. W. 858.

### SECRETARY OF INTERNAL AFFAIRS.

The office of the "Secretary of Internal Affairs" is a new one, and is charged with the survey and sale of public lands of the state and the custody of the books and documents relating to them; and the officer is a member of the board of property, and sits therein as a judge of questions affecting returns of survey, location of warrants, etc. The Secretary of Internal Affairs should not, therefore, be permitted to deal with his own department by receiving and granting his

own application for a land warrant, notwithstanding the fact that there is no statute forbidding him to so deal with his department. *Goodyear v. Brown*, 155 Pa. 514, 519, 520, 522, 523, 26 Atl. 665, 20 L. R. A. 838, 35 Am. St. Rep. 903.

### SECT.

See "Religious Sect."

A "sect" is a body of persons distinguished by peculiarities of faith and practice from other bodies adhering to the same general system, as the Presbyterian sect. *Stevenson v. Hanyon*, 7 Pa. Dist. R. 585, 590.

A sect is a class of people believing in a certain religious creed. *Hale v. Everett*, 53 N. H. 9, 92, 16 Am. Rep. 82.

A "sect" is a body of persons holding in effect the same religious faith and associating together in the same form of church government, discipline, and worship. Mere difference in faith with regard to doctrinal points seemingly does not constitute a sectarian difference, but the test lies in the similarity of discipline, worship, and church government, though there be diversity of opinion in regard to doctrine. *Muzzy v. Wilkins (N. H.) Smith*, 1.

A "sect or denomination of Christians" should be construed to include a company of persons, denominated "Shakers," who have formed themselves into a community as a religious society and entered into covenant relations with each other as a church, according to their faith and tenets, and have chosen deacons and a clerk, and appointed their deacons and their successors in office to hold the church property and have the management of its temporal concerns. *Lawrence v. Fletcher*, 49 Mass. (8 Metc.) 153, 162.

### SECTARIAN.

Webster defines "sectarian" as pertaining to a sect or sects; peculiar to a sect; bigotedly attached to the tenets and interests of a denomination; one of a party in religion which has separated itself from the Established Church, or whose tenets differ from those of the prevailing denomination in a kingdom or state. Thus an orphan asylum under control of Sisters of Charity, in which religious instruction is given to Catholic children according to the Catholic faith, is sectarian, regardless of whether there are Protestant children present who are not so taught. *State v. Hallock*, 16 Nev. 373, 385.

The words "sectarian purposes," in the Constitution, are used in the popular sense, that a religious sect is a body or number of persons united in beliefs, and that every sect is "sectarian" within the meaning of that word as used in the Constitution, and that it

includes the teaching of any doctrine upon which the Christian denominations agree. *State v. Hallock*, 16 Nev. 373, 385.

### SECTARIAN INSTRUCTION.

Const. art. 10, § 3, prohibiting "sectarian instruction" in the common schools, "manifestly refers exclusively to instruction in religious doctrines, and the prohibition is only aimed at such instruction as is sectarian; i. e., instruction in religious doctrines which are adopted by some religious sects and rejected by others. Hence to teach the existence of a Supreme Being, of infinite wisdom, power, and goodness, and that it is the highest duty of all men to adore, obey and love Him, is not sectarian, because all religious sects so believe and teach. Instruction becomes sectarian when it goes further and inculcates doctrine or dogma concerning which the religious sects are in conflict." *State v. City of Edgerton*, 44 N. W. 967, 973, 76 Wis. 177, 7 L. R. A. 330, 20 Am. St. Rep. 41.

### SECTARIAN TEACHING.

The wearing of the garb and the insignia of the Sisterhood of St. Joseph, a religious society of the Roman Catholic Church, by the nuns belonging thereto while teaching in the public schools, cannot be termed "sectarian teaching," though the dress and crucifix impart at once knowledge to the pupils of the religious belief and society membership of the wearer. *Hyson v. Gallitzin Borough School Dist.*, 30 Atl. 482, 484, 164 Pa. 629, 26 L. R. A. 203, 44 Am. St. Rep. 632.

### SECTARIANISM.

Sectarianism includes adherence to a distinct political party as much as to a separate religious sect. *State ex rel. Kelleher v. St. Louis Public Schools*, 35 S. W. 617, 621, 134 Mo. 296, 56 Am. St. Rep. 503 (citing *Webst. Int. Dict.*; *Cent. Dict.*).

## SECTION.

See "This Section."

### Of land.

The general and proper acceptation of the terms "section," "half section," and "quarter section" of land, as well as their construction by the general land department, denotes the land in the sectional and subdivisional lines, and not the exact quantity which a perfect admeasurement of an unobstructed surface would declare. *Brown v. Hardin*, 21 Ark. 324, 327.

### Of statute.

The word "section," as used in a proviso of the subdivision into which a section

is divided, reading, "provided that no tax shall be levied under this section unless two-thirds of the aldermen elected shall vote in favor of the same," refers only to such subdivision of the section, and not to the entire section. *Spring v. Collector of City of Olney*, 78 Ill. 101, 106.

St. Feb. 10, 1845, in the third subdivision, providing that all penalties contained in the preceding "section" may be recovered by action of trespass or debt founded on this statute by indictment, means "sections," referring to preceding subdivisions. *Ellis v. Whitlock*, 10 Mo. 781, 782.

As used in Sess. Laws 1881, c. 37, art. 3, § 11, subd. 34, authorizing each city to pass all ordinances and to enforce the same by fine or imprisonment, or both, to carry out fully the provisions of this "section," and providing that all work or labor done under the provisions of this "section" under the superintendence and control of the street commissioner, etc., means "subdivision," or "subsection," referring only to subdivision 34 of the general section. In *re Dassler*, 12 Pac. 130, 134, 35 Kan. 678.

"Section," as applied to a chapter in a statute, means a subdivision. *State v. Babcock*, 36 N. W. 348, 350, 23 Neb. 128.

"Section," as used in Act Cong. March 3, 1891, c. 561, § 17, 26 Stat. 1101 [U. S. Comp. St. 1901, p. 1405], repealing the timber culture laws, and providing that no person or association shall hold by assignment or otherwise, prior to the issue of patent, more than 320 acres of arid or desert lands, but that this "section" shall not apply to entries made or negotiated prior to the passage of this act, should be construed as meaning "provision," and hence does not relate to all the provisions of the entire section, but simply to the quantity of lands which one person could thereafter enter. *United States v. Healey*, 16 Sup. Ct. 247, 250, 160 U. S. 136, 40 L. Ed. 369.

The words "title," "chapter," and "section," when used by way of reference, shall mean a title, chapter or section of this volume of statutes. V. S. 1894, 16.

### Of street.

Laws 1883, c. 523, § 129, amending the charter of a municipality, provides with respect to street improvements that "whenever a petition to lay out a new street, signed by owners of a majority of the frontage on the line of said proposed street, or a petition to alter, open, widen, extend, or grade any section of a street or highway, signed by a majority of the owners of the frontage on said street or highway, or on the section of said street or highway proposed to be improved, shall be presented to the city council, it shall cause," etc. Held, that the word "section" cannot mean any arbitrary or uni-



form length of a street, like a block or half a mile, but it must refer to a portion of a street proposed to be improved, and when that portion is described it is a "section" of a street. In re Widening of Washington St., 14 N. Y. Supp. 470, 471, 60 Hun, 580.

## SECULAR.

The word "secular" means temporal or worldly; also, opposed to spiritual or holy. *Allen v. Deming*, 14 N. H. 133, 139, 40 Am. Dec. 179.

### SECULAR BUSINESS.

Rev. St. c. 82, § 1, prohibiting the exercise of any "secular labor, business, or employment" on Sunday, is to be construed as having the same meaning as the ordinary calling of any person in "worldly labor, business, or work," as the latter term was used in the English statute (St. 29 Car. II, c. 7, § 1) prohibiting the exercise of the ordinary calling of any person in worldly labor, business, or work on Sunday. The term "secular business or employment" means any business whatever, and is not limited to the acts in the line of one's usual avocation. *Lovejoy v. Whipple*, 18 Vt. 379, 383, 46 Am. Dec. 157.

"Secular business" and "servile labor," as used in a statute relating to work on the Sabbath, are equivalent in principle, though differing in expression. *Gladwin v. Lewis*, 6 Conn. 49, 53, 16 Am. Dec. 33.

#### Execution of a will.

"Secular business," as used in a New Hampshire statute providing against secular business or labor on Sunday, does not include the execution of a will. *George v. George*, 47 N. H. 27, 35.

#### Loan of money.

A loan of money made on the Lord's day is secular business, within the meaning of Gen. St. p. 643, prohibiting such labor on that day. *Finn v. Donahue*, 35 Conn. 216, 217.

#### Making of note.

Within the meaning of a statute providing that "no person whatsoever shall do or exercise any labor or work of his secular calling, works of necessity and of mercy only excepted, on the Lord's day, under a penalty," etc., the making of a promissory note on that day is secular business. *Allen v. Deming*, 14 N. H. 133, 139, 40 Am. Dec. 179.

"Secular calling," as used in Rev. St. c. 118, § 1, providing that no person shall do any work, business, or labor of his secular calling on the first day of the week, includes the selling, indorsing, and delivery

of a promissory note. *Smith v. Foster*, 41 N. H. 215, 221.

## SECURE.

Otherwise secured, see "Otherwise."

Webster defines "secure" to mean "to make certain; to put beyond hazard." *Huck v. Gaylord*, 50 Tex. 578, 582.

"To secure" is to make safe; to protect from danger; to make certain; to insure; to inclose effectually. Under Act April 10, 1867, requiring the jury wheel to be secured by sealing wax, the manifest purpose is to make it impossible for the wheel to be opened without in so doing furnishing evidence to the persons whose seals are impressed upon the wax that the seal has been tampered with; and it is not sufficient that the seal be sealed by the sheriff, if done in such a way that it can be opened without breaking the seal. *Commonwealth v. Delamater*, 13 Pa. Co. Ct. R. 152, 155.

The word "secure" means to get possession of; to make one's self secure of; to acquire certainly, as to secure an estate. *Webst. Dict.* It is so used in a contract "to secure a loan," and is not complied with where a promise of a loan only has been secured. *Venable v. Riley-Grant Co.*, 43 S. E. 428, 429, 117 Ga. 127.

The word "secure," in P. L. p. 73, entitled "An act to secure the purity of the public supplies of potable waters in this state," is to be construed according to one of its ordinary meanings, as meaning guard or protect, and therefore the act which prohibits the placing of polluting matter in any stream from which cities or other municipalities receive a water supply for domestic use above the point where such water is taken, fixes a penalty for a violation thereof, and authorizes the State Board of Health to enjoin the continuance thereof by a suit in chancery, is embraced within its title. *Board of Health v. Diamond Mills Paper Co.*, 51 Atl. 1019, 1020, 63 N. J. Eq. 111.

"Secured" means that which is presently reduced to possession, or that on which payment is made sure. It was thus used in a contract to pay a certain per cent. of the profits of a business when the profits were secured. *Allen v. Armstrong*, 68 N. Y. Supp. 1079, 1081, 58 App. Div. 427.

The word "secured," in the clause of the Greater New York Charter referring to the rights and privileges secured under the provisions of the act, "implies rights and privileges not created and conferred by the court, but secured—that is, confirmed; made fast and safe—by it to those entitled thereto. In other words, it implies rights and privileges conferred by some other act, and secured

to the beneficiaries by this one. *Hurst v. City of New York*, 67 N. Y. Supp. 84, 88, 55 App. Div. 68.

The word "secure," when used as a verb active, signifies to protect, insure, save, ascertain, etc. In Const. U. S. art. 1. § 8, declaring that Congress shall have power to promote the progress of science and useful arts by securing for a limited time to authors and inventors the exclusive right to their respective writings and inventions, the word does not mean the protection of an acknowledged legal right. It refers to inventors, as well as authors, and it has never been pretended by any one that an inventor has a perpetual right at common law to sell the thing invented. *Wheaton v. Peters*, 33 U. S. (8 Pet.) 591, 660, 661, 8 L. Ed. 1055.

#### **Adequacy of security.**

As used in Code Civ. Proc. § 726, providing that "there can be but one action for the recovery of any debt \* \* \* secured by mortgage upon real estate or personal property," does not mean that the security shall be adequate, but means a mortgage purporting on its face to be a security, and confines the remedy to a foreclosure thereon. *Barbieri v. Ramelli*, 23 Pac. 1086, 1087, 84 Cal. 154.

#### **Assign, convey, or transfer.**

"Secured," as used in the constitution and by-laws of a home for aged persons, providing that those who have any property, entering the home, are required to secure it to the institution before admission, and will be allowed interest on all moneys "secured" to the home, does not mean assigned or conveyed or transferred, and does not literally mean anything more than obtaining the custody of the property during the time of membership. In *re Maull's Estate*, 40 Atl. 1010; 1013, 186 Pa. 477.

#### **As creating of lien.**

In Hill's Code, § 3676, giving any person who, at the request of the owner of a lot, fills in or grades or improves the same, a lien thereon, and declaring that all the provisions of this act respecting the securing and enforcing of mechanics' liens shall apply thereto, the word "securing" should be held as applicable to the creation of the lien, and not to its protection. *Pilz v. Killingsworth*, 26 Pac. 305, 306, 20 Or. 432.

#### **Forbearance.**

An agreement as follows: "I hereby undertake to secure to you the payment of any sums you have advanced, or may hereafter advance, to D. & Co., on their account with you, commencing November 1, not exceeding £200"—implies a forbearance. *Raikes v. Todd*, 8 Adol. & E. 846, 848.

#### **As the giving of security.**

"Secure," as used in St. 5 & 6 Vict. c. 132, relating to admissions of indebtedness filed by a trader who has been summoned by his creditor, and requiring by section 14 that the debtor, within 14 days after filing his admission, shall pay or tender to his creditor the amount of the debt, or secure or compound for the same to his satisfaction, to secure implies the actual giving of a security. *Pennell v. Rhodes*, 9 Q. B. 114, 129, 130.

"Secured," as used in Const. 1874, art. 12, § 9, providing that no property nor right of way shall be appropriated to the use of any corporation until full compensation therefor shall be made to the owner in money or "first secured to him by a deposit of money," means the giving or depositing of something to make certain the fulfillment of an obligation, and it necessarily precedes the ripening of the obligation. *Ex parte Reynolds*, 12 S. W. 570, 572, 52 Ark. 330.

Duties are "secured to be paid" by the importer giving his bond therefor, accompanied by a deposit of the goods imported. *United States v. 350 Chests of Tea*, 25 U. S. (12 Wheat.) 486, 492, 6 L. Ed. 702.

"Secures," as used in a contract whereby a vendor of land agrees to execute a conveyance thereof as soon as the vendee secures the payment of the purchase money, means not a payment in money, but the giving by the vendee of something by means whereof payment at some future time can be procured or compelled. *Foot v. Webb* (N. Y.) 59 Barb. 38, 52.

#### **As obtain or purchase.**

"Secured," as used in a contract between an attorney and client providing for certain compensation in case the attorney "secured" for the client a portion of an estate, the fact that the estate vested in the client by operation of law does not prevent its being "secured" to her by the attorney, since his services were necessary to the establishment of the rights of the client. *Moran v. L'Etourneau*, 76 N. W. 370, 371, 118 Mich. 159.

In an ordinance providing for the submission to the people of the question of raising money for the purpose of securing a marketplace, "securing" is evidently used as synonymous with "purchasing," and will not include the idea of using the money so raised for the purpose of paying damages to surrounding property resultant on location of the marketplace. *Tukey v. City of Omaha*, 74 N. W. 613, 614, 54 Neb. 370, 69 Am. St. Rep. 711.

"Secure" is defined as to obtain, to give, or to procure, and is so used in the title of an act (Laws 1897, c. 145), being "An

act to secure the payment of wages of employees of certain corporations in money," and embodies the idea of certainty of the payment. *State v. Hann*, 54 Pac. 130, 132, 7 Kan. App. 509.

#### As paying.

"Securing," as contained in the charge of the court in replevin that if the bill of sale, under which the stock of goods were claimed, and which it was contended was given to defraud creditors, was made for the purpose of "securing or paying" an honest debt, was used in the sense of "paying." *Partlow v. Swigart*, 51 N. W. 270, 271, 90 Mich. 61.

#### As put beyond hazard.

Act 1850 (Comp. St. 1854, p. 377), providing that in every case where the real estate of a married woman has been or shall be sold, and the price or avails thereof "secured or invested in her name," the same shall in equity be deemed to belong to her, and shall not be liable to be taken on execution for the debts or liabilities of her husband, should be construed to apply to a note given for the price of a married woman's real estate, which was made payable to her; for it was within the popular meaning of the term, as well as in the spirit and equity of the statute secured and invested in her name. One of the definitions given by Webster to the word "secured" is "put beyond hazard," and a debt is put beyond hazard when the creditor has obtained for it the promissory note of one or more individuals of abundant property and undoubted credit. Promissory notes are, in the popular acceptance of the term, "securities for money." Money paid for a note, and especially for a note carrying interest, may with entire propriety be said to be invested in that note. *Jennings v. Davis*, 31 Conn. 134, 139.

#### SECURE PLACE.

"Secure place not exposed to a fire which would destroy the house where such business is carried on," as used in a fire policy providing that insured should keep a set of books in some such place as stipulated above, does not necessarily mean that the place must be absolutely secure against any fire that would destroy such house; but if, in selecting a place in which to keep his books, the insured acted in good faith and with such care as prudent men ought to exercise under like circumstances, it could not be said that the terms of the policy in that respect were violated. *Liverpool & L. & G. Ins. Co. v. Kearney*, 21 Sup. Ct. 326, 328, 180 U. S. 132, 45 L. Ed. 460.

#### SECURED CREDITOR.

"Secured creditor," as used in the bankruptcy act, shall include a creditor who has

security for his debt upon the property of the bankrupt of a nature to be assignable under the act, or who owns such a debt for which some indorser, surety, or other persons secondarily liable for the bankrupt has such security upon the bankrupt's assets. U. S. Comp. St. 1901, pp. 3419, 3420.

#### SECURELY.

A declaration against a cab proprietor, which stated that plaintiff hired the vehicle, and that defendant undertook to convey him and his luggage "safely and securely" from, etc., meant safely and securely with reference to the degree of care which under the circumstances the law required of the defendant; that is, that he should use a reasonable degree of care that the plaintiff should incur no damage or loss through the defendant's default or negligence, and did not import absolute assurance. *Ross v. Hill*, 2 C. B. 877, 890.

#### SECURELY FENCED.

A statute requiring a railroad right of way to be "securely fenced" requires, not only the erection of secure fences at the side of the track, but also secure cattle guards at highways crossing the track. *Indianapolis, P. & C. R. Co. v. Irish*, 26 Ind. 268; *Pittsburgh, C. & St. L. Ry. Co. v. Eby*, 55 Ind. 567, 571.

"Securely fenced," within the meaning of a requirement that a railroad track shall be securely fenced, requires that cattle guards at crossings shall not be placed so far apart as to leave an open space on both sides. *Indianapolis, C. & L. R. Co. v. Bonnell*, 42 Ind. 539, 540.

A statutory requirement as to a railroad being securely fenced is negated in a pleading alleging that the road was not sufficiently fenced. "We think the word 'sufficiently,' as used in the complaint, is of the same import and meaning as the word 'securely.'" *Evansville & T. H. R. Co. v. Tipton*, 101 Ind. 197, 198.

The term "securely fenced," in a statute requiring a railroad right of way to be securely fenced, in order to relieve the railroad from liability for killing stock, was construed to require the railroad to run a fence from cattle guards on its track to the right of way fence by the side of the track. *Louisville, E. & St. L. Ry. Co. v. Thomas*, 5 N. E. 198, 201, 106 Ind. 10.

Rev. St. 1894, § 5323, requiring a railroad to keep its right of way "securely fenced," does not mean that it shall be fenced at every point along the line. The words do not require building fences where a fence, if built, would obstruct a public highway. *Lake Erie & W. R. Co. v. Rooker*, 41 N. E. 470, 13 Ind. App. 600.

**SECURELY KEEP.**

A bond providing that a bank cashier shall "safely and securely keep" all moneys deposited, etc., should be construed to indicate a contract of bailment, and not to render the cashier and his sureties liable for loss by robbery. *Planters' & Merchants' Bank v. Hill (Ala.)* 1 Stew. 201, 208, 18 Am. Dec. 39.

**SECURITY.**

See "Additional Security"; "Adequate Security"; "Approved Security"; "Collateral Security"; "Due Security"; "Further Security"; "Good and Sufficient Security"; "Held as Security"; "Personal Security"; "Private Securities"; "Protestable Security"; "Public Security"; "State Securities"; "Sufficient Security."

"Security" is something which makes the enjoyment or enforcement of a right more secure or certain. A security on property is where a right over property exists, by virtue of which the enforcement of a liability or promise is facilitated or made more certain. *First Nat. Bank of Stewart v. Hollinsworth*, 43 N. W. 536, 538. 78 Iowa, 575, 6 L. R. A. 92 (citing *Rap. & L. Law Dict.*).

Webster defines "security" to be something to be given or deposited to make certain the fulfillment of an obligation; the observance of a provision for the payment of a debt. He also says it may mean any evidence of a debt. A contract which secures or clearly ascertains the amount of money due on the performance of a certain work or the furnishing of a certain material is a security in law. In *re Sloan's Estate (Pa.)* 2 Del. Co. R. 309, 310.

The term "security" signifies that which makes secure or certain. In its proper use it relates to pecuniary matters, and often consists of a promise or right unattended with possession of the thing upon which it reposes. It implies in its common acceptance that which prevents loss or makes safe. Dr. Johnson defines it as anything given as a pledge or caution. Dean Swift uses it as synonymous with "safety" or "certainty." Webster defines it as anything given or deposited to secure the payment of a debt or the performance of a contract, as a bond with surety, a mortgage, the indorsement of a responsible man, or a pledge. It is that which renders a matter sure; an instrument which renders certain the performance of a contract. *Storm v. Waddell (N. Y.)* 2 Sandf. Ch. 494, 507 (citing 2 Bouv. Law Dict. 493).

An Arkansas statute, providing that any "person bound as security for another" may at any time after action has accrued thereon

require the person having such right of action, to commence suit, etc., means only sureties proper on bonds, bills, or notes, but does not include indorsers, whose liability is fixed by notice of dishonor of the bill or note. *Ross v. Jones*, 89 U. S. (22 Wall.) 576, 591 22 L. Ed. 730.

**As chattels or effects.**

See "Chattel"; "Effects."

**Debt distinguished.**

See "Debt."

**Guaranty distinguished.**

The word "security" has an established and well-known meaning in the minds of most people, and indicates an obligation to stand for the sum absolutely, unless discharged by the supine negligence of the obligor after notice. It is in broad contrast with the word "guaranty," which imports a conditional liability, if due steps are taken against the principal. *Marberger v. Pott*, 16 Pa. (4 Harris) 9, 13, 55 Am. Dec. 479.

**As indicating a mortgage.**

The word "security," as used by a vendee in describing a bill of sale from the vendor, which purported to be an absolute transfer, is not sufficient to fix the character of such instrument as a mortgage. *Prentiss Tool & Supply Co. v. Schirmer*, 32 N. E. 849, 850, 136 N. Y. 305, 32 Am. St. Rep. 737.

**As negating payment.**

In a statute relating to the taking of land by a municipality for public purposes, and providing that a municipal warrant or order shall be deemed a sufficient security for the amount awarded, the word "security" negatives a payment, and hence it cannot be contended that the delivery of warrants for the land taken constituted a payment therefor. *Redman v. Philadelphia, M. & M. R. Co.*, 33 N. J. Eq. (6 Stew.) 165, 167 (cited and approved *Martin v. Tyler*, 60 N. W. 392, 399, 4 N. D. 278, 25 L. R. A. 838).

**As personal security.**

"Security," within the meaning of the statute making it the duty of guardians to lend out the money of wards upon bond or note with good and sufficient security, means personal security, and the statute does not require the funds of the ward to be invested upon real estate or government securities. *Boyett v. Hurst*, 54 N. C. 166, 171.

**As surety.**

The word "security" is often used in the Code in the sense of "surety." Thus the applicant for an attachment must give bond with good security, and one filing a claim to property levied on, in order to replevy the property, must give bond with good and sufficient security, so that the word "security,"

as used in the phrase "and to give security for the eventual condemnation money," appearing in section 4819 of the Civil Code, which provides for entering a defense to the levy of a distress warrant, means that the defendant in such warrant must give a bond with a surety or sureties thereon, and the levying officer is not authorized to take in lieu of such bond a deposit of money. *Goggin v. Jones*, 41 S. E. 995, 996, 115 Ga. 596.

The addition of the word "security" to the signature of a bond shows prima facie that the person signing is a surety. *Boulware v. Hartsook's Adm'r*, 3 S. E. 289, 291, 83 Va. 679 (citing *Harper's Adm'r v. McVeigh's Adm'r*, 1 S. E. 193, 82 Va. 751).

#### **Bills, bonds, notes, etc.**

A charge conferring on a savings institution the power to invest deposits made with it in public stocks or other "securities" is held to authorize the lending upon bills, bonds, notes, and mortgages as well as stocks, and also the power of making loans by way of discount. *Duncan v. Maryland Sav. Inst. (Md.)* 10 Gill & J. 299, 308.

Gold and silver certificates and notes of the United States are "securities of the United States" circulating as money, within the rule exempting from taxation by the states bonds and obligations dependent on the credit of its promise, issued by the United States, except by permission. *Howard Sav. Inst. v. City of Newark*, 44 Atl. 634, 635, 63 N. J. Law, 547.

Bills of exchange, bonds for the payment of money, and promissory notes are, in the popular acceptance of the term, "securities for money." *Jennings v. Davis*, 31 Conn. 134, 139.

The term "securities" in its broadest sense embraces bonds, certificates of stock, and other evidences of debt or of property. *Thayer v. Wathen*, 44 S. W. 906, 909, 17 Tex. Civ. App. 382.

The term "securities," in the charter of a bank authorizing it to buy and sell securities, signifies notes, bills of exchange, and bonds—in other words, evidences of debt or promises to pay money—but does not include corporate stocks. *Bank of Commerce v. Hart*, 37 Neb. 197, 203, 55 N. W. 631, 20 L. R. A. 780, 40 Am. St. Rep. 479.

#### **Book of original entries.**

A book of original entries of work done or material sold and delivered is a security. *In re Sloan's Estate (Pa.)* 2 Del. Co. R. 309, 311.

#### **Certificate of deposit prior to insolvency.**

A certificate of the receiver of an insolvent bank to the effect that an administrator had deposited certain funds belonging

to an estate in the bank prior to its insolvency was not a security. *Germania Safety Vault & Trust Co. v. Driskell (Ky.)* 66 S. W. 610, 611.

#### **Garnishee process.**

Garnishee process in a suit on a claim is "security" therefor, within the meaning of a contract by which the holder of such claim agreed to assign to another so much thereof as should remain uncollected or unsecured on a specified date. The language used in the contract was meant to include any kind of substantial security from which the debt might be made, such as levies by execution or attachment, which would be as binding as mortgages. *National City Bank v. Torrent*, 89 N. W. 938, 940, 130 Mich. 259.

#### **Judgment.**

"Security," as defined by Webster, means "an evidence of debt or of property, as a bond, a certificate of stock, and the like." In common commercial parlance a judgment would certainly not be referred to or be thought of when speaking of securities; this term generally being understood to refer to live and negotiable commercial obligations, or such negotiable obligations as state, county, government, and municipal bonds, and other obligations considered generally as safe or secure, and would not generally be understood to refer to or include judgments. *Mace v. Buchanan (Tenn.)* 52 S. W. 505, 507.

#### **Judgment note.**

A judgment note is a "security," and a valuable one, to the holder. *McCaul v. Thayer*, 35 N. W. 353, 355, 70 Wis. 138.

#### **Lands and mortgages of insolvent.**

The word "securities," in a credit insurance policy, providing that in estimating the loss of the insured of a debt due him from the insolvent, the "securities" of the debtor held at the time of the appointment of such receiver, taken at their actual value, and the other assets of such debtor, taken at the value as shown by his books, should be deemed a payment to the extent of such value on an account of the debt owing to him, was construed as not to include the lands of the debtor, nor mortgages thereon. *People v. Mercantile Credit Guaranty Co.*, 72 N. Y. Supp. 373, 376, 35 Misc. Rep. 755.

#### **Liens.**

"Securities," as used in Bankr. Act 1841, providing that nothing contained in the act shall be construed to annul, destroy, or impair any lawful rights of married women or minors, or any liens, mortgages, "or other securities on property, real or personal," includes every interest or right attached to or which is a charge upon specific property, or which entitles the owner thereof to be paid out of specific property, and embraces liens

as well as mortgages. *Storm v. Waddell* (N. Y.) 2 Sandf. Ch. 494, 507.

### Money.

The nature of a security required to be given by a nonresident plaintiff in commencing an action before a justice not being designated by the statute, there is no good reason why a deposit of money should not be deemed competent. *Wheelock v. Brinckerhoff* (N. Y.) 13 Johns. 481.

Cr. Code, § 298, providing that, when it shall become necessary to adjourn a trial, the person accused may enter into a recognizance before the magistrate, with good and sufficient "security," to be approved by the magistrate in such amount as he shall deem reasonable, contemplates a recognizance signed by duly qualified sureties, and a deposit of money, instead of the usual bail, is not authorized. *Snyder v. Gross* (Neb.) 95 N. W. 636, 637.

### Right to enter and take possession on condition broken.

Where it is shown that the suit is based upon a promissory note, providing that the express condition of the sale and purchase of the goods for which the note was given is such that the title, ownership, or possession does not pass until the note and interest is paid in full, and that the payee has full power to declare the note due and take possession of the goods at any time he may deem himself insecure, even before the specified maturity of the same, unless it is shown by the affidavit that the security is beyond his reach, or has become valueless through no fault of his, attachment cannot be maintained upon action or purchase price. In this connection the court observes: "It is urged by appellants that they had no 'security,' as contemplated by our statute; that it was not a mortgage, and was not a lien, and not a pledge. It occurs to us that plaintiffs' security was a higher class of security than either a mortgage, lien, or pledge. It was a reservation of the title itself, with a right to take possession at any time condition should be broken. Here the creditor held a security for the sum owed him from his debtor which did not require any of the processes of law to divest the title. All that was necessary for him to do in order to realize on his security was to obtain possession of the property. This we think clearly a security, within both the letter and spirit of the attachment statute, and that the plaintiff could not abandon such security, because, perchance, he preferred an attachment lien to the security he already had." *Mark Means Transfer Co. v. Mackinzie* (Idaho) 73 Pac. 135, 138.

### SECURITY COMPANY.

See "Mortgage Security Company."

### SECURITY DEALERS.

The term "security dealers," in Acts 1893, c. 89, imposing a license tax on security dealers, does not include the purchaser of a judgment on a note for less than the face thereof. *Mace v. Buchanan* (Tenn.) 52 S. W. 505, 507.

### SECURITY FOR COSTS.

"Security for costs," in Code 1896, § 1350, providing that, if suit be commenced by a resident who afterwards removes from the state, the defendant may require security for costs, means nothing more nor less than security for all costs for which the plaintiff may be or might become liable. *Ex parte Louisville & N. R. Co.*, 124 Ala. 547, 549, 27 South. 239.

### SEDATE MIND.

The phrase "sedate, deliberate mind" means a mental condition sufficiently composed to admit of reflection on the design, and to comprehend the nature and the probable consequence of the designed act. *Primus v. State*, 2 Tex. App. 369, 376.

A "sedate mind," as that phrase is used in the definition of malice, means an unruffled mind, undisturbed by passion, serene, and at repose. *Ake v. State*, 30 Tex. 466, 473.

### SEDGE FLATS.

"Sedge flats are flats which lie near the seashore, below ordinary high-water mark, and are covered by every tide, and grow a coarse or long sedge, which cattle will not eat, and which, like sea-weed, is valuable only for bedding and manure. A sedge flat, lying on the shore, which bounds an arm of the sea, is not in any popular, legal, or just sense a meadow." *Church v. Meeker*, 34 Conn. 421, 429.

### SEDITION.

The offense known in England as "sedition" consisted of speaking or writing against the character and constitution of the government, or seeking to change it by any means except those prescribed. *State ex inf. Crow v. Shepherd*, 76 S. W. 79, 83, 177 Mo. 205.

### SEDITIONOUS AGITATOR.

The obvious meaning of the words "seditionous agitator," as they would naturally be understood by ordinary men, when published in reference to another, is that he is a disturber of the public peace, a subverter of just laws, and a bad citizen. *Wilkes v. Shields*, 62 Minn. 426, 427, 64 N. W. 921.

## SEDO.

"Sedo" is the word ordinarily used in all Mexican conveyances to pass title to lands. It is translated "I grant." *Mulford v. Le Franc*, 26 Cal. 88, 103.

## SEDUCE—SEDUCTION.

See "Action for Seduction."

To "seduce" is to draw aside from the path of rectitude and duty in any manner; to entice to evil; to lead astray; to tempt and lead to iniquity; to corrupt; to deprave; to induce to surrender chastity. *Patterson v. Hayden*, 21 Pac. 129, 130, 17 Or. 238, 3 L. R. A. 529, 11 Am. St. Rep. 822 (citing *Webst. Dict.*); *State v. Patterson*, 88 Mo. 88, 96, 57 Am. Rep. 374.

To "seduce" is to draw away from the path of rectitude and duty in any manner by flattery, promises, bribes, or otherwise. *Brown v. Kingsley*, 38 Iowa, 220, 224.

"Seduced" means that a virtuous woman has been corrupted, deceived, and drawn aside from the path of virtue, which she was pursuing, by such acts and wiles, "in connection with a promise of marriage," as were calculated to operate upon a virtuous female. *State v. Eckler*, 17 S. W. 814, 815, 106 Mo. 585, 27 Am. St. Rep. 372; *State v. Wheeler*, 18 S. W. 924, 925, 108 Mo. 658.

The word "seduce," when used with reference to the conduct of a man toward a female, means an enticement of her on his part to the surrender of her chastity by means of some art, influence, promise, or deception, calculated to accomplish that object and to induce the yielding of her person to him. *State v. Bierce*, 27 Conn. 319, 321; *Hart v. Knapp*, 55 Atl. 1021, 1023, 76 Conn. 135.

The word "seduction," when applied to the conduct of a man toward a female, is generally understood to mean the use of some influence, promise, arts, or means on his part by which he induces the woman to surrender her chastity and virtue to his embraces. *Patterson v. Hayden*, 21 Pac. 129, 130, 17 Or. 238, 3 L. R. A. 529, 11 Am. St. Rep. 822; *Marshall v. Taylor*, 32 Pac. 867, 869, 98 Cal. 55, 35 Am. St. Rep. 144; *Croghan v. State*, 22 Wis. 444, 445; *Stowers v. Singer*, 68 S. W. 637, 639, 113 Ky. 584; *Robinson v. Powers*, 28 N. E. 1112, 129 Ind. 480.

Seduction may be defined to be the act of persuading or inducing a woman of previous chaste character to depart from the path of virtue by the use of any species of arts, persuasion, or wiles which are calculated to and do have that effect, and resulting in her ultimately submitting her person to the sexual embraces of the person accused. *State*

*v. Hamann*, 80 N. W. 1064, 1065, 109 Iowa, 646; *People v. Bressler*, 91 N. W. 639, 640, 131 Mich. 390.

"Seduction" is defined to be the wrong of inducing a female to consent to unlawful sexual intercourse by enticements and persuasions overcoming her reluctance and scruples. *Hood v. Sudderth*, 16 S. E. 397, 399, 111 N. C. 215.

"Seduction," as applied to a prosecution against a married man for seduction, is the offense of inducing an unmarried female of previous chaste character, by a married man, to consent to unlawful sexual intercourse by enticements and influences which overcome her scruples. *Flick v. Commonwealth*, 34 S. E. 39, 40, 97 Va. 766.

Pen. Code, art. 814, provides if any person, by a promise to marry, shall seduce an unmarried female under the age of 25 years, and shall have carnal knowledge of such female, he shall be punished, etc. Pen. Code, art. 815, provides: "The term 'seduction' is used in the sense in which it is commonly understood." Webster says the word "seduction" is derived from two Latin words, "se," which means away, and "duco," which means to lead, and together they mean to lead away. Seduction, then, implies that the female is led away from the path of rectitude and virtue, and is induced to indulge in carnal intercourse by the means used. *Putman v. State*, 29 Tex. App. 454, 456, 457, 16 S. W. 97, 25 Am. St. Rep. 738.

Seduction consists in the act of seducing an unmarried female "of previous chaste character," and having sexual intercourse with her, "by virtue of a feigned or pretended marriage, or any false or feigned express promise of marriage." *Walton v. State*, 75 S. W. 1, 2, 71 Ark. 398.

The word "seduction," when applied to the conduct of a man toward a woman, means the use of some influence, artifice, promise, or means on his part by which he induces a woman, who is then and has theretofore for a reasonable time been a woman of chaste conduct, to submit to unlawful intercourse with him. *Stowers v. Singer*, 68 S. W. 637, 638, 639, 113 Ky. 584.

Where an unmarried man, by his attentions to an unmarried female, gains her affections and confidence, and importunes her to sexual intercourse with him, and through her confidence in him and love for him she yields to his solicitations, it is seduction. *Bell v. Rinker*, 29 Ind. 267, 268.

Seduction is any act, solicitation, or statement by a man which overcomes the unwillingness of a woman and causes her to yield her virtue. *Bradshaw v. Jones*, 52 S. W. 1072, 1073, 103 Tenn. 331, 76 Am. St. Rep. 655.

Seduction is the offense of a man who abuses the simplicity and the confidence of a woman to obtain by false promise what she ought not to give. *Brown v. Kingsley*, 38 Iowa, 220, 224.

The feigned issue, which was abolished by the Constitution, in actions for seduction, is the loss of services and for damages based thereon. For centuries damages have been awarded on that basis, and a more transparent fiction than that the action of seduction was for the value of services was not known to the law. *Hood v. Sudderth*, 16 S. E. 397, 399, 111 N. C. 215.

#### **Adultery distinguished.**

See "Adultery."

#### **Debauch synonymous.**

"Seduction," as used in Gen. St. 1894, § 5162, giving a father a right to a civil action for the seduction of his daughter, is not to be taken in the technical and limited sense in which it is used in penal statutes, but in the same sense as it was used in the common-law actions by a father for the seduction of his daughter. In such actions, "seduction" and "debauching" were used as substantially similar terms, and it was not important which word was used in the declaration. *Hein v. Holdridge*, 81 N. W. 522, 78 Minn. 468.

"Seduction" and "debauching" are in civil causes very generally used as substantially similar terms. The term "debauching" is used by Chitty in his forms as the proper word for such misconduct with a servant or member of a family as gives grounds of action. We do not think it is important which word is used in the pleadings. *Stout v. Shepherd*, 41 N. W. 696, 697, 73 Mich. 588.

#### **Debauch distinguished.**

In Rev. St. § 1259, declaring that "if any person shall, under promise of marriage, seduce and debauch any unmarried female of good repute," etc., he shall be punished, each of the words "seduce" and "debauch" has its appropriate meaning. There are two steps necessary to be taken in order to consummate the crime: First. The female must be "seduced"; that is, corrupted, deceived, drawn aside from the path of virtue which she was pursuing. Her affections must be gained, and her mind and thoughts polluted. Second. In order to complete the offense she must be "debauched"—that is, she must be carnally known—before the guilty agent becomes amenable to human laws. Thus it will be seen that a female may be "seduced" without being "debauched," or "debauched" without being "seduced." *State v. Reeves*, 10 S. W. 841, 845, 97 Mo. 668, 10 Am. St. Rep. 349.

#### **As not necessarily first act of intercourse.**

Under the statutes any one act of carnal intercourse to which the complainant's assent was obtained by a promise of marriage made by the defendant at the time, and to which, without such promise, she would not have yielded, constitutes the offense of seducing and debauching as clearly as if it were the first act of intercourse induced by the like promise. If the first act would constitute seduction, because her assent was obtained by such promise, no good reason can be discovered why the second or any subsequent intercourse to which her assent was obtained only by the same means will not equally constitute the offense. *People v. Mills*, 11 Mich. 278, 282, 283.

#### **Consequent pregnancy not essential.**

There may be seduction without consequent pregnancy. *Haymond v. Saucer*, 84 Ind. 3, 6.

#### **As felony.**

See "Felony."

#### **As personal injury.**

See "Personal Injury."

#### **Previous chastity of female essential.**

The word "seduce" implies, *ex vi termini*, chastity as a condition precedent on which the act of seduction is to operate, resulting in the end in debauchment, the physical deprivation of chastity, as the consummation of the crime of seduction. Hence, on a prosecution under Rev. St. § 1259, providing for the punishment of any one who shall under promise of marriage seduce or debauch any unmarried female of good repute, evidence of previous specific acts of unchastity committed by prosecuting witness is admissible, the same as if the statute contained the words "of previous chaste character," instead of "of good repute." *State v. Patterson*, 88 Mo. 88, 95, 57 Am. Rep. 374.

"Seduce" means to deceive, to corrupt, and to draw aside from the path of virtue one who, at the time she is approached, is honestly pursuing that path; and seduction can only operate on one previously chaste. *Bailey v. O'Bannon*, 28 Mo. App. 39, 50.

To seduce is to induce to surrender chastity; but an unchaste woman has no chastity to surrender, and therefore cannot be seduced. *Commonwealth v. Hadfield* (Pa.) 3 Kulp, 121, 124.

Every illicit connection is not a seduction. It cannot be said that a female is drawn aside from the path of virtue unless she is honestly pursuing that path when polluted. If her mind is corrupt and polluted with lewd thoughts, and she is ready to submit to improper embraces, as opportunity



offers, from her own lustful propensity and without any arts or blandishments of him with whom she has had sexual intercourse, she cannot be said to be seduced by the party with whom she has improper sexual relations. *State v. Wheeler*, 18 S. W. 924, 925, 108 Mo. 658.

The word "seduce," as found in the statute relating to seduction, not only imports illicit sexual intercourse, but it imports also a surrender of chastity—a surrender of the woman's personal virtue. The statute is for the protection of the chastity of unmarried women, and the existence of the virtue at the time of the intercourse is a necessary ingredient of the offense; for, as has been often said, the woman who has lost her chastity, the prostitute, may be the victim of rape, but is not the subject of seduction. By this it is not, however, intended that the woman who may have at some time fallen cannot be the subject of seduction. That may be true, and there may be reformation; and at the time she yields to the man's embraces she may have the virtue of chastity, not in the high degree of the woman who has not strayed, but yet within the meaning of the statute, entitling her to protection. *Wilson v. State*, 73 Ala. 527, 533.

Mr. Worcester in his Dictionary defines the legal meaning of "seduction" to be the offense of a man who induces a woman to surrender her chastity. This is strictly accurate, both philologically and according to the common and well-understood meaning of the term. It is despoiling a woman of her virginity. It may also by some of our cases be where the woman, after having been seduced, has again returned to the path of virtue; but in both of these cases the act is complete when the chastity of the party has been surrendered. It is beyond question that this result is effectually produced, and the act of seduction is complete, by one act of sexual intercourse, though the amount of moral wrong may not be the same in the case of a single act as where the party persists in her evil course. *Franklin v. McCorkle*, 84 Tenn. (16 Lea) 609, 613, 57 Am. Rep. 244.

To seduce is to corrupt, to deceive, or to draw aside from the right path. Every illicit connection is not seduction. It cannot be said that a woman was drawn aside from the path of virtue, unless she was honestly pursuing that path when defendant approached her. If she was vile and corrupt at the time, and submitted to improper practices from her own lustful propensities and without any arts of his, he is not her seducer. But a single error on the part of the female will not place her beyond the protection of the law punishing seduction, if she has repented her error and is walking in

the path of virtue and enjoying the esteem of her acquaintances. *Commonwealth v. McCarty* (Pa.) 2 Clark, 351, 353.

On a prosecution for seduction under promise of marriage, the chastity of the woman at the time of the intercourse must be proved; for there must be a leading aside from the path of virtue to constitute the offense. *Norton v. State*, 16 South. 264, 266, 72 Miss. 128, 48 Am. St. Rep. 538.

Criminal connection may take place between the parties without seduction. "Supposing the daughter to have been unchaste, and the alleged carnal intercourse to have been occasioned as much by her misconduct as that of the defendant, the latter would not then have been guilty of seduction. That would have been a case of criminal connection, without seduction." *Hill v. Wilson* (Ind.) 8 Blackf. 123.

The word "seduction," when applied to the conduct of a man toward a woman, means the use of some influence, artifice, promise, or means on his part by which he induces her to surrender her chastity and virtue to his embraces. Criminal indulgence with a woman who is at the time leading a lewd and lascivious life does not constitute seduction. *Patterson v. Hayden*, 17 Or. 238, 242, 21 Pac. 129, 130, 3 L. R. A. 529, 11 Am. St. Rep. 822.

#### Promise or persuasion.

In order to constitute seduction it is necessary to show that the consent of the woman was obtained by flattery, promises, or other artifices used by the defendant. *Delvee v. Boardman*, 20 Iowa, 446, 448.

Simply having sexual intercourse with a female does not constitute seduction. In order to constitute seduction the defendant must use insinuating arts to overcome the opposition of the seduced, and must by wiles and persuasions, without force, debauch her. *Hogan v. Cregan*, 29 N. Y. Super. Ct. (6 Rob.) 138, 150 (cited in *People v. Gumaer*, 39 N. Y. Supp. 326, 4 App. Div. 412).

To constitute seduction there must be something more than a mere reluctance on the part of the woman, and her consent must be obtained by flattery, false promises, urgent importunity based on professions of attachment, or the like. *Marshall v. Taylor*, 32 Pac. 867, 869, 98 Cal. 55, 35 Am. St. Rep. 144.

To constitute seduction mere illicit intercourse in reliance on a promise made is not sufficient, but in addition to this it means some sufficient promise, and a reliance thereon, which causes the prosecutrix to depart from the "path of virtue she was honestly pursuing at the time the offense was committed." *People v. Clark*, 33 Mich. 112, 116.

Mere unlawful commerce for a consideration to be paid is not seduction. There

must be some artificial or false promise by which the virtuous female is induced to surrender her person to the accused. *State v. Fitzgerald*, 63 Iowa, 269, 19 N. W. 202. It has often been held that to constitute the crime it must be made to appear that the intercourse was obtained by some artifice or deception. It is not sufficient to establish the sexual intercourse, but the plaintiff must show that the defendant accomplished his purpose by some promise or artifice, or that she was induced to yield by flattery or deception. *State v. Hamann*, 80 N. W. 1064, 1065, 109 Iowa, 646.

In seduction the female must be an unmarried woman, and her consent to the act of sexual intercourse and the surrender of her chastity must have been obtained by means of deception, arts, flattery, or a promise of marriage. *Hall v. State*, 32 South. 750, 758, 134 Ala. 90.

Where the party charged with seduction boasted of his wealth, and promised the unfortunate woman that he would provide for her if she would yield her person to his embraces, and such promises and persuasions were renewed from day to day until she finally yielded, it constituted seduction. *Johnson v. Holliday*, 79 Ind. 151, 153.

In order to prove seduction under Civ. Code, § 35, providing that "an unmarried female over 21 years of age may maintain an action for her own seduction and recover thereon such damages as may be assessed in her favor," plaintiff must show that defendant employed such artifice or deceit as was calculated to mislead a virtuous woman, that she was misled in consequence thereof, and that she submitted to the sexual intercourse through the artifice or deception practiced on her by defendant. *Breon v. Henkle*, 13 Pac. 289, 290, 293, 14 Or. 494.

The offense of seduction, as was said in *Putman v. State*, 29 Tex. App. 454, 16 S. W. 97, 25 Am. St. Rep. 738, quoting from *Boyce v. People*, 55 N. Y. 644, consists in enticing a woman from the path of virtue, and obtaining her consent to illicit intercourse by a promise made at the time. The promise, and yielding her virtue in consequence thereof, is the gist of the offense. If she resists, but finally assents or yields thereto in reliance upon the promise made, the offense is committed. *McCullar v. State*, 36 S. W. 585, 586, 36 Tex. Cr. R. 213, 61 Am. St. Rep. 847.

In order to charge seduction, it is not necessary that the manner of accomplishing the act, or the circumstances attending it, should be set out. The allegation that defendant "did seduce" plaintiff implies that the act was done by flattery and false promises, or the exercise of other influences. Voluntary intercourse, without being secured by such influences on the part of defendant, would not

amount to seduction. By the use of the word "seduce," which is defined by Webster to mean "to draw away from the path of rectitude and purity in any manner, by flattery, promises, bribes, or otherwise," the acts which render defendant liable are sufficiently charged. *Brown v. Kingsley*, 38 Iowa, 220, 224.

Under Civ. Code, § 35, providing that "an unmarried female over 21 years of age may maintain an action as plaintiff for her own seduction, and recover therein such damages as may be assessed in her favor," etc., a plaintiff cannot recover unless it appears from the evidence that defendant employed such artifice or deceit as was calculated to mislead a virtuous woman, that she was misled and deceived in consequence thereof, and that she submitted to the sexual intercourse through the artifice or deception practiced upon her by defendant. The reluctance and scruples in such case must arise out of the consciousness that the act was immoral and wrong. If they were maintained from an apprehension of danger from exposure, or as a matter of expediency, overcoming them would be no evidence of seduction. Again, the character of the enticement, persuasion, and artifice employed is important. They must be of such a nature as would be likely to deceive and mislead a chaste woman, and have had that effect in the particular case. *Breon v. Henkle*, 14 Or. 494, 511, 13 Pac. 289, 293, 294.

One who induces a woman to have sexual intercourse by promising that, if she becomes pregnant, he will marry her, is not guilty of seduction on a promise of marriage, within Pen. Code, § 284, as the promise is conditioned on an event which may never occur. *People v. Duryea*, 9 N. Y. Cr. R. 402, 404, 405, 30 N. Y. Supp. 877.

#### **Promise of marriage.**

Seduction, in its ordinary acceptance, implies a betrayal of confidence, and for that reason a great majority of these cases are based on a violation of the marriage promise; but this is not a universal rule by any means, for a married man may seduce a girl, and that even if she be aware of his marriage. There are many cases to this effect; but they have arisen generally where the injured parties are young girls and easily beguiled, who could not be held to the plane of responsibility occupied by women possessing a wider knowledge of the world. *Marshall v. Taylor*, 32 Pac. 887, 869, 98 Cal. 55, 35 Am. St. Rep. 144.

Seduction is the act of a man inducing a woman to commit unlawful sexual intercourse with him, and it is not essential, in order to maintain the action, that there should be a promise of marriage. *Milliken v. Long*, 41 Atl. 540, 541, 188 Pa. 411.

Seduction is the act of a man in inducing a woman to permit unlawful sexual intercourse with him. This may be accomplished by the use of seductive arts, such as flattery, solicitation, importunity, and promises. While it may not be material or competent that there was an existing contract of marriage between the defendant and the woman seduced, it is proper to show that such a promise was made in order to accomplish the seduction. *Ayer v. Colgrove*, 30 N. Y. Supp. 788, 789, 81 Hun, 322.

Seduction consists in having illicit connection with an unmarried female, who yields to the solicitations of her seducer under the inducement of a promise of marriage; and hence it is no defense that defendant was a minor willing to marry prosecutrix, but was prevented by his father's refusal to consent. *Harvey v. State (Tex.)* 53 S. W. 102.

Under a statute providing for the punishment of any person who shall under promise of marriage seduce an unmarried female, the gist of the offense is that the seduction shall be accomplished under or by means of a promise of marriage which is unfulfilled. Without the promise there can be no crime under the statute, however reprehensible the conduct of the man may be. *State v. Adams*, 35 Pac. 36, 25 Or. 172, 22 L. R. A. 840, 42 Am. St. Rep. 790.

Seduction may be defined to be the act of persuading or inducing a woman of previous chaste character to depart from the path of virtue by the use of any species of arts, persuasions, or wiles, which are calculated to have and do have that effect, and resulting in her ultimately submitting her person to the sexual embraces of the person accused. A false promise of marriage, under the statute of Michigan, is not a necessary element in the influence exerted through the wiles, artifices, and deception used by the seducer in taking advantage of the guileless simplicity and confidence of a young girl, and leading her from the path of virtue, depriving her of her chastity, and accomplishing her ruin; but any other subtle device or deceptive means, involving the same moral turpitude, used in accomplishing the same criminal result, is all that is necessary to constitute the crime. The quality of the means used, rather than the kind, is that which characterizes the act, and brings it under the condemnation of the law. *People v. Gibbs*, 38 N. W. 257, 259, 70 Mich. 425.

#### Sexual intercourse.

The word "seduction," used in reference to a man's conduct toward a female, *ex vi termini* implies sexual intercourse between them. *Carlisle v. State*, 19 South. 207, 73 Miss. 387 (citing *Bish. St. Crimes*, § 645; *State v. Curran*, 51 Iowa, 112, 49 N. W. 1006);

*State v. Bierce*, 27 Conn. 319, 321; *Wilson v. State*, 73 Ala. 527, 533.

"Seduction," as used in an indictment, does not mean an enticement to any other sin than a surrender of chastity. No woman is seduced, within the meaning of the statute, until fornication has been committed on her body. Fornication is a substantive offense charged against defendant in an indictment for seduction. *Dinkey v. Commonwealth*, 17 Pa. (5 Harris) 126, 130, 55 Am. Dec. 542.

The words "seduce" and "debauch," in the statement in an indictment that defendant unlawfully and feloniously did seduce and debauch a woman named, necessarily charged the offense of seduction. They import the idea of illicit intercourse, accomplished by arts, promises, or deception, and have no other meaning. The use of the phrase "carnally know" is not essential to charge the offense, for the reason that the words "seduce and debauch" include the same meaning. *State v. Curran*, 49 N. W. 1006, 1007, 51 Iowa, 113; *State v. Whalen*, 68 N. W. 554, 555, 98 Iowa, 662.

## SEE

"See," as used in an ordinance requiring a building inspector to see that each house is being erected, constructed, or altered according to the provisions, etc., means to cause to be done or accomplished, or to require that the building be properly erected. *Merritt v. McNally*, 36 Pac. 44, 47, 14 Mont. 228.

A statement by an agent of the owner of the building that he "would see" that work done on the building would be paid for naturally meant that the payment was to come from the agent's principal, and could not have referred to the contractor, who was in default, and over whom the owner's agent had no control. *Desmond v. Schenck*, 55 N. Y. Supp. 251, 252, 36 App. Div. 317.

A power to dispose of property "as one shall see fit," as contained in a will, is no stronger than a power of disposal generally; and in *Wells v. Seeley* (N. Y.) 47 Hun, 109, the expression seems to have been considered as only leaving it to the judgment of the devisee. *Terry v. St. Stephen's Protestant Episcopal Church*, 81 N. Y. Supp. 119, 121, 79 App. Div. 527.

#### Agreement of indemnity.

"See you out," as contained in a letter by a grantor to a grantee, stating: "I will not give you a written indemnity, but I have sold you the property. It is yours, and I will see you out with it"—are synonymous with "I will indemnify you, or save you

harmless." *Brewster v. Countryman* (N. Y.) 12 Wend. 446, 449.

A statement to the employes of a fisherman that a canning company would "back him" and "see him through" is evidently nothing more than an agreement, in consideration of securing the salmon to be caught, to advance on account thereof a reasonable sum of money, and not as indicating employment of the fisherman by the company. *Miles v. Columbia Packers' Ass'n*, 69 Pac. 827, 829, 41 Or. 617.

In an action on an order, which the drawee had indorsed, "I will see the within paid," dating and signing such indorsement, the court said: "The defendant is bound and liable as acceptor, and the sentence, signed by him as above quoted, is a good and valid acceptance, although he thought proper in writing it to use the words, 'I will see the within paid,' instead of 'I will pay.' The opinion is entertained that the only certain and sure way by which he can ever expect to see the amount of the order paid is to pay it himself, and thus, like some other prophets in the world, produce by his own action the verification of his own prediction." *Brannin v. Henderson*, 51 Ky. (12 B. Mon.) 61, 62.

#### Original undertaking.

Where a party refused to supply more material to a certain person on his own credit, and his creditors told the former to continue to furnish the materials and that they "would see that they had their pay," the words "would see that they had their pay" should be construed to import an original and not collateral undertaking on the part of the promisors. *Greene v. Burton*, 10 Atl. 575, 576, 59 Vt. 423.

A promise that, if the promisee would extend credit for goods to a third party, the promisor would see the debt paid, was an original undertaking, and not an agreement to answer for the debt or default of another. *Maddox v. Pierce*, 74 Ga. 838.

#### SEED.

Beans, though "seeds," in the language of botany or natural history, are not so considered in commerce, nor in common parlance, but will be classed under the term of "vegetables." *Roberston v. Salomon*, 9 Sup. Ct. 559, 130 U. S. 412, 32 L. Ed. 995.

The question whether the word "seed," in the tariff act, includes millet seed, not in its natural state, but peeled, and which will not germinate, and used for making soup, and also for bird food, was held to be a question for the jury, and was determined by the jury not to be included therein. *Nordlinger v. Robertson* (U. S.) 33 Fed. 241, 242.

Canary seed is dutiable at 30 per cent. ad valorem, under Tariff Act July 24, 1897, c. 11, § 1, Schedule G, par. 254, 30 Stat. 171 [U. S. Comp. St. 1901, p. 1650], as "seeds not specially provided for." *United States v. Nordlinger* (U. S.) 119 Fed. 478.

#### SEEK.

A statute providing that corporations "seeking" to do business in the state should comply with certain prerequisites does not apply only to those corporations which had not theretofore done business in the state, but desired to do it in the future, but applied to all corporations who came within the state to do business. *State v. American Book Co.*, 69 Pac. 563, 65 Kan. 847.

A clerk in the excise office, attending the office (in the city of London) from 10 till 4 every day (Sundays and holidays excepted), and having no other means of obtaining his livelihood, but residing with his wife and family out of London, is not a person "seeking a livelihood within the city" of London or its liberties, within the meaning of those words in the London court of requests act (St. 39 & 40 Geo. III, c. 104), and therefore he is liable to be sued in the superior courts for a debt under £5. *Smith v. Hurrell*, 10 Barn. & C. 542.

#### SEEM.

"Seem," as used in an instruction on self-defense, requiring conviction if accused sought deceased at a time when the shooting did not seem to defendant to be necessary in order to protect himself, is synonymous with the word "appear," and not erroneous. *Jones v. Commonwealth* (Ky.) 46 S. W. 217, 218.

#### SEEM BEST.

A will giving a share of testator's real and personal property to a daughter, for the exclusive use of herself and her children, free from the debts and control of her husband, and to secure the same to their unimpaired enjoyment, giving the same to his sons, with full authority to apply the property "as to them shall seem best" for their exclusive benefit during the daughter's life, means according to their discretion. So long as they continue to use the fund for the benefit of their sister and her children, it is for them to apply it according to their judgment, and not as may seem best to their sister. *Leavitt v. Beirne*, 21 Conn. 1, 10.

A will providing that executors shall sell lands as it "may seem best" to them means that they are to exercise a discretion in making the sale; that is, the words confer a personal trust and confidence in the ex-

ecutors, which does not devolve upon the administrator with the will annexed. *Naundorf v. Schumann*, 2 Atl. 609, 610, 41 N. J. Eq. (14 Stew.) 14.

## SEEN.

The word "Seen," written by the drawee on a bill, is *prima facie* a complete acceptance by the law merchant. *Spear v. Pratt* (N. Y.) 2 Hill, 582, 38 Am. Dec. 600.

Where the acceptance of a bill of exchange is in writing, the words "Accepted," "Seen," or "Presented," written on the bill or on any other paper relating to the transaction, will amount to an acceptance. *Barnet v. Smith*, 30 N. H. 256, 266, 64 Am. Dec. 290.

The authorities require very little to make out an acceptance. Anything written by the drawee indicating an intent to accept is sufficient. To say "Accepted," or "Honored," or "Seen," is sufficient, even though no signature is appended. *Peterson v. Hubbard*, 28 Mich. 197, 199.

## SEINE.

A seine is defined by Webster as a large net, one edge of which is provided with sinkers and the other with floats, which hangs vertically in the water, and, when its ends are brought together or drawn ashore, incloses the fish. It is adapted solely to such use, and such use may be restricted, even though it may be made of harmless material. *State v. Lewis*, 33 N. E. 1024, 1025, 134 Ind. 250, 20 L. R. A. 52.

A net for meshing mackerel or porgies of not more than 100 meshes in depth, and a net for meshing herring of not more than 170 meshes in depth, shall not be deemed a seine. Rev. St. Me. 1883, p. 373, c. 40, § 17.

The term "seine," when used in the article regulating the catching of salmon, is intended to cover all forms of nets known as seines, purse seines or purse nets, trawls, beam trawls, stow nets, draw nets, bag nets, drag nets, drift nets, and dredge nets. *Ballinger's Ann. Codes & St. Wash.* 1897, § 3361.

## SEISED.

See "Covenant to Stand Seised."

The word "seised," in a conveyance, does not confine the description to tangible property. Seisin, as was very properly decided in *Van Rensselaer v. Poucher* (N. Y.) 5 Denio, 35, has reference to the estate, and not to the thing in which the estate exists. *Hunter v. Hunter* (N. Y.) 17 Barb. 25, 77.

The rightful owner of land which is not in the actual adverse possession of another is "seised," within the meaning of Code Civ. Proc. § 112, providing that an action for real estate shall not be maintained, unless it appears that the plaintiff, his ancestor or grantor, was seised or possessed of the premises within 10 years. *Balch v. Smith*, 30 Pac. 648, 649, 4 Wash. 497.

A person who purchases lands at a sheriff's sale under judgment and execution, and receives the sheriff's certificate, and dies while the time for redemption is running, dies seised of the premises, within the meaning of the statutes of New York concerning escheats. *Englishbe v. Helmuth*, 3 N. Y. (3 Comst.) 294, 300.

### As having.

The word "seised," as used in Gen. St. c. 171, § 1, giving the right of seisin only to persons who are seised, is evidently used in the broad sense of "having," which is a word used in the old English statutes of wills, under which it has been held that every descendible interest of which the testator has not been disseised is devisable. *Bailey v. Hopkin*, 12 R. I. 560, 569; *Loring v. Arnold*, 8 Atl. 335, 336, 15 R. I. 428.

### Fee imported.

The word "seised" imports a fee, when used in a petition for partition. *Lucet v. Beekman* (N. Y.) 2 Caines, 385.

The word "seised," as relating to a mine or claim, means something different from simple possession of a claim, or a holding of it in accordance with the laws and customs of miners. It means, as it would naturally import, an ownership in fee; for this is the only ownership known to the law. *South End Min. Co. v. Tinney*, 35 Pac. 89, 94, 22 Nev. 19.

The word "seised" is applicable only to freeholds, and the term does not embrace copyholds and terms of years. *Warner v. Sprigg*, 62 Md. 14, 21.

### Legal estate imported.

Rev. Code, c. 87, § 1, gives dower when the husband shall die "seised of an estate of inheritance." Held, that the term "seised" is used in its common-law sense, as applicable to legal estates only. *Cornog v. Cornog*, 3 Del. Ch. 407, 415.

The word "seised" will not apply to an equitable title, which is really the right to have a title, and not the title itself; and a title to land, amounting only to a trust by implication, not arising by deed nor established by any previous decree, is not a seisin of a freehold estate, within Rev. Laws, 35, § 1, providing that every person seised of a freehold estate of the value of £50, etc., shall

obtain a legal settlement in the township in which it is situated. *Tewksbury Tp. v. Readington Tp.*, 8 N. J. Law (3 Halst.) 319, 323.

#### As owning.

"Seised" is equivalent to the word "owning" in a statute providing that any real estate of which an infant is seised may be sold by order of court upon petition of guardian or next friend. *Dodge v. Stevens*, 12 N. E. 759, 762, 105 N. Y. 585.

#### As possessed.

The term "seised" is equivalent to the term "possessed." *Northern Pac. R. Co. v. Cannon* (U. S.) 46 Fed. 224, 232.

The title of the owner of a freehold estate is described by the word "seisin," or "seisin in fee"; yet in a proper legal sense the holder of the legal title is not "seised" until he is fully invested with possession, actual or constructive. When there is no adverse possession, the title draws to it the possession. There can be but one actual seisin, and this necessarily includes possession; and hence an actual possession in hostility to the true owner works a disseisin. Thus, in a statute limiting the time for the commencement of actions to recover real property, unless the plaintiff was seised or possessed of the premises within a certain time, the term "seised" is not used in contradistinction to "possessed," so as to admit of an interpretation that the legal title or ownership only would be sufficient to prevent the statute running as against the true owner, though a stranger be in the actual occupancy—"pedis possessione"—of the land in dispute. *Seymour v. Carll*, 16 N. W. 495, 31 Minn. 81.

## SEISIN.

See "Actual Seisin"; "Covenant of Seisin."

#### Beneficial interest required.

"Seisin," as used in the statement that the seisin of the husband is an essential to a right of dower, means a seisin accompanied by a beneficial interest. A seisin for an instant is not sufficient, as when the same act that gives the estate to the husband conveys it out of him, or when the husband takes a conveyance in fee and at the same time executes a mortgage to the grantor or to a third person to secure the purchase money in whole or in part; nor does dower attach to the wife of a vendee, the purchase money not being paid, nor the vendor's lien discharged. *McMahon v. Kimball* (Ind.) 3 Blackf. 1, 8. See, also, *Wallace v. Salsby*, 42 N. J. Law, 1, 7.

#### Freehold imported.

The word "seisin" imports a freehold estate, either for life or in fee. *Clay v. City of St. Albans*, 27 S. E. 368, 43 W. Va. 539, 64 Am. St. Rep. 883.

The term "seisin" has reference to the estate of the person seised, and not to the thing in which such estate exists. It is applicable to freehold estates only, for a person is said to be possessed, not seised, of any less estate. The seisin is of the estate, and according to its quality and quantity. *Van Rensselaer v. Poucher* (N. Y.) 5 Denio, 35, 41.

Seisin of land is more than possession, and it means the possession of at least a freehold. *George v. Fisk*, 32 N. H. 32, 46.

Actual seisin means possession of the freehold by *pedis positio* of one's self or one's tenant or agent, or by construction of law, as in case of the commonwealth's grant, a conveyance under the statute of uses, or a grant or devise, where there is no adverse occupancy. *Carpenter v. Garrett*, 75 Va. 129, 135.

"Seisin" does not mean the same thing as "possession." It does mean possession, but it is a possession of a freehold estate, such as by the common law is created by livery of seisin. In a suit for obstructing a canal, plaintiff declared that he was seised and possessed of a tract of land to which the right of drainage through the canal was appurtenant. At the trial he proved no title, but only his possession. It was held that the proof was sufficient, plaintiff's possession being presumptive evidence of such title as would sustain the action; for one proved to be in the actual possession of land to which an easement is attached has the right to maintain an action for disturbing him in the enjoyment of it. *Ferguson v. Witsell* (S. C.) 5 Rich. Law, 280, 284, 57 Am. Dec. 744.

The word "seisin," in connection with Acts 1868-69, by which every married woman, upon the death of her husband intestate, or in case she shall dissent from his will, shall be entitled to an estate for her life in one-third in value of all the lands, etc., whereof her husband was seised and possessed at any time during coverture, has a technical meaning. It is either a seisin in deed or a seisin in law. The former is where there is an actual possession of a freehold estate; the latter, where there is a right to an immediate possession or enjoyment of a freehold estate. Seisin only applies to freehold estates. There is no such thing as a seisin of a remainder under a freehold estate, because the remainderman has no right to the possession or enjoyment of the land until the termination of the particular estate. *Houston v. Smith*, 88 N. C. 312, 313.

**As ownership.**

"Seisin" means merely ownership, and a distinction between seisin in deed and seisin in law is not known in practice. *Whitehead v. Foley*, 28 Tex. 268, 283 (citing *Bush v. Bradley* [Conn.] 4 Day, 305; *Kennebeck Purchase v. Springer*, 4 Mass. 416, 3 Am. Dec. 227; *Horton v. Crawford*, 10 Tex. 388).

Seisin was originally the completion of the feudal investiture. In American jurisprudence it means, generally, ownership. The covenant of seisin and the covenant of right to convey are synonymous. *McNitt v. Turner*, 83 U. S. (16 Wall.) 352, 361, 21 L. Ed. 341.

"Seisin" and "ownership" as to corporeal hereditaments, in the common-law sense of the term, mean practically the same thing. Mere occupancy does not constitute seisin in the legal sense of that term. *Ft. Dearborn Lodge, I. O. O. F., v. Klein*, 3 N. E. 272, 273, 115 Ill. 177, 56 Am. Rep. 133.

Lord Coke says seisin is common, as well to the English as French, and signifies in the common law possession. It may be either a seisin in law or a seisin in fact. Without adverting to what constituted, in the ancient law, a seisin in law, as contradistinguished from a seisin in deed, it is sufficient to say that for centuries the language of the law has been that a reversioner is seised of the reversion, although dependent on an estate for life. My opinion is that the word "seised," used in all these acts relating to reversions and remainders, has the signification belonging to it in common parlance, and that it is equivalent to "owning"; and "seisin" is equivalent to "ownership." *Cook v. Hammond* (U. S.) 6 Fed. Cas. 399, 406.

**As possession.**

"Seisin" at common law signifies possession. *Jenkins v. Fahey* (N. Y.) 11 Hun, 351, 353.

The term "seisin" means possession. *Northern Pac. R. Co. v. Cannon* (U. S.) 46 Fed. 224, 232.

"Seisin" and "possession" are synonymous, meaning that possession which is held under claim of title. *Woolfolk v. Buckner*, 55 S. W. 168, 169, 67 Ark. 411.

Coke says that "seisin" signifies, in the common law, possession. Seisin, then, is only possession. At common law a judgment in a writ of entry did not vest in the demandant seisin or actual possession until it was executed, but after judgment in his favor in a writ of entry the demandant might enter. A common recovery, duly suffered, though executed only by an entry of the recoverer without a writ of seisin, is a

good bar to an estate tail. *Frost v. Cloutman*, 7 N. H. 9, 15, 26 Am. Dec. 723.

"Seisin" may be defined to be a possession of land under a claim, either express or implied by law, of an estate amounting at least to a freehold. *Altschul v. O'Neill*, 58 Pac. 95, 96, 35 Or. 202 (citing *Towle v. Ayer*, 8 N. H. 57).

In this country, where titles to land pass by deeds, and not by livery, the term "seisin" does not necessarily imply possession; but there may be a constructive seisin, which is only the right to the possession. *McGuire v. Cook*, 13 Ark. (8 Eng.) 448, 459 (citing 4 Kent, Comm. 414).

"Seisin" means possession with the intention of asserting a claim to a freehold estate in the premises. *Ft. Dearborn Lodge, I. O. O. F., v. Klein*, 3 N. E. 272, 273, 115 Ill. 177, 56 Am. Rep. 133.

Under our law the word "seisin" has no accurately defined technical meaning. At common law it imported a feudal investiture of title by actual possession. With us it has the force of possession under some legal title or right to hold. *Ford v. Garner's Adm'r*, 49 Ala. 601, 604.

According to the modern authorities there seems to be no legal difference between the words "seisin" and "possession," although there is a difference between the words "disseisin" and "dispossession." *Slater v. Rawson*, 47 Mass. (6 Metc.) 439, 444.

A seisin in the sense of the ancient law was the completion of the feudal investiture, by which the tenant was admitted into the feud and performed the rights of homage and fealty. A seisin is now understood to be possession with intent on the part of him who holds it to claim a freehold. *Upchurch v. Anderson*, 62 Tenn. (3 Baxt.) 410, 411.

Seisin signifies at common law possession; and he who enters under a deed which purports to convey to him a freehold or any other color of title to such an estate is presumed to enter according to his deed or other title, and his possession is seisin. He who enters without color of title, and turns the owner out of possession or forcibly holds him out, has a possession which amounts to seisin. Seisin, then, may be defined to be possession of land under a claim, either express or implied by law, of an estate amounting at least to a freehold. *Towle v. Ayer*, 8 N. H. 57, 59.

Seisin, in its technical sense, is actual or constructive possession under a perfect legal title, and includes as an essential element an actual entry also. *McMillan's Heirs v. Hutcheson*, 67 Ky. (4 Bush) 611, 613.

The word "seisin," in its primary sense, means possession, yet frequently has an en-

larged signification, meaning any present ownership of a freehold estate. Where a widow, to whom her husband had devised a life estate in a homestead, on the death, without child, of the wife, or issue of her son J., to whom the husband had devised the residue of the estate, which included the remainders in fee after the life estates he had thus devised, released to one of her three remaining children "all the estate for life of the party of the first part in and to all the undivided third part belonging to the party of the second part to all the estate of which J. died seised in his demesne as of fee" the word "seised" was used in its strict sense, and there was no intention to grant any more right to disturb her possession of the homestead than J. had in his lifetime. *Deshong v. Deshong*, 40 Atl. 402, 186 Pa. 227, 65 Am. St. Rep. 855.

"Seisin" denotes ordinarily a possession in fact by one having or claiming a freehold interest, which is known as a "seisin in deed," or a right of immediate possession, which is known as "seisin in law." There may be a constructive seisin, the equivalent of a seisin in deed. A remainderman, when the particular estate is a freehold, is not "seised," within this limited definition of the term; for he is not in possession and has no right of possession. *Jenkins v. Fahey*, 73 N. Y. 355, 362.

The term "seisin," in its primitive and vulgar acceptation, means the corporeal or visible possession. *Rickey v. Hillman*, 7 N. J. Law (2 Halst.) 180, 187.

#### Legal title or estate imported.

"Seisin" means, *ex vi termini*, the whole legal title, and nothing short of it will satisfy. A covenant of seisin is broken if the covenantor has not the possession or right of possession and the complete legal title, and the covenant is broken upon the execution of the deed, vesting in the grantee therein an immediate cause of action. *Allen v. Allen*, 51 N. W. 473, 48 Minn. 462.

The term "seisin" has always referred to a legal title; judgments and executions operating on legal estates only. *Disborough v. Outcalt*, 1 N. J. Eq. (Saxt.) 298, 305.

A husband cannot have curtesy in lands of which his wife had only a remainder expectant on a prior estate, which did not terminate during coverture. *Todd v. Oviatt*, 58 Conn. 174, 182, 20 Atl. 440, 7 L. R. A. 693.

#### Transitory seisin.

Any period of time, however short, is sufficient to constitute seisin as a foundation for dower, unless it be a "transitory seisin," as it is called, or a seisin for an instant, as where the same act which gives one an estate conveys it out of him, or where he takes

a conveyance in fee and at the same time mortgages the land to secure the purchase money in whole or in part to the grantor or some other person, in which case such transitory seisin does not constitute seisin within the meaning of the law of dower. *Griggs v. Smith*, 12 N. J. Law (7 Halst.) 22, 23.

#### SEISIN IN DEED.

"Seisin in deed" is actual possession. *Tate v. Jay*, 31 Ark. 576, 579.

"Seisin in deed" signifies actual possession of the freehold. *Jenkins v. Fahey* (N. Y.) 11 Hun, 351, 353.

"Seisin in deed" is sometimes called "actual seisin" or "seisin in fact," and it exists where a person is in the actual possession of a freehold estate in lands or corporeal tenements. *Vanderheyden v. Crandall* (N. Y.) 2 Denio, 9, 21.

If the grantor is in the exclusive possession of the land at the time of the conveyance, claiming a fee adverse to the owner, although he was in by his own disseisin, his covenant of seisin is not broken until the purchaser or those claiming under him are evicted by title paramount. He has a seisin in deed, as contradistinguished from a seisin in law, sufficient to protect him from liability under his covenant so long as those claiming under him may continue so seised. *Backus' Adm'rs v. McCoy*, 3 Ohio (3 Ham.) 211, 221, 17 Am. Dec. 585.

#### SEISIN IN FACT.

"To constitute seisin in fact there must be an actual possession of the land." *Savage v. Savage*, 23 Pac. 890, 891, 19 Or. 112, 20 Am. St. Rep. 795.

"Seisin in fact" is actual seisin, and means possession of the freehold by the possessor of one's self or one's tenant or agent, or by construction of law, as in the case of a commonwealth's grant, a conveyance under the statute of uses, or, doubtless, of grants or devises, where there is no actual adverse occupancy. *Seim v. O'Grady*, 24 S. E. 994, 995, 42 W. Va. 77.

#### SEISIN IN FEE.

In order that a man may become tenant by the curtesy, his wife must have been seised of the land in fee or in tail. This seisin means a seisin in deed, and not a seisin in law, and therefore a man shall not be tenant by the curtesy of a bare right, title, or use, or of a reversion or remainder expectant upon an estate of freehold, unless the particular estate be determined or ended during the coverture. *Stoddard v. Gibbs* (U. S.) 23 Fed. Cas. 128, 128.



**SEISIN IN LAW.**

"Seisin in law" is the right to immediate possession. *Tate v. Jay*, 31 Ark. 576, 579.

"Seisin in law" is a right to the immediate possession of land according to the nature of the estate. In ejectment plaintiff claimed as heir of the reversioner, who died before the termination of the particular estate on which the reversion depended, and defendant, as the surviving husband of the deceased reversioner, claimed the right to curtesy in the reversion; but it was held that defendant was not entitled to curtesy, as his deceased wife was not seised of the reversion either in fact or in law during coverture, and therefore the fee vested in plaintiff on the termination of the particular estate. *Martin v. Trall*, 142 Mo. 85, 95, 43 S. W. 655.

"Seisin in law" signifies a legal right to the possession of a freehold. *Jenkins v. Fahey* (N. Y.) 11 Hun, 351, 353.

The old doctrine of corporeal investiture has no force now, and a deed is a seisin in law. *Watkins v. Nugen*, 45 S. E. 262, 263, 118 Ga. 372.

In order to constitute a seisin in law there must be a right of immediate possession according to the nature of the interest, whether corporeal or incorporeal. *Savage v. Savage*, 23 Pac. 890, 891, 19 Or. 112, 20 Am. St. Rep. 795.

Seisin in law occurs where the law casts the freehold on a person. He has, before exercising any act of ownership over it, what is called a "seisin in law." Thus an heir, before entry, has but a seisin in law of lands which descend to him. *Vanderheyden v. Crandall* (N. Y.) 2 Denio, 9, 21.

"Seisin in law" is a right to the possession of the freehold, where there is no adverse occupancy thereof. *Carpenter v. Garrett*, 75 Va. 129, 135. Seisin in law exists in the heir after descent of lands upon him before actual entry by himself or his tenant. By virtue of a decree of confirmation of a judicial sale of vacant and unoccupied lots or lands the purchaser has, by construction of law, such possession as amounts to such seisin in fact as will entitle the husband of such purchaser to curtesy in such lots or land. *Seim v. O'Grady*, 24 S. E. 994, 995, 42 W. Va. 77.

**SEIZED.**

The addition of the word "seized" in an indictment for robbery, charging that defendant feloniously did seize, take, and carry away, etc., is a peculiarly appropriate substitute in an indictment for this offense for the word "steal," which is a mere repetition

of the words in the idea "feloniously take and carry away." *State v. Brown*, 18 S. E. 51, 52, 113 N. C. 645.

**SEIZED IN EXECUTION.**

Laws 1878, c. 608, § 4, provides that a judgment from another county than that in which land of the judgment debtor lay should be a lien on such land from the time the same was seized in execution. Held, that "seized in execution" meant rendered liable for the satisfaction of the execution by a valid levy; but it is not necessary that the officer make any actual seizure or take actual possession of the land. *Morgan v. Kinrey*, 38 Ohio St. 610, 614.

**SEIZING IN TRANSITU.**

"Seizing in transitu" is the exercise of a qualified right over the property of another, and exists only where the party entitled to exercise it has possession of the property. It is founded upon equitable principles. It cannot take place between vendor and vendee, where the property is paid for, or between consignor and consignee, where the property is sent to the consignee as factor merely, and not in the way of sale as already paid for, because in that case the property cannot be considered as subject in any degree to the control of the factor, or the factor as having any property in or right to the same until it comes into his actual possession. *Slater v. Gaillard* (S. C.) 3 Brev. 115, 129.

**SEIZURE.**

See "Constructive Seizure."

For violation of law as civil action or proceeding, see "Civil Action—Case—Suit—Etc."

The legal definition of the word "seizure" is the taking possession of property by an officer. *Carey v. German American Ins. Co.*, 54 N. W. 18, 20, 84 Wis. 80, 20 L. R. A. 267, 36 Am. St. Rep. 907.

"Seizure" is the act of taking possession of property of a person condemned by the judgment of a competent tribunal to pay a certain sum of money, by a sheriff or other officer lawfully authorized thereto by virtue of an execution, for the purpose of having such property sold according to law and to satisfy the judgment. *Goubeau v. New Orleans & N. R. Co.* (La.) 6 Rob. 345, 348.

"Seizure," as applied to a levy by a sheriff, means that he must make his levy in view of the goods, but he need not carry them away. *Appeal of Jaffray*, 101 Pa. 583, 591.

The word "seizure," in a statute providing that one who, without lawful authority,

seizes, inveigles, or kidnaps another, with intent to cause her to be securely confined or imprisoned in the state, or to be sent out of the state, etc., or detained against her will, is guilty of kidnapping, ordinarily employs actual force. *People v. De Leon*, 16 N. E. 46, 47, 109 N. Y. 226, 4 Am. St. Rep. 444.

To seize is to take hold of suddenly and forcibly; to take possession of by force. In law "seizure" is the act of taking possession by virtue of an execution or legal authority. *Bouv. Law Dict.* And a seizure by a marshal for a penalty is as much a seizure, both in the ordinary meaning of the word and in its legal sense, as a seizure by a revenue officer for the purpose of forfeiture. The word "seizure," used in Act Feb. 8, 1881, providing that no vessel shall be subject to seizure by force of the provisions of Rev. St. tit. 34, unless the owner or master was a consenting party to the illegal act, embraces seizures by the marshal, and the legal process for the enforcement of a penalty, pursuant to Rev. St. § 3088 [U. S. Comp. St. 1901, p. 2016], authorizing seizures of vessels subject to a penalty for violation of the revenue laws. *The Saratoga* (U. S.) 9 Fed. 322, 326.

A seizure is an assertion of title in the government, and the subsequent proceedings in court are proceedings to try the title so asserted. *The Missouri* (U. S.) 17 Fed. Cas. 479, 481.

#### **Capture distinguished.**

See "Capture."

#### **Taking possession required.**

In order to make a valid seizure of tangible property, it is necessary that the sheriff should take the property levied upon into actual possession. A sale under a fl. fa. of a promissory note, never in the actual possession of a sheriff, therefore, confers no title on the purchaser. *Fluker v. Bullard*, 2 La. Ann. 338.

"Seizure," as used in Act Cong. July 17, 1862, contemplating the seizure of property and forfeiture to the government, meant the taking of a thing into possession, the manner of which, whether actual or constructive, depended on the nature of the thing seized. As applied to subjects capable of manual delivery, the term means caption; the physical taking into custody. *Pelham v. Rose*, 76 U. S. (9 Wall.) 103, 106, 19 L. Ed. 602.

In order to make a legal and valid "seizure" of tangible property from which the seizing creditor may acquire a privilege on the thing seized, a sheriff should take the object seized into his possession; and the mere levying of an execution on property found in the hands of a debtor or of a third person, without showing that the sheriff took it into his actual possession, at least when

he levied the writ, is not sufficient to confer any right on the creditor. *Goubeau v. New Orleans & N. R. Co.* (La.) 6 Rob. 345, 348 (cited in *Simpson v. Allain* [La.] 7 Rob. 504).

To constitute a seizure, within the federal laws authorizing a seizure of vessels engaged in the slave trade, there must be an open, visible possession claimed and authority exercised under such seizure. The parties must understand that they are dispossessed, and that they are no longer at liberty to exercise any dominion on board of the ship. It is true that a superior physical force is not necessary to be employed, if there is a voluntary acquiescence in the seizure and dispossession. If the party, on notice, agrees to submit, and actually submits, to the command and control of the seizing officer, that is sufficient; for in such cases, as in cases of captures *jure belli*, a voluntary surrender of authority and an agreement to obey the captor supplies the place of actual force. *The Josefa Segunda*, 23 U. S. (10 Wheat.) 312, 326, 6 L. Ed. 329.

#### **In marine insurance.**

The word "seizure," in a policy of insurance, stipulating that the assurer "shall not be liable for any charges, damages, or loss which may arise in consequence of seizure or detention for or on account of illicit trade, or trade in articles contraband of war," does not except every seizure, but only such as are made for and on account of a particular trade. A seizure or detention which is a mere act of lawless violence, wholly unconnected with any illicit or contraband trade, is not within the terms or spirit of the exception; and as little is a seizure or detention not bona fide made upon a just suspicion of illicit or contraband trade, but the latter used as a mere pretext or color for an act of lawless violence. To bring a case, then, within the exception, the seizure or detention must be bona fide and upon a reasonable ground. If there has not been an actual illicit or contraband trade, there must at least be a well-founded suspicion of it, and a probable cause to impute guilt and justify further proceedings and inquiries. *Carrington v. Merchants' Ins. Co.*, 33 U. S. (8 Pet.) 495, 516, 8 L. Ed. 1021.

The word "seizure," in a policy issued in 1809, insuring a vessel against all risks, "except seizure in port," must be understood to mean any arbitrary seizure not foreseen by the parties, but which it was apprehended might grow out of the then disturbed and extraordinary state of things in Europe, for which the defendants were not willing to become answerable. *Barney v. Maryland Ins. Co.* (Md.) 5 Har. & J. 139, 141.

"Seizure," in a contract of insurance of a vessel, in a warranty against seizure, is always to be understood in a restricted and

limited sense, as signifying only the taking of a ship by the act of government or other public authority for a violation of the laws of trade, or of some rule or regulation instituted as a matter of municipal police, or in consequence of a state of war, and does not include a mutinous taking possession of the vessel by the mariners. *Greene v. Pacific Mut. Ins. Co.*, 91 Mass. (9 Allen) 217, 222.

## SEIZURE AND SALE.

See "Writ of Seizure and Sale."

## SELECT—SELECTION.

See "To be Selected."

The word "select," when used by a city mayor in appointing a person to an office, is equivalent to the word "appoint." *People v. Fitzsimmons*, 68 N. Y. 514, 519.

"Selected," as used in the caption of an indictment, which states that the grand jurors were selected, etc., is synonymous with "chosen." *Kruger v. State*, 1 Neb. 365, 369.

In Sess. Laws 1896, p. 213, § 11, providing that, if the debtor be the head of a family, there shall be a further exemption of a homestead, to be selected by the judgment debtor, "selected" is used in the sense of designation, appropriation, or choice. *Kimball v. Salisbury*, 56 Pac. 973, 975, 19 Utah, 161.

The use of the phrase "selected by the owner," in the Constitution, giving a homestead to a debtor, "to be selected by the owner thereof," shows that the debtor was not to be endowed with the house and lot on which he resided, but that he was to have a homestead upon any lands or town lots owned by him, wherever he might select it, and, after the selection has been made, occupancy is necessary to give it the character of a homestead. *Norris v. Kidd*, 28 Ark. 485, 491.

### Alternative implied.

"Selection" or "choice" means the power to determine between two or more. No selection or choice can be made when there is no alternative. *People v. Mosher*, 61 N. Y. Supp. 452, 454, 45 App. Div. 68.

The word "select" means to pick out or take from among a number. There can be no selection where there is nothing left. One may take the whole, but he cannot select the whole. So that an exemption law, providing an exemption of a certain amount, to be selected by the debtor, no express selection is necessary when the whole of his property only amounts to such sum. *Cole v. Green*, 21 Ill. (11 Peck) 104, 105.

The term "select and set apart," as used in Acts 1820, c. 11, providing that it shall be lawful for each individual against whom an execution may issue to select and set apart one farm horse and cow, etc., means the taking of one or more articles from other articles of a like character; but, where the party owned but one farm horse, it would be absurd to make the right of the defendant in the execution depend on his declaration to the officer that he claimed the benefit of the law. *State v. Haggard*, 20 Tenn. (1 Humph.) 390, 393.

"Select," as used in a law authorizing commissioners to select land to be condemned as a public park, implies choice. To choose signifies to take one thing rather than another. When we select, we choose. It is true that other lands than those designated by the commissioners could not have been taken, because it would have been in excess of the power; yet the commissioners might have refused to select. The law conferred an authority on them, to be exercised at their hazard and without regard to result. *Cook v. South Park Com'rs*, 61 Ill. 115, 119.

### Homestead.

The homestead law, exempting the homestead "to be selected" by the owner, does not restrict the creation of a homestead only when the debtor has property, other than that selected, which may be used to satisfy his debts. In *re Henkel* (U. S.) 11 Fed. Cas. 1124, 1126.

### Jurors.

The selection by the town clerk of grand jurors from the list of names under Gen. Laws, c. 227, § 21, providing that the clerk shall select grand jurors from the list of names in the order in which their names appear thereon, amounts practically to a mere notification of the requisite number of jurors named in the list that their services are required; that is to say, he has no power of selection, strictly so called, as he must take the names in the order in which they appear on the list. *State v. Fidler*, 49 Atl. 100, 101, 23 R. I. 41.

In the record in regard to the impaneling of the jury, that the jury "were drawn, selected, tried, and sworn in the manner required by law," the word "selected" imports that the jurors were freeholders; that is, that they were set apart from all other persons as required by law, which required them to be freeholders, and that legal qualification was an element in the act of selection will be assumed. *Ohio River R. Co. v. Blake*, 18 S. E. 957, 38 W. Va. 718.

### Swamp lands.

In Act Cong. March 3, 1857, providing that the selection of swamp and overflowed

lands granted to the several states be, and is hereby, approved, "selection" applies more naturally to the action of the grantee in reporting to the land department the lands which it claims, than to the action of the land officers in identifying from the field notes what are and what are not swamp and overflowed lands. *Michigan Land & Lumber Co. v. Rust*, 18 Sup. Ct. 208, 212, 168 U. S. 589, 42 L. Ed. 591.

## SELECTMEN.

As municipal officers, see "Municipal Officer."

"Selectmen" are independent public officers, whose duties are prescribed by law, and not by the municipality which elects them. As such officers, they are amenable to law for their conduct; but they are not agents or servants of the municipality, in any such sense as to make it liable for their defaults in the performance of their statutory duties, such as default in the performance of their duties imposed by Laws 1891, c. 60, § 16, requiring them to take certain specified steps toward the appraisal and payment of damages for sheep killed by dogs. *Felch v. Town of Weare*, 45 Atl. 591, 69 N. H. 617.

The word "selectmen" means the selectmen of the town or ward, or the mayor and aldermen of the city, to which the subject-matter to be acted upon belongs or in which it is situate. *Pub. St. N. H. 1901*, p. 64, c. 2, § 28; *Id.* p. 528, c. 27, § 2.

The word "selectmen" shall extend to and include the mayor and aldermen of cities. *V. S. 1894*, 19.

## SELF-DEFENSE.

See "Homicide in Self-Defense"; "Imperfect Right of Self-Defense"; "Necessary Self-Defense"; "Weapon of Self-Defense."

Perfect right of self-defense, see "Perfect Right."

"Self-defense" is defined in 3 Greenl. Ev. (14th Ed.) § 116, as follows: "Where one is assaulted in a sudden affray, and in the defense of his person, where certain and immediate suffering would be the consequence of waiting for the assistance of the law, and there was no other probable means of escape, he kills the assailant." *State v. Turner*, 29 S. C. 34, 44, 6 S. E. 891, 13 Am. St. Rep. 706.

To make out a case of self-defense four things are necessary: First, the party must be without fault in bringing on the difficulty. In the second place, he must believe at the time that he is in such immediate danger of

losing his own life, or of receiving serious bodily harm, as renders it necessary to take the life of his assailant to save his own life or to prevent serious bodily harm. In the third place, the circumstances must have been such as to have warranted such belief in the mind of a man of ordinary reason and firmness. Fourth, there must have been a necessity to take life, of which necessity the jury are the judges. *State v. Symmes*, 19 S. E. 16, 19, 40 S. C. 383.

The essential elements of "self-defense" are: (1) The defendant must be free from fault; that is, he must not say or do anything for the purpose of provoking a difficulty, nor must he be disregarding of the consequence in this respect of any wrongful word or act. (2) There must be a present impending peril to life or of great bodily harm, either real or so apparent as to create the bona fide belief of an existing necessity. (3) There must be no convenient or reasonable mode of escape by retreat, or declining the combat. *Jackson v. State*, 77 Ala. 18, 25 (citing *Storey v. State*, 71 Ala. 329; *De Arman v. State*, *Id.* 351; *Tesney v. State*, 77 Ala. 33).

The rule as to self-defense is the same in civil and criminal actions. The rule is this: An act otherwise criminal is justifiable when it is done to protect the person committing it, or one whom he is bound to protect, from imminent personal injury; the act appearing reasonably necessary to prevent the injury, and nothing more being done than is reasonably necessary. *Germolus v. Sausser*, 85 N. W. 946, 947, 83 Minn. 141.

It is said that the right of self-defense may be divided into two general classes, to wit: perfect and imperfect right of self-defense. A perfect right of self-defense can only be obtained where the party pleading it acted from necessity and was wholly free from wrong or blame. If, however, he was in the wrong, if he was himself violating or in the act of violating the law, but on account of his own wrong was placed in a situation wherein it became necessary for him to defend himself against attack superinduced or created by his own wrong, then the law makes it his right of self-defense, and regulates it according to the magnitude of his own wrong. Such a state of the case may be said to illustrate and determine what in law would be denominated an imperfect right of self-defense. *Wallace v. United States*, 16 Sup. Ct. 859, 863, 162 U. S. 466, 40 L. Ed. 1039.

Self-defense is the natural and inalienable right of every human being, and is to be held sacred and inviolable by any law of human or civil institution, and should not be limited or cut off by the doctrine of provoking a difficulty. Before a defendant can be deprived of his perfect right of self-de-

fense, there must, then, be testimony showing that he did some act to produce the occasion and bring on a conflict. The act which cuts off self-defense must be a hostile one, reasonably calculated to produce the occasion or bring on the difficulty, and it must be so intended by the defendant. *McCandless v. State*, 57 S. W. 672, 673, 42 Tex. Cr. R. 58.

The plea of self-defense rests upon the idea of legal necessity; that is, such a necessity as in the eye of the law excuses one for so grave an act as the taking of a human life. *State v. Sullivan*, 21 S. E. 4, 8, 43 S. C. 205 (citing *State v. Wyse*, 33 S. C. 582, 12 S. E. 556).

Self-defense is a creature of necessity, and a killing in self-defense must be a killing from necessity, and not from malice and with premeditation. *De Arman v. State*, 77 Ala. 10, 16.

In order to excuse a homicide on the ground of self-defense, it must clearly appear that it was a necessary act, in order to avoid destruction or some severe calamity. *State v. Wells*, 1 N. J. Law (Coxe) 424, 425, 1 Am. Dec. 211.

"If the individual assaulted be himself without fault, and reasonably apprehends death or serious bodily harm to himself, unless he kills the assailant, the killing is justifiable." *Reed v. State*, 11 Tex. App. 509, 517, 518, 40 Am. Rep. 795 (citing 1 Bish. Cr. Law, § 865).

In order to render a homicide excusable on the ground of self-defense, it is incumbent on the accused to show that he killed his adversary through mere necessity in order to avoid immediate death; and hence a slight blow, not threatening death or great bodily harm, does not excuse a homicide. *State v. Tackett*, 8 N. C. 210, 218.

Where defendant, on trial for murder, was placed in a position at the time of the killing in which his life was imperiled by the deceased, and he slew him without having any notice of his official character, and the killing was apparently necessary to save his own life or to prevent his receiving a great bodily injury, the killing of deceased was in self-defense; and it is immaterial that deceased was legally seeking to arrest the defendant, if the defendant had no notice of the fact, or reasonable grounds to know that he was an offender. *Bruce v. State*, 57 S. W. 1103, 1104, 68 Ark. 310.

The law, out of tenderness for human life and frailties of human nature, will not permit the taking of it to repel a mere trespass, or even to save life, where the assault is provoked; but a true man, who is without fault, is not obliged to fly from an assailant, who by violence or surprise mal-

iciously seeks to take his life or do him enormous bodily harm. *Kirk v. Territory*, 60 Pac. 797, 805, 10 Okl. 46 (citing *Erwin v. State*, 29 Ohio St. 186, 193, 199, 23 Am. Rep. 733, approved in *Beard v. United States*, 158 U. S. 550, 15 Sup. Ct. 962, 39 L. Ed. 1086).

#### Apprehension of danger.

"Self-defense" does not depend upon the slayer's correct apprehension of apparent danger. A deceased party may, under such circumstances, draw an unloaded pistol. The accused, believing his life in danger, shoots and kills. Yet, as a matter of fact, he may have been in no danger, for the pistol was unloaded. If defendant believed, under such circumstances, that his life was in danger, or the appearances were such to him, he would have the right to shoot, whether his apprehension was correct or not, and be justified under the law of self-defense. *Lankster v. State*, 59 S. W. 888, 889, 42 Tex. Cr. R. 360.

Before one can justify the taking of life in self-defense he must show that there were reasonable grounds for believing that he was in great peril, and that the killing was necessary for his escape from the peril, and that no other safe means of escape was open to him. *People v. Constantino*, 47 N. E. 37, 39, 153 N. Y. 24.

Self-defense "is simply the resistance of force, or seriously threatened force, actually impending or reasonably apparent, by force sufficient to repel the actual or apparent danger, and no more." *Springfield v. State*, 11 South. 250, 253, 96 Ala. 81, 38 Am. St. Rep. 85.

The doctrine of self-defense may be thus defined: Where a person, being without fault and in a place where he has a right to be so far as his assailant is concerned, is violently assaulted, he may, without retreating, repel force by force; and he need not believe that his safety requires him to kill his adversary, in order to give him right to make use of force for that purpose. When, from the acts of his assailant, he believes, and has reasonable ground to believe, that he is in danger of losing his life or receiving great bodily harm from his adversary, the right to defend himself from such danger or apprehended danger may be exercised by him, and he may use it to any extent which is reasonably necessary; and if his assailant is killed as a result from the reasonable defense of himself he is excusable. *Smith v. State*, 41 N. E. 595, 597, 142 Ind. 288.

"When a man has a reasonable expectation or fear of death or serious bodily harm from an unlawful attack made upon him, he may kill upon the very spur of the moment, and the law will justify the homicide, without requiring him to show that by ad-

ditional care the killing could not have been avoided with safety to himself." *Jordan v. State*, 11 Tex. App. 435, 439, 449.

In all cases of self-defense it must appear reasonable by the act, or by words coupled with the act, that it was the purpose and intention of the person against whose acts it is pleaded to commit some offense, and the right of self-defense must have been exercised while the person injured was in the act of committing the offense, or after some act done by him showing evidently an intention to commit such offense. If the right of self-defense is claimed against an attack upon the person of an individual, or in protection of his property, it must appear that all other means were resorted to for prevention of the injury, and the party acting on his defense must show that the other was in the very act of making such unlawful and violent attack. The action of the party claimed to have been defended against must be such as produced a reasonable expectation that such party was about to inflict an injury. A party is allowed to act, and to act promptly, upon his apprehensions and expectations, but only so when he can show from the acts, words, and conduct of the other party that his expectations and apprehensions are reasonable. *May v. State*, 6 Tex. App. 191, 192.

"Self-defense" or killing another in defense of one's own person, is, mostly, where one is suddenly assailed by another without any fault on his part, and under such circumstances as to give him just and reasonable ground to believe that he is in danger of losing his life or suffering some great bodily harm, or, as oftentimes expressed, to indicate the degree of such harm "enormous bodily harm." *State v. Walker* (Del.) 33 Atl. 227, 228, 9 Houst. 464.

If one is in danger of great bodily harm from another, or thinks himself so, and kills such other, it will be a killing in self-defense. *Grainger v. State*, 13 Tenn. (5 Yerg.) 459, 462, 26 Am. Dec. 278.

In order to make out a case of self-defense, defendant must show that he was without fault in bringing about the necessity for the killing; that he believed himself in such imminent danger of losing his own life, or of sustaining serious bodily harm, that there was necessity for him to take life in order to avoid the injury; and that the facts and circumstances surrounding defendant were such as to justify a man of ordinary discretion and reason, situated as defendant was at the time, in concluding that his life was in danger. *State v. Hutto*, 45 S. E. 13, 14, 66 S. C. 449.

The right of self-defense is based on the broad ground of necessity, which is evidenced by a real or apparent exhibition of

force, superinducing a reasonable apprehension of imminent danger, which justifies the use of force to repel force; but without such necessity the right to resort thereto does not exist. *State v. McCann* (Or.) 72 Pac. 137, 139, 43 Or. 155 (citing *State v. Moray*, 25 Or. 241, 35 Pac. 655, 36 Pac. 573).

Under the statute, to constitute self-defense, the killing must take place while the person killed was in the act of committing the offense, or after some act done by him showing evidently an intent to commit such offense. Of course, the latter portion of this clause does not mean that one may kill his assailant after some act done by him showing an intent to kill, and after all danger has ceased; but it does mean that he can act so long as from his standpoint the danger is imminent, though the act which demonstrates that imminency has transpired. *Orta v. State*, 71 S. W. 755, 44 Tex. Cr. R. 393.

#### Duty to retreat.

A man may defend himself by taking the life of his assailant, if necessary to preserve his own life, and is justified in so doing, and he may defend himself, if he is attacked, against serious bodily injury, and, when attacked, he is not bound to retreat, but may stand and defend himself. *Harris v. State*, 8 Tex. App. 90, 110.

If an assault is made upon a man with an attempt to commit a felony upon him, he may resist, so far as it is necessary to resist, the assailant, even if he must take the assailant's life. But this has a limitation. If he can resist the assault, and free himself, without taking life, and kills the assailant without necessity, he is not excusable. If mere heat of blood impels him to take life in such case, he is guilty of manslaughter. To reduce homicide in self-defense to excusable homicide, it must be shown that the slayer was closely pressed by the other party, and retreated as far as he conveniently or safely could, in good faith, with the honest intent to avoid the violence of the assault. Where one, without fault himself, is attacked by another, in such a manner or under such circumstances as to furnish reasonable grounds for apprehending a design to take away his life, or to do him some great bodily harm, and there is reasonable ground for believing the danger imminent that such design will be accomplished, and the person assaulted has reasonable ground to believe, and does believe, such danger is imminent, he may act upon such appearances, and, without retreating, kill his assailant, if he has reasonable grounds to believe, and does believe, that such killing is necessary in order to avoid the apparent danger; and the killing under such circumstances is excusable, although it may afterwards turn out that the appearances were false, and

that there was in fact neither design to do him some serious injury, nor danger that it would be done. But of all this the jury must judge, from all the evidence and circumstances of the case. *State v. Zeigler*, 21 S. E. 763, 767, 40 W. Va. 593.

Gantt's Dig. § 1825, stating what constitutes self-defense, said: "It must appear that the danger was so urgent and pressing that, in order to save his own life or to prevent his receiving great bodily injury, the killing of the other was necessary; and it must appear, also, that the person killed was the assailant, or that the slayer had really and in good faith endeavored to decline any further contest before the mortal injury was given." It is thus seen that a necessity for taking the life of another is the controlling circumstance which justifies or excuses the act, and before resorting to such extremity the party must employ all means within his power, consistent with his safety, to avoid the danger and avert such necessity. *Levellis v. State*, 32 Ark. 585, 590.

The doctrine of retreat is a part of the law of self-defense. Self-defense is one of the rights which the law of necessity gives to a man. It is founded and based on necessity—on the inability of the executive machinery of the law to be always with the citizen to protect him from the aggression of others. Self-defense is a legal right, and not an excuse for a homicide, and can be exercised only where he who employs it is himself in the right at the time or the moment of its use. *Hays v. Territory (Okl.)* 52 Pac. 950, 952.

#### Defense of father by son.

The defense of a father by his son, or the assistance of the father by the son in his self-defense, technically is "self-defense," and is treated as self-defense, and called self-defense by the law writers. *State v. Prater*, 43 S. E. 230, 240, 52 W. Va. 132 (citing *Whart. Cr. Law*, 1024; 4 Bl. Comm. 186).

## SELF-DESTRUCTION.

A provision in a policy of life insurance that "self-destruction" is a risk not assumed by the company under the contract means suicide, and does not include accidental self-killing. *Union Mut. Life Ins. Co. v. Payne* (U. S.) 105 Fed. 172, 178, 45 C. C. A. 193.

"Self destruction," as used in a life policy providing that self-destruction of the assured in any form shall avoid the policy, is not a more comprehensive term than "suicide," so as to include an insane killing of one's self, but all the terms, "dying by his own hand," "self-killing," "self-slaughter," "suicide," and "self-destruction" are synonymous, and cannot be imputed to one who,

by reason of insanity, takes his own life; the theory being, apparently, that during the insane condition he is not himself. *Connecticut Mut. Life Ins. Co. v. Akens*, 14 S. Ct. 155, 157, 150 U. S. 468, 37 L. Ed. 1148.

"'Self-destruction,' 'suicide,' and 'death by his own hand' are synonymous terms, and are defined to be the voluntary destruction of one's self. The involuntary destruction of one's self is not self-destruction. Self-destruction by a fellow being bereft of reason can with no more propriety be ascribed to his own hand than to the deadly instrument that may have been used for the purpose, and whether it was by drowning, poisoning, or hanging, or in any other manner, was no more his act, in the sense of the law, than if he had been impelled by irresistible physical power." Thus, an exception in a life policy releasing the insurer from liability in case the insured comes to his death by self-destruction, does not include self-destruction while the insured is insane. *New Home Life Ass'n of Illinois v. Hagler*, 29 Ill. App. 437, 439.

The words, "self-destruction, felonious or otherwise," in a life policy conditioned that the insurer shall not be liable if insured died by self-destruction, felonious or otherwise, has the same meaning as "self-destruction, sane or insane," and relieves the insurer from liability, although insured takes his life while insane. *Riley v. Hartford Life & Annuity Ins. Co. (U. S.)* 25 Fed. 315, 316.

The words "self-destruction, sane or insane," as used in a provision of a life insurance policy to the effect that self-destruction, sane or insane, is a risk not assumed, must be given effect in accordance with its plain meaning; and there can be no recovery under such policy where the insured took his own life other than accidentally, whatever may have been his mental condition. *Clarke v. Equitable Life Assur. Soc. (U. S.)* 118 Fed. 374, 378, 55 C. C. A. 200.

## SELF-EXECUTING.

A statutory provision is said to be self-executing "when it merely enacts principles, and without laying down rules by means of which these principles may be given the force of law." *Reeves v. Anderson*, 42 Pac. 625, 627, 13 Wash. 17.

## SELF-GOVERNMENT.

"Self-government" means everything for the people and by the people, considered as the totality of organic institutions, constantly evolving in their character as all organic life is; but not a dictatorial multitude. Dictating is the rule of the army, not of liberty; it is the destruction of individuality. People

v. Hurlbut, 24 Mich. 44, 98, 99, 9 Am. Rep. 103 (citing Lieber, Civil Liberty and Self-Government, c. 21).

## SELF-INFLICTED INJURIES.

"Self-inflicted injuries," as used in an accident policy providing that the insurer shall not be liable to the insured for self-inflicted injuries means injuries which are self-inflicted by the insured when he is capable of rational voluntary action, and not when he is insane. *Crandal v. Accident Ins. Co. of North America* (U. S.) 27 Fed. 40, 44; *Accident Ins. Co. v. Crandal*, 7 Sup. Ct. 685, 687, 120 U. S. 527, 30 L. Ed. 740; *Bacon v. United States Mut. Acc. Ass'n* (N. Y.) 44 Hun, 599, 604.

## SELF-SERVING.

Self-serving statements are usually made after the main fact has transpired; but this alone will not cause their rejection as not forming a part of the res gestæ if such statements are so connected with the main act as to elucidate the animus of such act, and to show that such statements were the actual concomitants or emanations of such main and controverted act. *State v. Lockett*, 68 S. W. 563, 565, 168 Mo. 480.

## SELL.

See "Agreement to Sell or Convey"; "Grant, Bargain, and Sell."

See, also, "Sale."

As authority to pledge, see "Buy."

To sell a thing is to part with the ownership thereof to the buyer for a compensation. *State v. Peo* (Del.) 42 Atl. 622, 623, 1 Pennewill, 525.

"Ordinarily, power to sell implies the ownership of the goods on the part of the person by whom they are sold or offered for sale. There are some exceptions, however, as in the case of a commission merchant, who is expressly authorized to sell personal property left with him or consigned to him for sale." *White v. Commonwealth*, 78 Va. 484, 485.

The words "sell and convey" in a deed give rise to no implied warranty. *Dorsey v. Jackman* (Pa.) 1 Serg. & R. 42, 50, 7 Am. Dec. 611.

The term "to sell," used in the employment of an ordinary real estate broker to sell a parcel of land, usually means no more than to negotiate a sale by finding a purchaser upon satisfactory terms. *Keim v. O'Reilly*, 34 Atl. 1073, 1075, 54 N. J. Eq. 418.

The authority vested in a real estate broker to sell property does not authorize

him to conclude and execute a power of sale, but simply empowers him to find a purchaser, leaving the terms and conditions of the sale subject to negotiation between his principal and such purchaser. *York v. Nash*, 71 Pac. 59, 62, 42 Or. 321 (citing *Armstrong v. Lowe*, 76 Cal. 616, 18 Pac. 758; *Lindley v. Keim*, 54 N. J. Eq. 418, 34 Atl. 1073).

A contract giving a real estate agent "authority to sell" land means only authority to find a purchaser, whether the authority be orally or by written request, and he is not authorized to enter into a contract binding upon his principal. *Carstens v. McReavy*, 25 Pac. 471, 472, 1 Wash. St. 359.

"Authority to sell land" does not, by the force of the term or by its general acceptance, give authority to sign the vendor's name to a contract for its sale. *Morris v. Ruddy*, 20 N. J. Eq. (5 C. E. Green) 236, 238.

A power of attorney to sell any and all real estate confers the power to contract to sell and to convey or transfer the property sold. *Hemstreet v. Burdick*, 90 Ill. 444, 449.

Where a will gives the trustees "authority to sell" land, it includes authority to convey. *Hackett v. Hackett*, 40 Atl. 434, 435, 67 N. H. 424.

An express power to sell does not include the power to mortgage, and, where land was devised to a widow for her use and benefit for life, a mortgage thereon given by her to pay for valuable improvements made on it for her benefit was an equitable incumbrance, notwithstanding that the will gave her no express power to mortgage. *In re Jenks*, 43 Atl. 871, 21 R. I. 390.

A power to sell may include a power to mortgage, but only because of some exceptional reason, generally where there is a particular charge to which the devise is subject, and it is proper to raise money to meet it. "A power for trustees to sell will authorize a mortgage by them, which is a conditional sale, wherever the objects of the trust will be answered by a mortgage; as, for instance where the trust is to pay debts or raise portions. But where the trusts declared of the purchase money show that the settlor contemplates an absolute conversion of the estate, a mortgage will be an improper execution of the power." *Rutherford Land & Improvement Co. v. Sannrock*, 46 Atl. 648, 60 N. J. Eq. 471 (citing *Hill, Trustees*, 475).

The word "sell," in a will ordering testator's executors "to sell, or dispose of as they may think best," the remainder of his real estate, is synonymous with the word "convey," and carries with it that intent, for land cannot be effectually sold without a



conveyance. *Elle v. Young*, 24 N. J. Law (4 Zab.) 775, 779.

As used in Gen. St. c. 54, §§ 2, 3, relating to factors and other agents intrusted with the possession of merchandise, for the purpose of sale, and to persons intrusted with merchandise having authority to sell or consign the same, the words "for the purpose of sale" and the words "having authority to sell" mean much the same thing; it is that in the one case the factor or other agent is intrusted with the possession of the merchandise for the purpose of sale by him, so that he can himself make a sale and transfer the title of the merchandise, and in the other that the person intrusted with the merchandise has, as a person so intrusted, authority given him to sell or consign. *Thacher v. Moors*, 134 Mass. 156, 163.

A corporate power of manufacturing and selling lumber does not authorize the corporation to furnish lumber in the construction of buildings for others, and therefore the corporation cannot have a mechanic's lien for labor so furnished. *Dalles Lumber & Mfg. Co. v. Wasco Woolen Mfg. Co.*, 3 Or. 527, 530.

"Sells," as used in Pamph. Acts 1896-97, pp. 1089, 1090, providing that every person who sells, removes, or otherwise disposes of property subject to execution, intending to hinder or defraud creditors, may be punished by fine, etc., means a divestiture of title by the debtor. *Builders' & Painters' Supply Co. v. Lucas*, 24 South. 416, 418, 119 Ala. 202.

Where the word "sell" is employed in a deed, it is not used to designate the quantity of estate intended to be conveyed, but merely for the purpose of passing title to an estate described by other words introduced for that purpose. *Krider v. Lafferty* (Pa.) 1 Whart. 303, 314-316.

**Bargain distinguished.**

See "Bargain."

**Convey distinguished.**

See "Convey."

**Give distinguished.**

See "Give."

**SELL AND CONVEY.**

Deeds containing the language "do hereby sell and convey unto," as well as quitclaim, are more than mere quitclaim deeds. *Sibley v. Bullis*, 40 Iowa, 429, 430.

A statute providing that a certain bank is to continue its corporate capacity for three years for the sole purpose of collecting the debts due the corporation, and to "sell and convey the property of the bank," will be

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construed to authorize the bank to transfer negotiable paper in the usual manner. *Cooper v. Curtis*, 30 Me. (17 Shep.) 488, 490.

A power and direction to an executor to sell and convey, contained in the testator's will, includes the idea of conveying the title free and clear of dower. *Cooper v. Cooper*, 38 Atl. 198, 200, 56 N. J. Eq. (11 Dick.) 48.

A power to sell and convey is *prima facie* a power to sell and convey for money, and hence, in the absence of evidence to the contrary, a tenant in common who was so authorized by his co-tenant, but who in his own name agreed to convey, and afterwards did convey, a portion of the land in consideration of the purchaser's boring an artesian well thereon, bound himself only, and not his co-tenant. *Mora v. Murphy*, 23 Pac. 63, 83 Cal. 12.

The words "sell and convey," as used in a covenant whereby one covenants to sell and convey a lot of land for an agreed price to be paid at a time subsequent to the giving of the deed, requires the covenantor to tender a deed of warranty free from all incumbrances, so as to give the grantee a good title. *Sibley v. Spring*, 12 Me. (3 Fairf.) 460, 28 Am. Dec. 191.

The words "sell and convey," used with reference to a conveyance of real estate, employed as the operative words in a power to convey lands, do not carry authority to mortgage or otherwise dispose of the property. *Hawthurst v. Rathgeb*, 119 Cal. 531, 533, 51 Pac. 846, 847, 63 Am. St. Rep. 142.

**SELL AND DISPOSE OF.**

A trust deed authorizing the trustees "to sell and dispose of said premises" leaves them to exercise a sound discretion and sell the lands as a whole or in parcels, and their failure to advertise the land in parcels, will not invalidate the sale. *Loveland v. Clark*, 18 Pac. 544, 547, 11 Colo. 265.

A power to sell and dispose of property is merely a power to sell, but a power to dispose of, without any other qualification, extends to a disposal by exchange as well as sale, including that by partition, which is a species of exchange. In *re Carr*, 19 Atl. 145, 146, 16 R. I. 645, 27 Am. St. Rep. 773; *Phelps v. Harris*, 101 U. S. 370, 381, 25 L. Ed. 855.

**SELL AND TRANSFER.**

The words "sell and transfer," in a power of attorney to sell, transfer, and release certain mortgages, etc., do not confer power to pledge them. They are not broader than the words "sell and convey," which, when used with reference to a conveyance of real

estate, and employed as the operative words in a power to convey land, do not carry authority to mortgage or otherwise dispose of the property. *Hawthurst v. Rathgeb*, 119 Cal. 531, 533, 51 Pac. 846, 847, 63 Am. St. Rep. 142.

### SELL, EXCHANGE, AND DISPOSE OF.

The phrase "sell, dispose of, and exchange," following a general authority of control given to a trustee, was not a restriction of such authority, but conferred a more absolute power and extended the trustee's authority of disposition. But even if the clause be regarded as a limitation on the trustee's power, he still has authority to incumber the estate by deeds of trust authorizing the trustee, on the failure to pay the money borrowed, to sell the land. It is laid down in many cases that a power of sale implies a power to mortgage. *Faulk v. Dashiell*, 62 Tex. 642, 649, 50 Am. Rep. 542.

### SELL FOR.

A lease of a coal mine, by which the lessee was to pay a moiety of all such sums of money as the coals raised should "sell for at the pit's mouth," should be construed to mean "shall be worth to be sold at the pit's mouth"; and the lessee was liable to pay a moiety of money from the sale of coals raised from the mine, but sold elsewhere than at the pit's mouth. *Clifton v. Gerrard*, 1 Bos. & P. 524, 525.

### SELL TICKETS.

Acts 1891, c. 290, § 1, providing that it shall be unlawful for any person to "sell or deliver any tickets" issued by any railway company unless he is authorized to do so as the agent of such company, means selling or delivering any tickets as a business, and does not mean the sale of a single ticket which a person may happen to have and cannot use. *State v. Ray*, 14 S. E. 83, 84, 109 N. C. 736, 14 L. R. A. 529.

### SELLER.

A seller is one who disposes of a thing in consideration of money. *Consumers' Brewing Co. v. City of Norfolk*, 43 S. E. 336, 101 Va. 171.

"Seller" is the term used in the law of sales to designate the person selling the goods which are the subject of the sale. *Eldridge v. Kuehl*, 27 Iowa, 160, 173.

One who receives liquors imported by a number of persons who have united in so doing, and takes such liquors to his place of business, and makes or superintends the division among the contributors to the purchase money, is not a "seller of intoxicating

liquors," within the meaning of statutes prohibiting the sale thereof. *Commonwealth v. Smith*, 102 Mass. 144, 147.

### SELLING PRICE.

See "General Selling Price."

### SELLING RACE.

A selling race is one in which the owner of every horse entered in the race as a contestant places a price on it before the race takes place, and, when the race is over, the winning horse is sold at auction at not less than the price previously fixed. If the price is greater than that set by the owner, the surplus constitutes a fund for the contesting owner of one or more of the defeated horses. *Applegate v. Berry*, 8 Ky. Law Rep. 432, 433.

### SEMIANNUALLY.

A contract providing for the payment of a sum of money described as "\$200 per annum, payable semi-annually," means ordinarily at the expiration of each half year from the date of the agreement or from some other specified event. *Cornell v. Cornell*, 96 N. Y. 108, 112.

### SEMICOLON.

Webster defines the office of a "semicolon" as follows: "It is used to distinguish the conjunct members of a sentence." *Case v. People* (N. Y.) 14 Hun, 503, 506.

According to well-established grammatical rules, a semicolon is a point only used to separate parts of a sentence more distinctly than a comma. *Lambert v. People*, 76 N. Y. 220, 225, 32 Am. Rep. 293, 6 Abb. N. C. 181, 188.

The semicolon and the comma are both used for the same purpose in punctuation, namely, to divide sentences and parts of sentences, the only difference being that the semicolon makes the division a little more prolonged than the comma. *Holmes v. Phenix Ins. Co.* (U. S.) 98 Fed. 240, 242, 39 C. C. A. 45, 47 L. R. A. 308.

### SEMINARY.

See "Public Seminary."

All seminaries of learning, see "All."

A seminary is a place of education, as a school, academy, college, or university, where persons, especially the young, are instructed in the several branches of learning to fit them for their future employment; specifically a school for the education of men for the priesthood or ministry. Where land was

conveyed with provision for forfeiture in case a seminary should not be maintained thereon, the court, in order to prevent the forfeiture, construed the term "seminary" as including a high-grade school for the higher education of young men and women, in which the higher branches of learning were taught by a competent corps of teachers to a large number of pupils. *Maddox v. Adair* (Tex.) 66 S. W. 811, 813.

#### As including academies.

The term "seminary" has not acquired any definite or fixed legal meaning, though occasionally used in a general way to designate institutions for the promotion of learning, and as used in 1 Rev. St. p. 388, § 4, exempting from taxation every building erected for the use of a college, incorporated academy, or other seminary of learning, means an incorporated academy. *Chegaray v. City of New York*, 13 N. Y. (3 Kern.) 220, 229 (overruling *Same v. Jenkins*, 5 N. Y. [1 Seld.] 376, 378).

"Seminary of learning," as used in Laws 1883, exempting from taxation every building erected for the use of a college, incorporated academy, or other seminary of learning, includes academies, and describes institutions of learning for either sex of a similar character. *Young Men's Christian Association v. City of New York*, 21 N. E. 86, 87, 113 N. Y. 187.

"Seminaries of learning," within the meaning of a statute exempting from taxation all seminaries of learning, includes an academy or seminary for the instruction of females agreeably to the faith and practice of the Roman Catholic Church, and includes the lands and buildings used exclusively for the purpose of the seminary, and dormitories and convent outbuildings used in connection therewith. *Warde v. City of Manchester*, 56 N. H. 508, 509, 22 Am. Rep. 504.

#### As the buildings used.

A "seminary" is a place of education. Like "academy," the word has two meanings—one referring to the institution, and the other to the building in which the institution performs its function. Seminaries of learning, like schoolhouses, are buildings appropriated for use by schools. *Town of New London v. Colby Academy*, 46 Atl. 743, 744, 69 N. H. 413.

"Seminary," as used in a deed conveying land to "the board of trustees of the County Seminary of R. County, and their successors in office, forever, to have and to hold the premises, with all the appurtenances, to the only proper use, benefit, and behoof of said board of trustees for the use of said seminary forever," does not signify an edifice or building, but signifies the seminary cor-

poration itself. *Heaston v. Randolph County*, 20 Ind. 398, 402.

#### As a public institution.

A seminary is such a public institution that the public might take charge of and operate the same. A seminary is a school; an educational institution; so that a dedication of a square as "Seminary Square" is a dedication to the public. *Miami County v. Wilgus*, 22 Pac. 615, 616, 42 Kan. 457.

A dedication for seminary purposes is a dedication for public school purposes. It is such a public institution that the public may take charge of and operate the same. *Board of Education of Kansas City v. Kansas City*, 63 Pac. 600, 602, 62 Kan. 374.

"Seminary," as used in Ky. St. 1883, c. 92, art. 1, § 3, exempting from taxation "the real estate and investments devoted to public schools, seminaries, universities, colleges," etc., means those institutions which are public, and not private; a seminary being an institution of education, a school, academy, college, or university, in which young persons are instructed in the several branches of learning which may qualify them for their future employments. *City of Henderson v. McCullagh*, 12 S. W. 932, 933, 89 Ky. 448.

#### SEMINARY SQUARE.

The words "Seminary Square," written upon a block designated in a plat of the town filed for the purpose of laying out a town, was construed to show a dedication of the lot to the town for seminary purposes. *Miami County v. Wilgus*, 22 Pac. 615, 616, 42 Kan. 457.

#### SENATE POKER.

Senate poker is described as a game played with cards. The dealer sits on one side of the table and the players around in front of him. The players put up their money in the dealer's hands, for which he issues to the players some ivory or bone chips. The dealer then deals to each man five cards. Then the players either bet their chips or not, according as they are willing to venture on their hands. They may discard and draw more if they see fit. For each dollar that is bid on the game, the dealer takes off five per cent. or ten per cent., or something like that amount, for the proprietor of the house. At the end of each game the chips are handed in to the dealer, who cashes them. No particular table is required for the game. It may be played as well upon the floor, a bed, a rock, or any smooth surface. A dealer in such game, who takes no part in the game, but merely receives the percentage, is not guilty of exhibiting a gaming bank and table for the pur-

pose of gaming. *Hairston v. State*, 30 S. W. 811, 34 Tex. Cr. R. 346.

## SENATOR.

See "De Facto Senator."

## SEND.

"Send," as used in Rev. St. § 3894 [U. S. Comp. St. 1901, p. 2659], providing that no letter or circular concerning lotteries shall be carried in the mail, and that "any person who shall knowingly deposit or send anything to be conveyed by mail in violation of this section shall be punishable," etc., means to knowingly forward, or cause to be forwarded, through the mail, as matter to be conveyed by it—that is, as mail matter—after the prohibited article has been deposited in the mail, and does not include the naked sending towards or to the post office. *United States v. Dauphin* (U. S.) 20 Fed. 625, 630.

"Send," as used in Act March 29, 1878 (P. L. 1878, p. 211), prohibiting the sending of any indecent letter or communication to any female, means the putting of the communication in the course of transmission by the accused with intent that it should reach the person to whom it is charged in the indictment to have been sent, provided that in fact it reaches such person. *Larison v. State*, 9 Atl. 700, 701, 49 N. J. Law (20 Vroom) 256, 60 Am. Rep. 606.

### Convey distinguished.

Act March 29, 1878 (P. L. 1878, p. 221), provides that any person who shall send or convey to any female, etc., any insulting, indecent, lascivious, or annoying letter or communication, shall be punished, etc. Held, that the words "send or convey," as used in the statute, imported two modes of transmission, and hence that an indictment charging conjunctively that the defendant did send and convey was defective, since the words "send and convey" imported a different mode of transmission than either of those stated in the statute. *Larison v. State*, 9 Atl. 700, 701, 49 N. J. Law (20 Vroom) 256, 60 Am. Rep. 606.

### Mailing.

A suspended member of a mutual benefit association, who signed a written statement on an official form furnished by the association to the effect that he is in good health, and deposited the same in a letter box, inclosed in an envelope stamped and addressed to the clerk of the camp, has "sent" such statement to the clerk, within the requirement of its by-laws, even though the statement did not reach the clerk until after the death of the suspended member. *Sovereign Camp of Woodmen of the World v. Grandon*, 89 N. W. 448, 449, 64 Neb. 39.

### Personal taking.

"Sends," as used in Rev. St. 1881, § 2162, punishing every person who, with intent to deprive a resident of the state of his rights under its exemption laws, "sends or causes to be sent" out of the state any claim against a debtor within its jurisdiction, applies to one who carries a claim upon his own person out of the state with intent to deprive the debtor of the benefit of the laws. *State v. Dittmer* (Ind.) 22 N. E. 299.

The leaving of a sealed letter containing threats at a gate in a road near J.'s house, where it was found, and eventually carried to J., was a "sending," within 4 Geo. IV, c. 54, § 3. *Regina v. Grimwade*, 1 Car. & K. 592.

## SENILE DEMENTIA.

Senile dementia is a mental disorder usually attacking the faculties of old persons. *McDaniel v. McCoy*, 36 N. W. 84, 86, 68 Mich. 332.

Senile dementia is that form of insanity in the old, marked by slowness and weakness, indicating the breaking down of the mental powers in advance of bodily decay. *Hiatt v. Shull*, 15 S. E. 146, 147, 36 W. Va. 563.

Senile dementia is a form of insanity in the aged. *Pyott v. Pyott*, 61 N. E. 88, 89, 191 Ill. 280.

## SENIOR.

The word "Senior" is attached to the name of a father to distinguish him from a son of the same name. It is no part of the name. *Colt v. Starkweather*, 8 Conn. 289, 293.

The addition of "Senior" or "Junior" to a name is a mere matter of description, and forms no part of the name. Thus, there is no variance between an indictment charging that liquor was illegally given by defendant to Robert McNeal, Junior, and proof that it was given to Robert McNeal. *Allen v. State*, 52 Ind. 486, 488.

The addition of "Senior" to a name is a mere matter of description, and forms no part of the name. It is generally used to distinguish between a father and a son of the same name, who reside at the same place; but the addition is useless, and the omission thereof furnishes no ground of objection on account of variance, where there is any other addition or description by which the real party intended can be ascertained. *Fleet v. Youngs* (N. Y.) 11 Wend. 522, 524 (citing *People v. Collins* [N. Y.] 7 Johns. 549; *Leplot v. Browne*, 1 Salk. 7; *Kincaid v. Howe*, 10 Mass. 203).

**SENIOR IN SERVICE.**

The "senior deputy sheriff in service," who by St. 1877, c. 200, § 23, is required, in case a vacancy occurs in the office of sheriff of any county, to perform all the duties of the office, etc., until it is filled in the manner required by law, is the deputy sheriff who has been longest in the office continuously when the vacancy occurs. *Advisory Opinion*, 126 Mass. 603.

**SENIOR JUDGE.**

The term "senior judge," as used in 79 Ohio Laws, 79, providing for the appointment of an assistant prosecuting attorney in Lucas county by the senior judge of the court of common pleas residing therein, means "the judge who, at the time the appointment of assistant prosecuting attorney is to be made, has served the longest under his present commission." *State v. Hueston*, 4 N. E. 471, 473, 44 Ohio St. 1.

**SENTENCE.**

See "Cumulative Sentence"; "Definitive Decree or Sentence"; "Suspension of Sentence."

Every sentence, see "Every."

A "sentence" is defined by grammarians to be an assemblage of words so arranged as to express an entire proposition. *Bourland v. Hildreth*, 26 Cal. 161, 232.

The sentence is the final determination of a criminal court; the pronouncement by the judge of the penalty or punishment as the consequence to the defendant of the fact of his guilt. *Featherstone v. People*, 62 N. E. 684, 687, 194 Ill. 325.

"Sentence," as the term is used in criminal law, is the appropriate word to denote the action of the court before which the trial is had, declaring the consequences to the convict of the fact thus ascertained. *State v. Barnes*, 4 South. 560, 561, 24 Fla. 153.

A sentence is the judgment of a court. *Allen v. Delaware County*, 29 Atl. 288, 289, 161 Pa. 550.

A sentence is a judgment on conviction for crime; and any proceeding that may end in a sentence is substantially criminal in its nature. *State v. Ballard*, 29 S. E. 899, 900, 122 N. C. 1024.

The word "sentence" means a final determination by a criminal court or by a court of admiralty. Ordinarily this final determination fixes the punishment to be imposed on the defendant when the verdict is one of "Guilty"; but it may declare the freedom of the defendant from the obligation

imposed by his recognizance, and his discharge therefrom, when the verdict is "Not guilty." *Wright v. Donaldson*, 27 Atl. 867, 868, 158 Pa. 88.

A sentence is the order of the court, made in the presence of the defendant and entered of record, pronouncing the judgment and ordering the same to be carried into execution in the manner prescribed by law. *Pennington v. State*, 11 Tex. App. 281, 282 (citing *Mayfield v. State*, 40 Tex. 289; *Nathan v. State*, 28 Tex. 326); *Steagald v. State*, 3 S. W. 771, 775, 22 Tex. App. 464; *Code Crim. Proc. Tex.* 1895, art. 832.

A sentence is a judicial termination of a cause agitated between real parties in which a real interest has been settled. In order to make a sentence there must be a real interest, a real argument, a real prosecution, a real defense, and a real decision. *Conklin v. La Dow*, 54 Pac. 218, 222, 33 Or. 354 (citing *Earl of Bandon v. Becher*, 3 Clark & F. 479, 510). Of all these requisites, not one takes place in the case of a fraudulent and collusive suit. There is no judge, but a person invested with the ensigns of a judicial office is misemployed in listening to a fictitious case proposed to him; there is no party litigating; there is no party defendant; no real interest brought into question. *Metropolitan El. R. Co. v. Manhattan El. R. Co.* (N. Y.) 11 Daly, 367, 444, 14 Abb. N. C. 103, 217.

As used in Laws 1865-66, pp. 19, 20, §§ 1, 2, providing that when any person imprisoned in the penitentiary shall have, during the whole time of such imprisonment, behaved according to the rules and regulations of that institution to the full satisfaction of the inspectors, on the expiration of three-fourths of the time for which such person was sentenced, the inspectors shall write and sign a testimony to that effect, and present it to the Governor with a recommendation for pardon, and that the same should be done in regard to persons "under sentence of imprisonment for life" after having been in prison for 15 years and complied with the conditions named, are broad enough to cover and include any sentence, whether it be considered as resulting from the act of the court or that of the executive in commuting a sentence of death to life imprisonment. *Ex parte Collins*, 6 S. W. 345, 94 Mo. 22.

The word "sentence," in Acts 1887 (P. L. 138), making the county liable for the costs of a prosecution on the termination thereof by a verdict of a traverse jury and sentence of the court, means not a mere judgment in favor of the commonwealth, but the imposition of a punishment or enforcement of a penalty. In the case of an acquittal, no punishment can be imposed, for no one has been found guilty, and therefore the act

must mean a sentence to pay costs. *Commonwealth v. Bishoff*, 13 Pa. Co. Ct. R. 503, 504.

#### **Conviction distinguished.**

The ordinary legal meaning of "conviction," when used to designate a particular stage of a criminal prosecution triable by a jury, is the conviction of the accused in open court or the verdict returned against him by the jury, which ascertains and publishes the fact of his guilt, while "judgment" or "sentence" is the appropriate term to denote the action of the court before which the trial is had, declaring the consequence to the convict of the fact thus ascertained. *People v. Adams*, 55 N. W. 461, 95 Mich. 541 (citing *Commonwealth v. Lockwood*, 109 Mass. 323, 12 Am. Rep. 699); *State ex rel. Butler v. Moise*, 18 South. 943, 948, 48 La. Ann. 109, 35 L. R. A. 701; *State v. Henson*, 50 Atl. 468, 470, 66 N. J. Law, 601; *Munkley v. Hoyt*, 60 N. E. 413, 179 Mass. 108.

The term "sentence" is usually used to designate the judgment rendered against the defendant in a criminal proceeding, which is the act of declaring his punishment. The term "conviction" may refer to the judgment or sentence of the court, but it ordinarily refers to the ascertainment of the defendant's guilt. *Bugbee v. Boyce*, 35 Atl. 330, 331, 68 Vt. 311.

#### **SENTIENT BEINGS.**

The term "sentient beings" is used to designate those beings having the faculty of sensation, and the power to perceive, reason, and think. *Kelly Brewing Co. v. Parnin*, 41 N. E. 471, 474, 13 Ind. App. 588.

#### **SEPARABLE CONTROVERSY.**

A separable controversy in a cause, within the meaning of the United States Statutes relative to removal of causes, must be something more than a mere collateral or incidental dispute or question of fact or of law, and amount to a substantial controversy in respect to the relief sought, which can be granted or denied according to the rights of the parties as they may be ascertained. *Security Co. v. Pratt* (U. S.) 64 Fed. 405, 406.

In a proceeding to condemn a right of way for a railroad over a portion of the right of way of another road, which is under a lease having 90 years to run, in which the lessee, lessor, and the original owners of the land are joined as defendants, neither the lessor nor the owners of the fee have any present interest in the controversy, and they are merely nominal parties, whose interests are separable from that of the lessee, and whose presence will not deprive the lessee

of the right of removal. *Seaboard Air Line Ry. v. North Carolina R. Co.* (U. S.) 123 Fed. 629, 630.

#### **SEPARALITER.**

In England the practice has prevailed—subject, however, to the discretionary power of the court to direct the indictment to be quashed—to indict a number of persons for several offenses of the same nature; but there it must be laid "separaliter," or otherwise the indictment thus framed will be quashed. The word "separaliter" is held to make an indictment drawn in this manner tantamount to several indictments. *State v. Edwards*, 60 Mo. 490, 491, 492 (citing *Rex v. Kingston*, 8 East, 41).

#### **SEPARATE.**

See "Sole and Separate Business."

To separate is to disunite, to divide, to disconnect, to sever. *Meisser v. Thompson*, 9 Ill. App. (9 Bradw.) 368, 370.

The words "joint and general" import unity, as distinguished from the word "separate," which implies division and distribution. *Merrill v. Pepperdine*, 36 N. E. 921, 922, 9 Ind. App. 416.

"Separate," as used in a statute relating to separate sales on foreclosure of mortgages, means separate or different; not the same. *Larzelere v. Starkweather*, 38 Mich. 96, 104 (cited in *Wolf v. Holton*, 75 N. W. 762, 117 Mich. 321).

Pen. Code, art. 567, making homicide justifiable by a husband on one taken in the act of adultery with his wife, and "before the parties to the act of adultery have separated," meant while they were still together in the company of each other, and not necessarily while they were in the act. *Price v. State*, 18 Tex. App. 474, 484, 51 Am. Rep. 322.

#### **SEPARATE BRANCH OR DEPARTMENT.**

An engineer in charge of a locomotive on one train of cars of a railroad company is in a branch or department of its service separate from that of a brakeman on another train of the same company, within the meaning of the terms "separate branch or department," as used in Act April 2, 1890, providing that every employé in any separate branch or department having charge or control of other employés, etc., shall be held to be the superior, and not the fellow servant, of such employés. *Cincinnati, H. & D. R. Co. v. Margrat*, 37 N. E. 11, 14, 51 Ohio St. 130. Within the meaning of such provision, as construed by the Supreme Court of

Ohio, two switch crews handling different trains in the same yard are engaged in separate branches or departments of the service. *Erie R. Co. v. Kane* (U. S.) 118 Fed. 223, 226, 55 C. C. A. 129.

### SEPARATE BUSINESS.

An agreement between a farmer and his wife that she should have for her own the proceeds of dairy and poultry products sold, under which she received such proceeds, a portion of which was expended for groceries and clothing for the family and a part used by the husband, did not constitute the production and sale of such articles the "sole and separate business" of the wife, within the meaning of Burns' Rev. St. 1894, § 6975, so as to render the husband her debtor for the sum so used by him. *Kedey v. Petty*, 54 N. E. 798, 801, 153 Ind. 179.

### SEPARATE CAUSES OF ACTION.

Under a statute requiring the complaint to be divided into separate counts, in case separate causes of action are joined, it is held that the phrase "separate causes of action," within the meaning of this rule, must be such as are both separable from each other, and separable by some distinct line of demarcation. In one sense every cause of action must be separate and distinct from every other, but this is not the sense in which these terms are employed in the statute under consideration. The rule does not require separate counts in all cases where the plaintiff declares on several causes of action, but only where these are separate and distinct from each other. *Craft Refrigerating Mach. Co. v. Quinniac Brewing Co.*, 29 Atl. 76, 78, 63 Conn. 551, 25 L. R. A. 856.

### SEPARATE COACH.

Each compartment of a coach, divided by a good and substantial wooden partition with a door therein, shall be deemed a "separate coach," within the meaning of a provision requiring railroad companies to provide separate coaches for the accommodation of white and negro passengers. *Pen. Code Tex.* 1895, art. 1010.

### SEPARATE CONTROVERSY.

Separate defenses to an action do not create "separate controversies," within the meaning of the act relative to the removal of causes, so as to permit the removal of an action where all the defendants are not citizens of a state different from that of plaintiff. *Fidelity Ins., Trust & Safe Deposit Co. v. Huntington*, 6 Sup. Ct. 733, 734, 117 U. S. 280, 29 L. Ed. 898.

### SEPARATE DWELLING HOUSE.

A person rented and occupied the middle floor of a house. Two outer doors and some steps which gave access to that floor were appropriated by him exclusively. A separate flight of steps on the outside of the house led by a different outer door to a passage on the main floor, from which passage a tenant occupying the upper floors reached his premises by a staircase of his own. One of the person's rooms opened into this passage, and he could not reach that room but by going by the last-mentioned steps and along the passage, or by crossing the passage from his other rooms by a door in one of them, which was usually locked. All the last-mentioned rooms communicated with each other, and with both the doors appropriated to such person. Held, that the premises occupied by him were a "separate and distinct dwelling house," within 6 Geo. IV, c. 57, by renting which a settlement might be gained. *Rex v. Great & Little Ulsworth*, 5 Adol. & El. 261.

### SEPARATE ESTATE.

See, also, "Separate Property."

The separate estate of a wife is one over which she has such dominion as to exclude the marital rights of the husband. *American Home Missionary Soc. v. Wadhams* (N. Y.) 10 Barb. 597, 601 (citing *Dixon v. Olmius*, 2 Cox, 414, 1 Madd. 376; *Stanton v. Hall*, 2 Russ. & M. 175); *Noland v. Chambers*, 2 S. W. 121, 122, 84 Ky. 516; *Frary v. Booth*, 37 Vt. 78, 87; *Hackett v. Moxley*, 34 Atl. 949, 68 Vt. 210; *Cardwell v. Perry*, 82 Ky. 129, 131.

The separate estate of the wife is defined to be that estate, either real or personal, which is settled upon the wife for her separate use, without any control over it on the part of her husband. *Williams v. King* (U. S.) 29 Fed. Cas. 1369, 1370 (citing *Butler v. Buckingham* [Conn.] 5 Day, 492, 5 Am. Dec. 174).

The separate estate of a married woman may be acquired or created by conveyance, devise, or gift from another, or by relinquishment by antenuptial contract of the husband's marital rights, or by deed of husband and wife after marriage, where the conveyance is to another for the express purpose of reconveyance to the wife with exclusion of the husband's right in and to the property. *Cardwell v. Perry*, 82 Ky. 129, 131.

Whether the definition of a separate estate of a married woman as being that alone of which she has the exclusive control independent of her husband, and the proceeds of which she may dispose of as she pleases, as given in the case of *Petty v. Malier*, 53 Ky. (14 B. Mon.) 247, is entirely accurate or not,

to constitute a separate estate, within the meaning of Rev. St. c. 47, art. 4, § 17, declaring that a married woman shall not alienate her separate estate with or without the consent of any husband she may have, it should be conveyed or devised for the separate use of the feme to the exclusion of her husband's marital rights therein. *Bowen v. Seebree*, 65 Ky. (2 Bush) 112, 115.

The character of an estate, whether it be separate or not, in a married woman, will be determined by ascertaining whether the words employed in the grant manifest an unequivocal intent to exclude the power and marital rights of the husband. *Burnley v. Thomas*, 63 Mo. 390. Thus, a deed granting property to a wife for her sole use and benefit separate and apart from her said husband created a use limited to the then existing marriage, and not a separate estate extending over all future coverture. *O'Brien v. Ash*, 69 S. W. 8, 11, 169 Mo. 283.

"Separate estate," as used in the chapter relating to the distribution of estates of decedents, comprises "all the property, both real and personal, brought into the marriage community by the surviving husband or wife, or acquired by him or her by inheritance, donation, or legacy," and the same is declared subject to the private debts of the survivor. *Comp. Laws N. M. 1897, § 2030.*

#### **As estate created by law.**

The "separate estate" of a wife, within the meaning of Code, §§ 1991, 1992, providing that, if the separate estate of a wife who survives her husband shall be greater than her dower interest and distributive share in her husband's estate, she shall not be entitled to dower, and that, if her separate estate be less in value than her dower, it shall be deducted from her dower, means estate created by law, and not by contract or will. *Glenn v. Glenn*, 41 Ala. 571, 582.

#### **As an equitable estate.**

A wife's separate estate is an equitable estate, where the legal title is fixed in some other person as trustee for her benefit. *Seedhouse v. Broward*, 16 South. 425, 429, 34 Fla. 509.

A wife's separate estate is properly an equitable estate, and not her legal property; an estate vested in a trustee for her benefit, over the body of which she has no legal power of alienation except such as might be given by the terms of the grant or settlement creating it. *Halle v. Einstein*, 16 South. 554, 557, 34 Fla. 589.

The doctrine of the separate estate of a married woman was purely a creature of equity, and worked a radical change in the principles of the common law applicable to the marital relation as affecting the rights of property between husband and wife. Sepa-

rate estates were created in equity because married women could hold no other. *Brown v. Macgill*, 39 Atl. 613, 615, 87 Md. 161, 39 L. R. A. 806, 67 Am. St. Rep. 334.

#### **As estate held in trust.**

The expression "separate estate" always refers to an estate held in trust for a married woman. *Richardson v. Aiken* (Pa.) 14 Wkly. Notes Cas. 491, 492.

#### **Real estate derived from husband.**

The "separate estate" of a wife, within the meaning of the statute defining the rights of married women over their separate estate, does not apply to real estate derived by the wife from her husband. *Pike v. Miles*, 23 Wis. 164, 171, 99 Am. Dec. 148.

#### **SEPARATE ESTATE (In Partnership).**

The separate estate of a partner is that in which his copartners have not a joint interest with him, in which he has a right and interest disconnected from the partnership; and it may consist of his interest in other partnerships. The terms "separate estate" and "separate debts" may be and are often used relatively. *Bank of Mobile v. Dunn*, 67 Ala. 381, 385.

"Separate estate," in the meaning of the bankruptcy law, is that in which each partner is separately interested at the time of the bankruptcy. It might have been used, it is true, in connection with and for the benefit of the partnership business. But the term "separate estate" can be applied only to property so used which belonged to one or more of the partners to the exclusion of the rest. *In re Lowe* (U. S.) 15 Fed. Cas. 1015, 1016.

#### **SEPARATE GENERAL VERDICT.**

A separate general verdict is the finding upon any of the issues in favor of the plaintiff or the defendant. *Witty v. Chesapeake, O. & S. W. R. Co.*, 83 Ky. 21, 27.

#### **SEPARATE INSTRUMENT.**

*Comp. Laws, § 4441*, permits judgment by confession when the authority to confess the judgment shall be conferred by some instrument distinct from that containing the evidence of the debt or obligation for which the judgment is confessed, and capable of being produced and filed with the clerk of the court in which the judgment is entered. A note and the warrant of attorney authorizing the confession of judgment bore different dates, though they were written on the same piece of paper. It must be presumed that the note and the warrant of attorney were executed at the times they severally bear date, notwithstanding the fact that they were on the same paper. And even if the



warrant of attorney was executed at the same time as the note on which it authorized judgment, the two instruments must be regarded as "separate instruments," within the meaning of the statute. *Trombly v. Parsons*, 10 Mich. 272, 274.

### SEPARATE LIST.

Gen. St. 1894, § 637, requires the county commissioners to make separate lists of the grand and petit jurors, which list shall be certified and signed by the chairman of the board, attested by the clerk, and shall be forthwith delivered to the clerk of the district court. At the head of a list it stated that "the names were selected by the board of county commissioners of Polk county at the adjourned meeting held January 29, 1894, to serve as grand and petit jurors, respectively, for the ensuing year. Grand jurors: [Then follows a list of the names of grand jurors.] Petit jurors: [Then follows a list of the names of petit jurors.]"—and it was certified as correct by the county authorities and chairmen of the county board. It was held a compliance with the requirements of the statute, though the list of grand and petit jurors were both included under one head and covered by only one certificate. *State v. Peterson*, 63 N. W. 171, 172, 61 Minn. 73, 28 L. R. A. 324.

### SEPARATE LIVING.

Where a husband leaves his wife on account of domestic infelicity, and during his absence determines never to resume marital relations with her, but to provide for his family when necessary, and the wife and children live together, supported by her exertions, this is a "separate living," within Civ. Code, providing that the wife's earnings "while she is living separate from her husband" are her separate property. *Loring v. Stuart*, 21 Pac. 651, 79 Cal. 200.

### SEPARATE MAINTENANCE.

Actions for separate maintenance are in no sense actions for divorce. Judgments rendered therein may be appealed to the Supreme Court or brought up by writ of error, and the sufficiency of the judgments may be determined under the general appellate powers conferred by the act creating the court. *Mitchell v. Mitchell* (Colo.) 72 Pac. 1054, 1055 (citing *Mercer v. Mercer*, 13 Colo. App. 237, 57 Pac. 750).

### SEPARATE POST.

An officer may be said to command at a separate post when he is out of the reach of the orders of the commander in chief, or of a superior officer in command in the neighborhood, within Act Cong. March 16, 1802, §

5, providing that the commanding officer of each separate post shall be entitled to certain rations, etc. *Parker v. United States*, 28 U. S. (1 Pet.) 293, 294, 7 L. Ed. 150.

### SEPARATE PROPERTY.

The separate property of a married woman is that property settled to a married woman's separate use by deed or by will, with the power of appointment, and rendered subject to her exclusive control. *Martin v. Dwelly* (N. Y.) 6 Wend. 9, 18, 21 Am. Dec. 245.

The separate property of a married woman is that of which she has the exclusive control, independent of her husband, and the proceeds of which she may dispose of as she pleases. All her real estate does not belong to her as her separate property. That character must be imported to the property by the instrument which invests her with a right to it. *Petty v. Maller*, 53 Ky. (14 B. Mon.) 246, 247.

A wife's separate property, or separate statutory property, is all property, the legal title to which is fixed in her individually for her own use and benefit. *Seedhouse v. Broward*, 16 South. 425, 429, 34 Fla. 509.

The separate property of the wife is that which she brings into the marriage or acquires during the marriage by inheritance, or by donation made to her particularly. *Fleitas v. Richardson*, 13 Sup. Ct. 495, 496, 147 U. S. 550, 37 L. Ed. 276.

At common law the property of the wife was divided into two general classes—her general property and her separate property. The goods and personal chattels of the wife which were actually beneficially possessed by her in her own right at the time of her marriage, and such other goods and personal chattels as come to her during her coverture, belong to the first class, and these, at common law, vested absolutely in the husband. The separate property of the wife is that of which she has the absolute control, independent of her husband, and the proceeds of which she may dispose of as she pleases. A gift of personal property to the wife is presumed, in the absence of testimony to the contrary, to be a gift, and is her general property. *Alston v. Rowles*, 13 Fla. 117, 126.

"Separate property," as applied to the property of a wife, has a fixed meaning in the common law. The idea attached to separate property in the wife by the common law, and which forms a portion of its definition, is that it is an estate held as well in its use as in its title for the exclusive benefit and advantage of the wife. The common law recognizes no such solecism as a right in the wife to the estate, and the right in some one else to use it as he pleases and to en-

joy all the advantages of its use. Such is the meaning of the term "separate property" in Const. art. 11, § 14. *George v. Ransom*, 15 Cal. 322, 324, 76 Am. Dec. 490.

The words "separate property," as used in Cod. St. 1872, § 7, providing that when an action concerns the separate property of a married woman she may be sued alone, means property held by a married woman to her sole and separate use, and secured to her either by a deed of conveyance, a marriage settlement, or otherwise. *Allen v. Roush*, 39 Pac. 459, 460, 15 Mont. 446.

The statute defining the rights of husband and wife provides, in the first section, that "all property, both real and personal, of the wife, owned by her before marriage, and that acquired afterwards by gift, bequest, devise, or descent, shall be her separate property; and all property, both real and personal, owned by the husband before marriage, and that acquired by him afterwards by gift, bequest, devise, or descent, shall be his separate property." *Meyer v. Kinzer*, 12 Cal. 247, 251, 73 Am. Dec. 538.

The property or estate of a wife may remain her sole and separate property, though it consists of goods, wares, and merchandise, book accounts, notes, or other evidences of debt owned by a firm of which she and her husband are members. *Toof v. Brewer* (Miss.) 3 South. 571, 575.

#### **Cause of action for personal injuries.**

A cause of action for personal injuries is the "separate property" of a married woman, within the meaning of Code Civ. Proc. § 450, providing that it is not necessary or proper to join her husband with her as a party in any action or special proceeding affecting her separate property. *Campbell v. Perry*, 9 N. Y. Supp. 330, 331, 56 Hun. 639.

#### **Consortium.**

The right which a wife has to the conjugal society of her husband is her "separate property," within the meaning of that term as used in Laws 1860, c. 90, § 5, as amended by Laws 1862, c. 172, § 3, for which she has a right to maintain action against the person depriving her of the same. *Jaynes v. Jaynes* (N. Y.) 39 Hun. 40, 42.

The consortium to which a wife is entitled is not "property," within the meaning of an act authorizing a married woman to maintain an action with reference to her individual property. *Hodge v. Wetzler*, 55 Atl. 49, 50, 69 N. J. Law, 490.

#### **Tenancy in common.**

An estate by entirety is held by the husband and wife as one person and under one title. The grant, gift, or devise creating the estate operates in such a manner as to give each the whole, and each is seised of

the whole of the estate in the survivor. It is not the separate property of the wife, and she is without the characterizing feature of holding it to her sole use to the exclusion of the marital rights of her husband. Hence land held by husband and wife as tenants in common pass to an assignee by an assignment of a court of insolvency, though the statute provides that the separate property of the wife shall not be subject to the disposal of her husband or liable for his debts. *Laird v. Perry*, 52 Atl. 1040, 1041, 74 Vt. 454, 59 L. R. A. 340.

#### **SEPARATE PROPERTY (In Communitative Property Law).**

Civ. Code, § 141, prescribes that in executing the provisions of section 139, providing for the maintenance of a wife in case of divorce, the court shall resort first to the community property, and then to the separate property of the husband, does not embrace the earnings of the husband after divorce, such earnings being neither communitative property nor separate property. In re *Spencer*, 23 Pac. 37, 38, 82 Cal. 110.

Property acquired after marriage by either husband or wife, by gift, bequest, devise, or descent, with its rents, issues, and profits, is the separate property of the spouse who acquired it, though all other property acquired after marriage by either husband or wife or both is community property. When property is purchased in part with the community fund of the husband and wife, and in part with the wife's separate property obtained by her as a gift, the wife becomes a tenant in common of the land with her husband, her interest being proportionate to her investment. And the property is liable only for the husband's debts to the extent of his interest therein, determined by the ratio between the amount of the community fund invested in the purchase and the total consideration. *Schuyler v. Broughton*, 11 Pac. 719, 720, 70 Cal. 282.

Acts 1871, § 1, giving a married woman exclusive control of her separate property, repeals the provision of Acts 1865, providing that rents and profits of separate property shall be common property and under the control of the husband; and she may acquire separate property by purchase with such rents, though Acts 1865 recognizes its acquisition only by gift, bequest, devise, or descent. *Woffenden v. Charauleau*, 25 Pac. 662, 664, 1 Ariz. 346.

The word "separate," in Const. art. 11, § 14, providing that all property, both real and personal, of the wife, owned and claimed by her before marriage, and that acquired afterwards by gift, devise, or descent, shall be separate property, neither enlarges nor limits the right of a married woman in or to the property mentioned, but it serves to dis-

tinguish such property from other property in which he is interested—the common property of both husband and wife. *Dow v. Gould & Curry Silver Min. Co.*, 31 Cal. 629, 630, 636.

"Separate property is that which the husband or wife owned at the time of the marriage, and such as is given either of them during the marriage by gift, devise, or descent. Where property is purchased during marriage with separate means of either husband or wife, it still remains the separate property of the spouse whose separate means were so used in the purchase." *Mitchell v. Mitchell*, 15 S. W. 705, 707, 80 Tex. 101.

#### **Money.**

The provision of Civ. Code, § 167, that "a wife cannot make a contract for the payment of money," was not modified by the provisions authorizing her to make contracts relating to her separate property. It is true that personal property includes money; but section 167 refers to that very subject directly, and withdraws money from the effect of the word "property" as used in the other sections. *Butler v. Baber*, 54 Cal. 178.

#### **Rents, issues, and profits of separate property.**

Under a statute providing that all the property of a wife owned before marriage, and that acquired afterwards by gift or devise, shall be her separate property, the rents, issues, and profits of a married woman's separate property are her separate property. *Woffenden v. Charaleau*, 8 Pac. 302, 303, 2 Ariz. 44.

#### **SEPARATE STREETS.**

Where three unconnected sections of a street are opened, each of which is less than a mile in length, but more than a mile in the aggregate, and each section is called "167th Street," but there is no physical connection between such sections or streets, nor does it appear that a union is contemplated or practical, and there is no connection between them except the name, such sections are "separate streets," and not a "single street," within the meaning of Laws 1882, c. 410, providing that, where a street more than a mile long is opened, half the cost shall be paid by the city. In *re One Hundred Sixty-Seven St.*, 22 N. Y. Supp. 604, 605, 68 Hun, 158.

#### **SEPARATE TRACTS OR PARCELS.**

The mere fact that portions of the land appraised lay in different quarters of the section did not make them "separate tracts or parcels," within the rule that separate tracts or parcels of land must be appraised separately. *Pierce v. Reed* (Neb.) 93 N. W. 154.

#### **SEPARATE USE.**

A devise to surviving sisters, share and share alike, for their sole and separate use as long as both shall live, must be construed as referring to each of the sisters in their individual right, and not to them jointly, when considered in connection with 1 Rev. St. p. 727, § 44, providing that every estate granted or devised to two or more persons shall be a tenancy in common unless expressly declared to be a joint tenancy; and therefore the sisters hold in common, and not jointly. In *re Eldridge's Estate*, 62 N. Y. Supp. 1026, 1027, 29 Misc. Rep. 734.

The intention of a testator to create a separate estate for the use of his wife must plainly appear from the words used that it is claimed create such an estate; and where testator says, "It is my will that she have the benefit of said negroes, either by keeping them in specie, or selling them and have the proceeds of sale," the language cannot be construed as intending them for her separate use, there being no expression denoting an exclusion of the husband's rights, nor any direction as to the enjoyment of the property inconsistent with his dominion over it. *Thompson v. McKislick*, 22 Tenn. (3 Humph.) 631, 633.

#### **SEPARATELY.**

A statute providing that the wages and earnings of any married woman acquired in any employment, etc., carried on separately from her husband, shall be her sole and separate property, etc., should not be construed to mean that the business must be carried on absolutely apart from and unassisted by the husband, so that he cannot be his wife's agent without the business ceasing to be separately carried on by her. *Kutcher v. Williams*, 40 N. J. Eq. (13 Stew.) 436, 439, 3 Atl. 257.

*Sess. Laws 1887, c. 99, § 4*, declaring that for all municipal paving, etc., assessment shall be made for the full cost thereof "on each block separately," means that each block, or the street between each block for the distance of a block, shall be separate from that of an adjoining block in the city; that each block, or the two half blocks divided by the street, become a block or taxing district as contemplated by section 4—and does not have reference to a division of the cost and apportionment of the expenses of its improvement between the two half blocks divided by the street. *Blair v. City of Atchison*, 19 Pac. 815, 816, 40 Kan. 853.

A finding of fact and conclusion of law therefrom are "separately" stated, within the requirement of Code, § 216, when the

effect of each upon the final judgment is distinct and severable from that of the other. *Weissman v. Russell*, 10 Or. 73, 75.

#### As apart.

A statement in a certificate of acknowledgment of a married woman that she was examined "separately and out of the hearing of her husband" is equivalent to the words of 1 Rev. Code, § 365, requiring that the certificate should show that the married woman was examined "privily and apart from her husband." *Blair v. Sayre*, 2 S. E. 97, 101, 29 W. Va. 604.

#### As severally.

"Separately," as used in a single demurrer to an answer in several paragraphs which is addressed to the paragraphs separately, means severally, and is sufficient to raise the question of the sufficiency of each. *Mitchell v. Stinson*, 80 Ind. 324, 325.

#### SEPARATELY AND SEVERALLY.

"Separately and severally," as used in a demurrer reciting that defendants separately and severally demurred to different paragraphs of a complaint, cannot be applied both to the separate paragraphs and also to the defendants, but will be construed to apply only to the separate paragraphs, and to render the demurrer joint as to the parties defendant. *Armstrong v. Dunn*, 41 N. E. 540, 541, 143 Ind. 433.

#### SEPARATELY APART.

Under a statute providing that in conveyances "the acknowledgment of the wife shall be taken separately apart from her husband," the acknowledgment is not taken separately apart from a wife's husband where she objects to signing a deed of real property, and is thereupon addressed by her husband in harsh, threatening, and abusive language, though not in the presence of the acknowledging officer and immediately thereafter, in the presence of her husband, she acknowledges the same to be her voluntary act, etc. *Edgerton v. Jones*, 10 Minn. 427, 431 (Gil. 341, 344).

#### SEPARATION.

See "Deed of Separation"; "Voluntary Separation."

"Separation," as used in Rev. Civ. Code, art. 140, relating to divorces and separations, and providing that "separation is to be claimed, sued for, and pronounced in a competent court of justice," includes all kinds of judicial separation and for any and every cause. *Butler v. Washington*, 12 South. 356, 358, 45 La. Ann. 279, 19 L. R. A. 814.

#### As desertion.

Mere separation is not desertion in the divorce law. *Loux v. Loux*, 41 Atl. 358, 359, 57 N. J. Eq. (12 Dick.) 561; *Davis v. Davis* (N. J.) 30 Atl. 20; *Proudlove v. Proudlove* (N. J.) 46 Atl. 951, 952; *Ingersoll v. Ingersoll*, 49 Pa. (13 Wright) 249, 251, 88 Am. Dec. 500; *Middleton v. Middleton*, 41 Atl. 291, 293, 187 Pa. 612.

"Separation is not necessarily desertion. The latter may not arise until long after the former has occurred." *Warner v. Warner*, 20 N. W. 557, 558, 54 Mich. 492.

A "separation" between husband and wife implies the consent of both parties to be affected thereby, and is not synonymous with "desertion," the very idea of which is to leave without consent of the other and in violation of duty. The word "separate" means "to part from each other." A separation by mutual consent cannot be desertion. Consent to a separation may be revoked. Where the parties separate by consent, and one repents and asks the other to be reconciled, but the other refuses to be thus reconciled, this becomes a desertion on the part of the one so refusing from the moment of such refusal. *Stoddart v. Stoddart*, 11 Chi. Leg. N. 162.

A "separation" which is sanctioned and authorized by a decree or judgment of a court of competent jurisdiction is neither wrongful nor unlawful, and cannot be made a ground for divorce as against the party rightfully acting under it, and hence is not equivalent to "desertion," as used in Gen. St. 1878, c. 69, § 5, providing that desertion by husband or wife should be a ground for an action to bar the right of curtesy or dower, for desertion imports such a willful abandonment as would constitute good ground for a divorce. *Weld v. Weld*, 7 N. W. 267, 27 Minn. 330.

In a prosecution for perjury, defendant was charged with having sworn in a divorce suit that his wife had willfully deserted him. His testimony was that they separated; that she refused to return. It was contended that the jury should have been instructed as to the difference between separation and desertion, and that a defendant indicted for perjury, who swore that his wife was guilty of desertion, cannot be a proof that defendant swore that himself and his wife separated. It was held that such instruction was not necessary, since the wife testified that the separation was because of her absolute refusal to live with her husband or to come where he was after he had left his former home; there being no distinction between a separation accompanied by such refusal and the statutory definition of desertion. *Hereford v. People*, 64 N. E. 310, 318, 197 Ill. 222.

**SEPARATION OF HABITATION.**

The separation of habitation is the relief which, for just cause, is accorded by the judge to one of the parties from the obligation of living with the other and performing conjugal duties, without, however, severing the marriage tie. *Butler v. Butler* (Pa.) 1 Pars. Eq. Cas. 320, 342 (citing Pothier *Traite du Contrat du Mariage*, partie 6, c. 3, p. 269).

**SEPARATION OF JURY.**

After jurors were impaneled they went in a body under the care of the sheriff a mile and a half in the country for recreation, were kept together, and no one was permitted to speak to them nor were they permitted to speak to any one, and upon returning they immediately retired to their room. Held, that this did not constitute a separation of the jury, which only occurs where one or more jurors depart from their fellows, or the whole of the jurors depart from each other. *State v. Perry*, 44 N. C. 330, 331.

Where two of the jury trying a felony case were taken in charge of an officer to the foot of the stairs in a hotel, where the jury were staying, and then the officer left them, and they went into a water-closet, and a stranger had just gone into the closet before them, and afterwards another stranger went into the same water-closet, and the officer's back was turned on them when the stranger went into the closet and the two jurors remained in the closet some time, in the absence of the officer, with the strangers, this is such a separation of the jury as will entitle the prisoner to have the verdict set aside and a new trial granted, though there be no evidence that conversation was had between the strangers and the two jurors while in the closet about the case then on trial. And the presumption that the prisoner was prejudiced by such separation of the jury is not rebutted by the several affidavits of all the jurors and the officers having them in charge, made before the affidavit of such separation, that there was no such separation of the jury during the trial, and no opportunity offered any one to tamper with the jury. *State v. Robinson*, 20 W. Va. 713, 750, 43 Am. Rep. 799.

**SEPARATION OF PATRIMONY.**

The creditors of the succession may demand, in every case and against every creditor of the heir, a separation of the property of the succession from that of the heir. This is what is called the "separation of patrimony." Civ. Code La. 1900, art. 1444.

**SEQUESTRATE.**

"Sequesterate" is defined to mean to separate from the owner for a time; seize

or take possession of—as the property or income of a debtor until the claims of the creditor are satisfied. And an action brought under Code Civ. Proc. § 1784, to sequestrate the property of a corporation, is similar to a creditor's bill brought by a judgment creditor against an individual. An action to obtain a sequestration of the property of a corporation must be deemed a suit in equity. *Proctor v. Sidney Sash, Blind & Furniture Co.*, 40 N. Y. Supp. 454, 455, 8 App. Div. 42.

**SEQUESTRATION.**

See "Judicial Sequestration."

A writ of sequestration is a process for contempt used by chancery courts to compel the performance of their orders and decrees. When there is a decree against a party for the payment of money, or to do any other act, this process cannot issue until he is put into contempt or it is shown that process cannot be served. *Ryan v. Kingsbery*, 14 S. E. 596, 604, 88 Ga. 361.

A writ of sequestration is a process for contempt, but a sequestration merely to compel the payment of money cannot issue. *McMakin v. McMakin*, 68 Mo. App. 57, 60.

A writ of sequestration provided by Gen. St. 1865, c. 114, § 6, declaring that the court shall have power to award an execution for the collection of the alimony awarded in a divorce proceeding or to enforce the performance of the judgment or order by sequestration of property, is a process for contempt, and, as imprisonment for debt is abolished, a party cannot be imprisoned for a contempt of court in refusing to obey an order or decree directing the mere payment of money. And an order for the payment of alimony is simply an order for the payment of money. *Coughlin v. Ehlert*, 39 Mo. 285, 286.

The writ of sequestration is based upon, and operates to preserve, protect, and enforce, an antecedent privilege or claim of ownership or possession resting on the property seized. *American Nat. Bank v. Childs*, 22 South. 384, 386, 49 La. Ann. 1359.

The process of sequestration, although it has gone almost out of use since the statute allowing an ordinary execution against the real as well as personal estate of a party to enforce the payment of money decreed by this court, may be properly resorted to as a means of enforcing the performance of other decrees where an attachment cannot be served, or where the defendant chooses to remain in prison after his commitment for contempt of court. *Hosack v. Roges* (N. Y.) 11 Paige, 603, 606.

Sequestration of the property of an insolvent corporation is in the nature of an attachment or execution on behalf of the

creditors. *Farmers' Loan & Trust Co. v. Baker*, 46 N. Y. Supp. 266, 273, 20 Misc. Rep. 387.

In Vermont the writ of sequestration is merely an attachment by mesne process in an equity suit. It is called "sequestration." It might as well have been called something else. It is not the writ of sequestration known to the English chancery. *Steam Stone Cutter Co. v. Jones* (U. S.) 13 Fed. 567, 568.

The phrase "writ of sequestration," in Act Gen. Assem. Ark. July 21, 1868, providing that, if a railway company does not pay the interest on the state bonds as stipulated, the treasurer of the state may, "by writ of sequestration, seize and take possession of the income and revenues of said company," etc., is used in its usual sense, and means "to seize or take possession of the property belonging to another, and hold it till the profits have paid the demand for which it was taken." *Tompkins v. Little Rock & Ft. S. Ry.* (U. S.) 15 Fed. 6, 11 (citing Worcester, Dict.).

A writ of sequestration is permitted by law to issue in a suit of trespass to try title for the purpose of preventing injury to the property, its waste, or to prevent the conversion by an occupant of the fruits and revenues of the property, and is permitted for no other purpose. *Finegan v. Read*, 27 S. W. 261, 262, 8 Tex. Civ. App. 33.

A writ of sequestration is a process of contempt against the property of the defendant for the purpose of compelling him to obey or perform some order or decree of court. *McCann v. Randall*, 147 Mass. 81, 93, 17 N. E. 75, 9 Am. St. Rep. 666.

A writ of sequestration is a process for contempt, issued by chancery courts to compel the performance of orders and decrees. In re *Jaramillo*, 45 Pac. 1110, 1113, 8 N. M. 598.

In the local nomenclature of Louisiana, a right of attachment is called a "writ of sequestration." *Stewart v. Potomac Ferry Co.* (U. S.) 12 Fed. 296, 306.

Sequestration is a species of execution. Instead of levying on a life estate in real property, as may be done, a creditor has a right to a writ of sequestration, by which the lands and profits of the life estate may be taken and applied to the payment of the judgment until it is satisfied. *Buchi v. Pund* (Pa.) 17 Montg. Co. Law Rep'r, 11, 12.

"Sequestration" means to seize or take possession of the property belonging to another, and hold it until the profits have paid the demand for which it is taken. *Tompkins v. Little Rock & Ft. S. Ry.* (U. S.) 15 Fed. 6, 11.

A sequestration is intended to accomplish its object by the actual taking of goods and chattels, or the rents and profits of lands, and withholding them until the distress brings compliance with what is then required; and it creates no lien in favor of future judgments or decrees, while an attachment creates such a lien, and nothing more. It is in effect strictly an attachment to create a lien. *Steam Stone Cutter Co. v. Sears* (U. S.) 9 Fed. 8, 12 (citing *French v. Winsor*, 36 Vt. 412).

A sequestration action is said to be simply a summary mode of compelling the application of property of a corporation, which has allowed an execution to be returned unsatisfied, to the payment of its debts. *Townsend v. Oneonta, C. & R. S. R. Co.*, 84 N. Y. Supp. 427, 431, 88 App. Div. 208.

Sequestration is a kind of deposit which two or more persons, engaged in litigation about anything, make of the thing in contest to an indifferent person, who binds himself to restore it, when the issue is decided, to the party to whom it is adjudged to belong. Civ. Code La. 1900, art. 2973.

## SERGEANT.

See "Town Sergeants."

## SERIAL ASSOCIATION.

Where the stock of the building and loan association is divided into series being issued separately and maturing separately, the association is known as a "serial association." *Cook v. Equitable Bldg. & Loan Ass'n*, 30 S. E. 911, 914, 104 Ga. 814.

## SERIOUS.

"Serious" means "important, weighty, momentous, and not trifling." *Lawlor v. People*, 74 Ill. 228, 231.

## SERIOUS BODILY HARM OR INJURY.

As felony, see "Felony."

The term "serious bodily harm," as used in a statute relating to self-defense, is interchangeable or synonymous with the term "great bodily harm." *Lawlor v. People*, 74 Ill. 228, 231.

The word "serious," as used in Pen. Code, art. 679, providing that a homicide is justifiable when committed against an attack which produces a reasonable expectation or fear of death or some serious bodily injury, means what the word imports—that is, grave; not trivial; not light—and it does not necessarily mean in contemplation of

death, or any injury that will eventuate in death or might probably cause death. To be choked until one falls from lack of breath, or from injury inflicted, is a serious injury justifying a homicide. *Bruce v. State*, 51 S. W. 954, 955, 41 Tex. Cr. R. 27.

As used in Pen. Code Tex. art. 496, the biting off of a small portion of a person's ear is not the infliction of a serious bodily injury. *George v. State*, 17 S. W. 351, 21 Tex. App. 315.

As used in Pen. Code, art. 496, the words serious bodily injury cannot be construed to include the fracture of a rib, which was not a serious or permanent wound, being caused by the injured party being knocked down; the person committing the assault pressing his knees on the other's breast and choking him almost to insensibility; the injured person being confined in his room about six weeks. *Halsell v. State*, 18 S. W. 418, 29 Tex. App. 22.

92 Ohio Laws, p. 136, § 2, for the suppression of mob violence, provides: "The term 'serious injury,' for the purposes of this act, shall include any such injury as shall permanently or temporarily disable a person receiving it from earning a livelihood by manual labor." *Caldwell v. Cuyahoga County*, 15 Ohio Cir. Ct. 167, 168, 8 Cir. Dec. 56. See, also, *Bates' Ann. St. Ohio* 1904, § 4426-5.

In an indictment charging that certain persons did inflict serious bodily injury upon each other, the word "serious" is too vague and indefinite to show the extent of the injury so as to support the indictment. *State v. Battle*, 41 S. E. 66, 67, 130 N. C. 655.

Evidence that defendant struck a person with a good-sized or fair-sized walking stick made of bois d'arc and loaded, that the blow was over the eye and stunned the assaulted person, that the blow cut the skin, and that blood was wiped from his forehead, is insufficient to show a serious bodily injury. *Stevens v. State*, 27 Tex. App. 461, 11 S. W. 459.

An application for a life insurance policy requiring the applicant to state whether he has ever had a serious personal injury means one the effects of which were not temporary, or remained when the application was taken, or so affected the general health that it might affect the health or shorten life, and does not include an injury the effects of which were temporary, and had entirely passed away before the application was taken, and did not affect the applicant's health or shorten her life, though at the time it was received it might have been considered serious. *Union Mut. Life Ins. Co. v. Wilkinson*, 80 U. S. (13 Wall.) 222, 230, 20 L. Ed. 617.

## SERIOUS DAMAGE.

The term "serious damage," as used in Code, § 892, providing that justices of the peace shall have exclusive original jurisdiction of all assaults and batteries where no deadly weapon is used and no serious damage done, "does not imply pecuniary damage, nor does it imply merely physical damage, such as acute pain or bodily suffering, or the impairing of physical power or mental suffering. It means damages in one or more of these respects, but it implies as well or as certainly damage to the peace, good order, decencies, and proprieties of society. If the offense is such as to damage greatly the party assailed, or the offenders, or one or more of them, or, if it is calculated to outrage stir up the wrath, and disturb the quiet and good order of the community, if it shocks the moral sense of all good citizens, the justice of the peace would have no jurisdiction. Such offense is not petty, small, trifling, and of little importance in the eye of the law." *State v. Huntley*, 91 N. C. 617, 620.

## SERIOUS ILLNESS.

The term "serious illness," in an application for a life policy, means such illness as is likely to impair permanently the constitution and render the risk more hazardous. *Rand v. Provident Sav. Life Assur. Soc.*, 37 S. W. 7, 8, 97 Tenn. (13 Pickle) 291 (citing *Union Mut. Life Ins. Co. of Maine v. Wilkinson*, 80 U. S. [13 Wall.] 222, 232, 20 L. Ed. 617); *Mutual Life Ins. Co. of New York v. Blodgett*, 27 S. W. 286, 287, 8 Tex. Civ. App. 45.

The term "serious illness," as used in an application for a life insurance policy in a question whether the applicant ever had any serious illness, means a grave, important, and weighty trouble. *Brown v. Metropolitan Life Ins. Co.*, 65 Mich. 306, 32 N. W. 610, 8 Am. St. Rep. 894; *Goucher v. Northwestern Traveling Men's Ass'n* (U. S.) 20 Fed. 596. In the Century Dictionary the words "serious illness" are defined as "attended with danger; giving rise to apprehension." *Caruthers v. Kansas Mut. Life Ins. Co.*, 108 Fed. 487, 490; *Boyle v. Northwestern Mut. Relief Ass'n*, 70 N. W. 351, 353, 95 Wis. 312.

The term "serious illness," as used in an application in a life insurance policy, means an illness that permanently impairs the health of the applicant, and does not mean an insignificant illness. *Drakeford v. Supreme Conclave Knights of Damon*, 39 S. E. 523, 525, 61 S. C. 338.

The term "serious illness," in a statement by an applicant for life insurance that he has had no serious illness, will be construed to mean that the applicant has never

been so ill as to impair his constitution and render the risk unusually hazardous. The term does not include every sickness which may terminate in death, as such an interpretation would cause it to embrace almost every distemper in the entire catalogue of diseases. *Illinois Masons' Ben. Soc. v. Winthrop*, 85 Ill. 537, 542.

### SERIOUSLY.

In a prosecution for robbery the court charged that the jury's opinion of guilt of the accused must "approach absolute conviction," and concluded that certain crimes ought to be punished when they are proved "to your satisfaction, and if not so proved, whatever suspicion there may be, he [defendant] is entitled to an acquittal unless you seriously believe him guilty." Held, that the law does not justify a conviction without the jury being convinced of his guilt—in other words, there must be a conviction of guilt before there can be a conviction of the defendant—and hence there was no error in directing the jury that their opinion must "approach absolute certainty," viz., "a conviction so perfect, complete, and unconditioned as to exclude the possibility of a doubt"; but that the word "seriously," used in connection with the last clause of the charge, was of such doubtful import that it did not fairly present to the jury a meaning of the law that they should find defendant guilty if the evidence established defendant guilty beyond a reasonable doubt. *People v. Ferry*, 24 Pac. 33, 34, 84 Cal. 31.

### SERIOUSLY DISTURB OR INJURE THE PUBLIC PEACE.

The phrase "seriously disturb or injure the public peace," in Pen. Code, § 675, making any person committing any act which seriously disturbs or injures the public peace, or who openly outrages public decency, guilty of a misdemeanor, includes the teachings of the doctrine of anarchy. "To give this construction of the law in no way abridges the liberty of the conscience in the matter of religion or the freedom of speech on all questions of government or of social life, nor does it in any way trespass upon the proper freedom of the press. The point and pith of the offense of anarchists is that they teach the doctrine that the pistol, the dagger, and dynamite may be used to destroy rulers. The teaching of such horrid methods of reaching an end is the offense. It is poor satisfaction, when one of their dupes has consummated the results of their teaching, to catch him, and visit upon him the consequences of his acts. The evil is untouched if we stop there. In this class of cases the courts and the public have too long overlooked the fact that crimes and offenses are committed by written or spoken words. We have been punishing

offenders in other lines for words spoken or written without waiting for an overt act of injury to persons or property. The press is restrained by the law of libel from the too free use of words. Individuals can be punished for words spoken or written, even though no overt act of physical injury follow. It is the power of words that is the potent force to commit crimes and offenses in certain cases. No more striking illustration of the criminal power of words could be given, if we are to believe the murderer of our late President, than that presents. The assassin declares that he was instigated and stimulated to consummate his foul deed by the teachings of Emma Goldman. He is now awaiting execution for the crime, while she is still at large in fancied security. A person may advocate any change of our government by lawful and peaceful means, or may criticize the conduct of its affairs, and get as many people to agree with him as he can, so long as he does not advocate the commission of crime as the means through which he is to attain his end. If he advocates stealthy crime as the means of reaching his end, he, by that act, commits a crime for which he can be punished. The distinction we have tried to point out has been too long overlooked. If our conclusions are sound, it is the teachers of the doctrine who can and ought to be punished. It is not necessary to trace and establish the connection between the teaching of anarchy and a particular crime of an overt nature. It is a strange spectacle in this age for a great nation to stand mute and paralyzed in the presence of teachers of crimes that are advocated only for the purpose of destroying such nation, and it has no power to defend against such internal enemies. We do not believe the arm of the law is too short to reach those offenders against the life of the nation, or too paralyzed to deal with them. The liberty of conscience, the freedom of speech, the freedom of the press, do not need such concessions to save to the fullest extent, unimpaired, those sacred rights of a free people." *People v. Most*, 73 N. Y. Supp. 220, 222, 36 Misc. Rep. 139.

### SERVANT.

See "Fellow Servant"; "Menial Servant"; "Public Servant."

A "servant," as defined by Webster, "is one who serves or does service voluntarily or involuntarily; a person who is employed for another for menial offices or for other labor, and is subject to his command; a person who labors or exercises himself for the benefit of another, his master or employer; a subordinate helper." *Flesh v. Lindsay*, 21 S. W. 907, 911, 115 Mo. 119, 37 Am. St. Rep. 374; *In re Scanlan* (U. S.) 97 Fed. 26, 27; *Lang v. Simmons*, 25 N. W. 650, 651, 64 Wis. 525.



In the Imperial Dictionary the word "servant" is defined as "a person who attends another for the purpose of performing menial offices for hire, or who is employed by another for such offices or other labor, and is subject to his command. The word is correlative to master." Worcester says, "Servant is one who serves; correlative of master." *Lang v. Simmons*, 25 N. W. 650, 651, 64 Wis. 525.

The primary definition of the word servant given by the Century Dictionary is: "One who serves or attends, whether voluntarily or involuntarily; a person employed by another, and subject to his orders; one who exerts himself or herself or labors for the benefit of a master or employer." And the Standard Dictionary defines a "servant" as: "(1) A person employed to labor for the pleasure or interest of another; especially, in law, one employed to render service or assistance in some trade or vocation, but without authority to act as agent in place of his employer; an employé. (2) Specifically, a person hired to assist in domestic matters, living within the employer's house, and making part of his family; hired help." Webster is to the same effect. *Ginter's Ex'rs v. Shelton* (Va.) 45 S. E. 892, 893. See, also, *In re Scanlan* (U. S.) 97 Fed. 26, 27.

A servant is one who, for a valuable consideration, engages in the service of another and undertakes to observe his directions in some lawful business. *Central Coal & Iron Co. v. Grider's Adm'r* (Ky.) 74 S. W. 1058, 1060 (citing *Cooley*, *Torta*, p. 531).

A servant is one who is employed to render personal service to his employer, otherwise than in the pursuit of an independent calling, and who in such service remains entirely under the control and direction of the latter, who is called his master. *Civ. Code Cal.* 1903, § 2009; *Rev. Codes N. D.* 1899, § 4123; *Civ. Code S. D.* 1903, § 1476; *Civ. Code Mont.* 1895, § 2720; *Murray v. Dwight*, 55 N. E. 901, 902, 161 N. Y. 301, 48 L. R. A. 673; *Singer v. McDermott*, 30 Misc. Rep. 738, 741, 62 N. Y. Supp. 1086; *Baldwin v. Abraham*, 57 App. Div. 67, 77, 67 N. Y. Supp. 1079; *Hedge v. Williams*, 63 Pac. 721, 723, 131 Cal. 455, 82 Am. St. Rep. 368.

A servant, strictly speaking, is a person who by contract or by operation of law is for a limited period subject to the control of another in a particular trade, business, or occupation. *Ginter's Ex'rs v. Shelton* (Va.) 45 S. E. 892, 893.

The word "servant" ordinarily means a person employed by another to render personal services to the employer. *In re Grubbs-Wiley Grocery Co.* (U. S.) 96 Fed. 183, 184.

A servant is one who does work under the direction of another, who not only pre-

scribes to the workman the nature of his work, but directs, or at any moment may direct, the means also, or, as it has been put, retains the power of controlling the work. *Powers v. Massachusetts Homœopathic Hospital* (U. S.) 109 Fed. 294, 298, 47 C. C. A. 122.

The word "servant" is applicable to any relation in which, with reference to the matter out of which the alleged wrong has sprung, the person sought to be charged had the right, under the contract of employment, to control, in the given particular complained of, the action of the person doing the wrong. *Gahagan v. Aermotor Co.*, 69 N. W. 914, 915, 67 Minn. 252 (citing *Rait v. New England Furniture & Carpet Co.*, 68 N. W. 729, 66 Minn. 70).

A servant is one who is engaged, not merely in doing work or services for another, but who is in his service usually upon or about the premises or property of his employer and subject to his direction and control therein, and who is generally liable to be dismissed. *Campfield v. Lang* (U. S.) 25 Fed. 128, 131; *State v. Myers*, 82 Mo. 558, 561, 52 Am. Rep. 389 (citing *Heygood v. State*, 59 Ala. 49).

In *Wood, Mast. & Serv.* § 317, it is said the real test by which to determine whether a person is acting as servant of another is to ascertain whether, at the time when the injury was inflicted, he was subject to such person's orders and control, and was liable to be discharged by him for disobedience of orders or misconduct. *Indiana Iron Co. v. Cray*, 48 N. E. 803, 807, 19 Ind. App. 565.

Any person who works for another for a salary is a servant in the eye of the law. In the law, the relation of master and servant does not necessarily include anything menial or degrading. It is not necessary that there shall be any written, or even verbal, contract between them to work for any particular length of time. The relation clearly exists when the one person is willing from day to day to work for another, and that other person desires the labor and makes his business arrangements accordingly. *Frank v. Herold*, 52 Atl. 152, 155, 63 N. J. Eq. 443.

The word "servant," as used in the statement of the law that a master is liable for the acts of his servant, indicates a person hired for wages to work as the employer may direct and under his control. Therefore, where one employs a person carrying on a distinct trade or calling to perform certain work for him independent of the control of the employer, the latter is not responsible for any injury caused by the negligence of that person or his workmen; but where the one employed to superintend the work to be done is subject to the control of an employer, and is paid for his services by day wages, the employer is responsible for injuries to third

persons caused by such employer or his servants. *Morgan v. Bowman*, 22 Mo. 538, 548.

"Servants," as used in 2 Rev. St. (5th Ed.) p. 658, § 18, providing that stockholders of mining companies shall be liable for all debts due and owing to their laborers, servants, and apprentices, comprehends not only such persons as perform labor with their hands, but also includes persons who do menial services. *Hovey v. Ten Broeck*, 26 N. Y. Super. Ct. (3 Rob.) 316, 320.

Laws 1892, c. 688, § 53, making stockholders of corporations personally liable for all debts due any of its laborers, servants, or employes other than contractors for services, applies to those who serve manually, but a class above a mere laborer. *Bristow v. Kretz*, 49 N. Y. Supp. 404, 406, 22 Misc. Rep. 55.

The term "servant" is properly used in an indictment for embezzlement as descriptive of a person employed at a monthly salary, who in the discharge of his duties is subject to the immediate direction and control of his employer. *Gravatt v. State*, 25 Ohio St. 162, 167.

The term "servant or clerk," in the embezzlement statute, making any servant or clerk who embezzles property received in the course of his employment guilty, etc., does not include a tradesman to whom raw materials are given to be converted into manufactured articles, and who contracts for and receives them in good faith. *People v. Burr* (N. Y.) 41 How. Prac. 293, 297.

Testator devised \$12,000, to be divided between "such of my servants as shall be in my employ at my death." C., who was employed and present when he died, had for several years been employed as a laundress, and to assist the other servants, sometimes two days out of the week, and sometimes not employed at all, having the right, when not employed, to serve elsewhere. She was trusted by testator, usually going to his summer house in advance to prepare it for occupancy, and during one summer had charge of his city house. Held, that she was not a "servant," within the meaning of the will. *Metcalf v. Sweeney*, 21 Atl. 364, 365, 17 R. I. 213, 33 Am. St. Rep. 864.

The term "agents and servants," as used in Rev. St. Mo. 1899, c. 2876, providing that no contract between any railroad corporation and any of its agents or servants, limiting the liability of the railroad for damages under a provision of the act abolishing the fellow-servant rule, shall be valid, has such a well-defined meaning, in ordinary as well as legal acceptance, as to admit of no cavil or debate. It is not any corporation but a railroad corporation named by the statute, and it and its agents and servants alone with whom it may not make such contracts. In other words, it

is restricted to the instance where the relation of master and servant exists between the railroad corporation and the other party, and it does not apply between a railroad company and the porter of a Pullman car, who was neither hired nor paid by the railroad company, and over whom it exercised no control, and whom it could not discharge. *McDermon v. Southern Pac. Co.* (U. S.) 122 Fed. 669, 674.

A master is one who exercises personal authority over another, and that other is his servant. The several classes of servants are (1) slaves; (2) menial servants; (3) apprentices; (4) laborers; (5) stewards, bailiffs, factors, agents, etc. *Ginter's Ex'rs v. Shelton* (Va.) 45 S. E. 892, 893.

A legacy "to all servants in my employ," contained in a will, includes servants of all classes, whether menial or not. The word "servant" embraces many classes. It is a generic, and not a specific, designation. It would have been easy to confine the bequest to a class of servants, such as "menial," "household," or "domestic," if such had been the intention of the testator, but no such restraining purpose is shown. Our office is to find out the intention of the testator from the words he used, giving to them their usual or common meaning. It is not for us to interpolate words, or to indulge in a strained construction, in order to effectuate a presumed intention. We are here to interpret a will, and not to make one. *Ginter's Ex'rs v. Shelton* (Va.) 45 S. E. 892, 893.

The term "servants," as used in the general railroad act of 1850, § 10, which declares that all the stockholders of a railroad company shall be liable for all the debts due by it to its laborers and servants, is qualified and limited in its meaning by its association with the word "laborers," according to the familiar maxim, "Noscitur a sociis," and does not include every one performing service for the company. *Aikin v. Wasson*, 24 N. Y. 482, 484.

#### Agent.

In legal essence there is no difference between the relation of master and servant and that of principal and agent, the terms "servant" and "agent" being fundamentally interchangeable, and the distinction between them evidential only. *Brown v. German-American Title & Trust Co.*, 34 Atl. 335, 339, 174 Pa. 443.

There is a distinction between an agent and a servant. An agent has more or less discretion, while a servant acts under the master's control and direction. *McCroskey v. Hamilton*, 34 S. E. 111, 112, 108 Ga. 640, 75 Am. St. Rep. 79.

The word "servant," in its broadest meaning, includes an agent. Agents are oft-

en denominated servants, and servants are often called agents. There is, however, in legal contemplation, a difference between an agent and a servant. An agent is the more direct representative of the master, and clothed with higher and broader powers than a servant. Servants deal with matters of manual or mechanical execution. And where a person is employed to take a note of certain debtors for his employer, and after taking it materially alters the note, he acts as the agent in obtaining the note, but thereafter became a mere servant charged with the duty of carrying it to his master, and in altering the note he was the servant, and not the agent, of his employer. *Kingan & Co. v. Silvers*, 37 N. E. 413, 416, 13 Ind. App. 80.

The words "agents" and "servants" in a not wholly synonymous. Both, however, relate to voluntary action under employment, and each expresses the idea of service. The service performed by a servant for his employer may be inferior in degree to work done by an agent for his principal. A servant is a worker for another under an express or implied agreement; so also is an agent, only he works not only for, but in place of, his principal. In the sense of service an agent is the servant of his principal; therefore designating him, in an information or indictment for embezzling, as agent and servant, is not such a misnomer of his capacity as affects any of his substantial rights. *People v. Treadwell*, 10 Pac. 502, 508, 69 Cal. 226.

The words "agents" and "servants" in a general sense both apply to persons in the service of another, but in a legal sense an agent is one who stands in the place of his principal—his representative—while a servant is one in the master's employment, but not clothed with any representative character. *Turner v. Cross*, 18 S. W. 578, 579, 83 Tex. 218, 15 L. R. A. 262.

Agents of a lumber company who had entire control of the business in the place where located, and who held themselves out as managers, and exercised discretion and independent judgment in the management of the business, and received as such an annual salary, did not occupy the position of "inferior agents or servants" in the sense in which these terms are used. *Foster v. Charles Betcher Lumber Co.*, 58 N. W. 9, 14, 5 S. D. 57, 23 L. R. A. 490, 49 Am. St. Rep. 859.

Mr. Wharton, in speaking of the introduction of the word "agent" in the embezzlement statute in reference to embezzlement by agents, servants, or clerks, says: "As used in the Massachusetts statute, the term 'agents' is much wider in its significations than 'servants' or 'clerks.' The latter are restricted to the performance of specific acts in a specific way; the former may or may not be restricted, and may in fact be clothed with full power to represent their principal with the same discretion as he

might exercise himself." *Territory v. Maxwell*, 2 N. M. 250, 262 (citing 1 Whart. Cr. Law, § 1022).

#### **Agricultural laborer working on shares.**

An agricultural laborer who engages with a landowner to work on the land for a share in the crop is not a "servant," within the rule that a master may recover damages from a third person who unlawfully prevents the servant from performing his duty. *Burgess v. Carpenter*, 2 S. C. (2 Rich.) 7, 9, 16 Am. Rep. 643.

#### **Attorney.**

Code, art. 47, § 15, providing that the wages or salaries of clerks, servants, or employes of a person or corporation making an assignment for the benefit of creditors should be first paid, cannot be construed to include an attorney at law, for the word "servant" should be construed in the sense in which it was employed in the common law. The first sort of servants acknowledged by the laws of England are "menial servants," so called from being intra mœnia, or domestics. Another species of servants are called "apprentices," from apprende, to learn. A third species of servants are "laborers," who are only hired by the day or week, and do not live intra mœnia, as part of the family. There is yet a fourth species of servants, if they may be so called, being rather in a superior—a ministerial—capacity, such as stewards, factors, and bailiffs, whom, however, the law considers as servants pro tempore with regard to such of their acts as affect their master's or employer's property. Besides these four sorts of servants may be mentioned clerks and shopmen, who, however confidentially they may be employed, are servants in the eye of the law; merchant seamen; persons working in mills and factories, or mines and collieries. *Lewis v. Fisher*, 30 Atl. 608, 609, 80 Md. 139, 26 L. R. A. 278, 45 Am. St. Rep. 327 (citing 1 Broom & H. Comm. bk. 1, c. 14; 1 Black, Comm. c. 14).

#### **Clerk.**

The term "servants and helpers," in a statute preferring the claims of servant girls at hotels, boarding houses, restaurants, etc., or other servants and helpers in and about said house of entertainment, includes a clerk or bartender in a hotel. *Weaver v. Wheaton*, 2 Pa. Co. Ct. R. 428, 430.

A clerk is a "servant," within the act respecting executors and administrators, and making wages due servants a preferred claim. *Cawood Bros. v. Wolfley*, 43 Pac. 236, 56 Kan. 281, 31 L. R. A. 538, 54 Am. St. Rep. 590.

#### **Driver of coach or stage.**

The driver of a closed coach hired by defendant is not a "servant" of the party

hiring, within the meaning of 7 & 8 Geo. IV, c. 29, § 46, relating to larceny by servants. *Rex v. Haydon*, 7 Car. & P. 444.

The term "servant," within the meaning of the statute providing a punishment for embezzlement by servants, includes a stage driver intrusted by his employers to carry money from one place to another, who obtains possession of the property by virtue of his employment. *People v. Sherman* (N. Y.) 10 Wend. 298, 299, 25 Am. Dec. 563.

#### **Employé synonymous.**

The word "servant," in legal nomenclature, has a broad significance, and embraces all persons, of whatever rank or position, who are in the employ or subject to the direction or control of another in any department of labor or business. In most cases it may be said to be synonymous with "employé." *Hand v. Cole*, 12 S. W. 922, 923, 88 Tenn. (4 Pickle) 400, 7 L. R. A. 96.

#### **As family servant.**

The common understanding seems to confine the term "servant" to that class of persons who make part of a man's family, whose employment is about the house or appurtenances, or who reside in the house and are at the command of the master. In this sense it was employed in the act of 1704, giving a preference to servants' wages. *Ex Parte Meason* (Pa.) 5 Bin. 167, 175.

"Servants," as used in Act April 19, 1794, giving the wages of servants a preference over other claims against a decedent's estate, means only those who in common parlance are called "servants"—that is, "hirelings who make a part of a man's family, employed for money to assist in the economy of the family or in matters connected with it." *Boniface v. Scott* (Pa.) 3 Serg. & R. 351, 353.

The word "servant," as used in Bankr. Act July 1, 1898, c. 541, § 64b, cl. 4, 30 Stat. 563 [U. S. Comp. St. 1901, p. 3447], according priority of payment out of bankrupts' estates to wages due servants, etc., includes others than domestic servants. In *re Greenwald* (U. S.) 99 Fed. 705, 706.

The word "servant," as used in Act Feb. 24, 1834, giving a preference, in the settlement of an intestate's estate, to the wages of a servant, is restricted to that class of persons who make a part of a man's family, whose employment is about the house or its appurtenances, as the stable, or who, residing at the house, are at the command of the master, to be employed at his pleasure, either in the house or otherwise; and it has been held to embrace only those who in common parlance are called servants—that is, hirelings who make a part of a man's family, employed for money to assist in the economy of the family or in matters

connected with it. In *re McKim's Estate*, 8 Pa. Law J. 502, 508.

"Servants," as used in a will giving each of testator's servants one year's wages over and above what might be due to them at the time of his death, means family servants, usually hired by the year, and does not include a person who had worked in testator's garden under his gardener for several years at weekly wages, and a boy who had served the testator for some time as a cowboy, at weekly wages, neither of whom resided with, or formed part of, the testator's family. *Booth v. Dean*, 1 Mylne & K. 560.

The term "servant" is very broad, and, if taken in its legal sense, would embrace all classes of persons retained, hired, or employed in the business of another; and when used in Act April 19, 1794, giving a preference for the amount due as servant's wages in a settlement of an estate, a person hired at a monthly salary, who, when required, assisted in the domestic labors of the house, though principally employed in aiding the intestate in a market which he kept, is a servant. In *re Miller's Estate* (Pa.) 1 Ashm. 323, 327.

#### **Indented apprentice.**

The term "servants" in the Act of 1837, against enticing away negro slaves and servants, does not include indented apprentices. *State v. Conover* (Del.) 3 Har. 565.

#### **Independent contractor distinguished.**

To draw the distinction between independent contractors and servants is often difficult, and the rules which courts have undertaken to lay down on this subject are not always simple of application. A rule as often quoted as any is stated in the syllabus of the case of *Bibb's Adm'r v. Norfolk & W. R. Co.*, 14 S. E. 163, 87 Va. 711, after an able review of the authorities, as follows: "An independent contractor is one who renders service in the course of an occupation, and represents the will of his employer only as to the result of his work, and not as to the means whereby it is accomplished, and is usually paid by the job." *Thomp. Neg. § 39*, says: "Perhaps the most usual test by which to determine whether the person doing the injury was a servant or an independent contractor is to consider whether he was working by the job or at stated wages—so much per day, week, or month. *Schular v. Hudson River R. Co.* (N. Y.) 38 Barb. 653. A person who works for wages, whose labor is directed and controlled by the employer, either in person or by an intermediate agent, is a servant, and the master must answer for the wrongs done by him in the course of his employment. A person who, for a stated sum, engages to perform a stated piece of labor, in which he is skilled, the proprietor of the work leav-

ing him to his own methods, is an independent contractor. The proprietor does not stand in relation of superior to him, and is not answerable for the wrongs done by him or his servants in the prosecution of the work, unless special circumstances exist making him so. The fact the employé was hired, not for a definite time, but to perform a particular job, does not, however, of itself negative the relation of master and servant, for under such a contract the employer may well retain full control over him; and it must be constantly borne in mind that the power to control, on the part of the employer, is the essential fact establishing the relation." A person employed by the agent of the owner of a street railway, at a stipulated sum per month, to run a car and furnish a driver, the car and the road being controlled and the work directed by the agent, is not an independent contractor, but is a servant. *Jensen v. Barbour*, 39 Pac. 906, 908, 15 Mont. 582.

A contractor who simply undertakes to bring about a result after his own methods is not a servant of his employer. Thus, a contractor engaged in building a sewer under a contract by the city, which provided that it should be done under the immediate superintendence and direction of a commissioner, was not a servant of the city. *Foster v. City of Chicago*, 64 N. E. 322, 323, 197 Ill. 264.

#### **Laborer distinguished.**

See "Laborer."

#### **Manager or superintendent of corporation.**

The general manager of a mercantile corporation, who has supreme authority in managing his business, and is a stockholder and director, and allowed a salary of \$100 per month for his services, is not a servant within Bankr. Act July 1, 1898, c. 541, § 64b, 30 Stat. 563 [U. S. Comp. St. 1901, p. 3447], according priority of payment to servants. In re *Grubbs-Wiley Grocery Co.* (U. S.) 96 Fed. 183, 184.

"Servants," as used in Acts 1863, c. 63, making stockholders of a corporation liable for all debts that may be due and owing to their laborers, servants, and apprentices for services performed for such corporation, cannot be construed to mean a general manager of a corporation. "Servants" mean those who render menial or manual services. They are a class whose members usually look to the reward of a day's labor or service for immediate or present support, from whom the company does not expect credit, and to whom its future ability to pay is of no consequence. A servant is one who is responsible for no independent action, but who does a day's work or stated job under the direction of a superior. A general manager would not, in popu-

lar language, be deemed a servant of the corporation. The word used is no doubt broad enough and might without exaggeration represent all persons connected with the administration or furtherance of the affairs of a corporation from the very lowest menial to the president of the corporation, but it would manifestly be too general an application of the word. *Wakefield v. Fargo*, 90 N. Y. 213, 217.

A servant is one who is engaged not merely in doing work or services for another, but who is, in his service, usually upon or about the premises or property of his employer subject to his direction and control therein, and who is generally liable to be dismissed. Hence a person whom a railroad company employs to get out cross-ties, or build a section of their road, according to certain specifications and at a certain price, or whom a planter employs to build a house or dig a ditch of certain dimensions upon terms agreed upon, is not a servant of his employer; but persons who are engaged as conductors, or other employés of railroad trains, to assist in running them, and a person who is employed as superintendent of the business of a railroad company, according to such schedules and arrangements or directions as the company may from time to time prescribe, come within the definition laid down, and may properly be regarded as "servants" within the legal meaning of that word. *Heygood v. State*, 59 Ala. 49, 51.

One employed by a mining corporation organized under the general manufacturing act of New York, as agent to take charge of its mines in another country, with full power to control its property and manage its financial affairs in that country in all respects as the company itself could do, is not a "servant," within the meaning of the provision of that country making the stockholders of any company organized under it liable for services performed for the corporation by its laborers, servants, etc. The term "servant" is one in general use. In common parlance it is understood to relate and apply only to a person rendering service of a subordinate, but not necessarily of a menial, character to an employer, varying in its nature according to the business or occupation in which it is rendered, and not to extend to and include every employé or party who does work for another. Being associated in the section with the words "laborers" and "apprentices," such context indicates that it was intended to apply to a person employed to devote his time and render his services in the performance of work similar in its general character to that done by those employés. The word "servants" in the section must be taken to have been used not in its broadest, most comprehensive, nor in its more limited or restricted, sense, but in the general and ordinary use of the term. It may be conceded that to use

it in its most comprehensive sense would include the president and other officers of the corporation, while its use in a limited and restricted sense would only indicate a domestic, a person employed in the house or family, or a menial who labors in some low employment; and the term was not intended to extend to the former or to be limited or restricted to the latter class. *Hill v. Spencer*, 61 N. Y. 274, 278.

The superintendent of a mine is not a laborer, servant, clerk, or operative of a company, within the meaning of a provision of its charter making the stockholders individually liable for the wages of such persons in case the company becomes insolvent. *Cockling v. Ward* (Tenn.) 48 S. W. 287, 289.

"Servants," as used in Laws 1848, p. 54, c. 40, § 18, providing that the stockholders of any company organized under the provision of such act shall be jointly and severally individually liable for all debts that may be due and owing to all their laborers, servants, and apprentices for services performed for such corporation, is not restricted to one who performs menial services, but includes one acting as engineer and foreman, and sometimes as superintendent, of a mining company. *Vincent v. Bamford* (N. Y.) 12 Abb. Prac. (N. S.) 252.

#### **Officer or stockholder of corporation.**

"In construing the eighteenth section of the general manufacturing corporation act, which imposes liability upon stockholders in corporations for debts owing to laborers, servants, or apprentices, the courts have confined its application to persons occupying subordinate positions, and have excluded from its protection the officers and managers of corporations on the ground that they were not laborers or servants, within the meaning of the act." *Palmer v. Van Santvoord*, 47 N. E. 915, 916, 153 N. Y. 612, 38 L. R. A. 402 (citing *Dean v. De Wolf*, 82 N. Y. 626; *Hill v. Spencer*, 61 N. Y. 274; *Wakefield v. Fargo*, 90 N. Y. 213).

Act Minn. March 6, 1876, providing that in a foreclosure sale of a railroad the court granting the foreclosure decree shall provide therein that the purchaser shall fully pay all sums due and owing by such foreclosed railroad company to any servant or employé thereof, meant operatives of the grade of servants, which excluded officers to whom was intrusted the management of the corporate business. *Wells v. Southern Minnesota Ry. Co.* (U. S.) 1 Fed. 270, 272.

The secretary of a manufacturing corporation, in performing the services incident to the duties of his office, is a "servant" of the company, within the meaning and intent of Act Feb. 17, 1848, § 18, making stockholders of such corporations individually liable for debts due to their laborers, servants, etc.

*Richardson v. Abendroth* (N. Y.) 43 Barb. 162, 164.

The term "laborers, servants and apprentices of a corporation," within the meaning of Laws 1848, c. 40, § 18, providing that the stockholders of such corporation shall be jointly and severally and individually liable for all debts that may be due and owing to all their laborers, servants, and apprentices, does not include the secretary of such corporation. *Coffin v. Reynolds*, 37 N. Y. 640, 641.

Comp. Laws 1883, c. 349, made every assignment void which gave a preference to one creditor over another except for the wages of laborers, servants, and employés earned within six months prior thereto. Held, that the words "laborers, servants, and employés" were not used to mean simply persons who work at manual toil, since, if that construction was to obtain, the use of the three words "laborers, servants, and employés" was tautological, and that the words should be construed to include even stockholders of the corporation, who are engaged in its service, and work for the corporation on a salary. *Conlee Lumber Co. v. Ripon Lumber & Mfg. Co.*, 29 N. W. 285, 287, 66 Wis. 481.

#### **As owner.**

See "Owner."

#### **Piece workman.**

A servant is one who, for wages, serves his employer, following his direction and performing the work. A workman by the piece, who, by his industry and labor, gives the required shape to the material of his employer, who has no interest in the work, and is not under a contract, is a servant and ordinary employé. The same is true of a laboring man who works by the job in unloading a car of coal under the direction and subject to the control of the employer. *Holmes v. Tennessee Coal, Iron & R. Co.*, 22 South. 403, 405, 49 La. Ann. 1465.

#### **Railroad physician.**

The term "servant," as used with relation to the rule of respondeat superior, has a well-defined meaning, being applicable to any relation in which, with reference to the matter out of which an alleged wrong has sprung, the person sought to be charged had the right to control the action of the person doing the alleged wrong; and this right to control appears to be the conclusive test by which to determine whether the relation exists. For the relation to exist so as to make the master responsible, the master must not only have the power to select the servant, but to direct the mode of executing, and to so control him in his acts in the course of his employment as to prevent injury to others. The relation of master and servant does not exist between a railroad company and a physician employed by it to take care of men injured in its em-

ployment. *Quinn v. Kansas City, M. & B. R. Co.*, 30 S. W. 1036, 1037, 94 Tenn. (10 Pickle) 713, 28 L. R. A. 552, 45 Am. St. Rep. 767.

#### Road commissioner.

Road commissioners act as public officers, and not as servants of the town. *McManus v. Inhabitants of Weston*, 41 N. E. 301, 302, 164 Mass. 263, 31 L. R. A. 174.

#### School teacher.

A school teacher is neither a laborer, clerk, servant, nurse, nor other person, within the meaning of the statute providing that in all cases within the jurisdiction of a justice of the peace, where any action is brought by any laborer, clerk, servant, nurse, or other person for compensation claimed to be due for personal services performed, the plaintiff, if successful, shall be entitled to recover, as part of the costs, a judgment against the defendant for an attorney's fee. *School Dist. No. 94 v. Gautier*, 73 Pac. 954, 957, 13 Okl. 194.

#### Special police officer.

A special police officer appointed on application of the keeper of a theater, by giving a bond to the city, is not a servant of the proprietor of the theater, who did not appoint him, could not remove him, and could not control his official conduct. *Healey v. Lothrop*, 50 N. E. 540, 171 Mass. 263.

#### Traveling salesman.

A creditor of a bankrupt, employed by the bankrupt as a traveling salesman at an annual salary, is not a servant of his employer, within the meaning of Bankr. Act, July 1, 1898, c. 541, § 64b, 30 Stat. 563 [U. S. Comp. St. 1901, p. 3447], according priority of payment out of bankrupt estates to servants. *In re Scanlan* (U. S.) 97 Fed. 26, 27.

"A servant is popularly understood to be one who is employed to perform an inferior and menial service. There is also a sense in which the word 'servant' may be applied to a person who performs for another any kind of service in which the word would be equivalent to 'employé' or 'agent.' But this is not the signification popularly attached to the word." As used in a statute creating exemptions in favor of "servants," the word does not include a traveling salesman. *Epps v. Epps*, 17 Ill. App. (17 Bradw.) 196, 201.

"Servants," as used in General Incorporation Act 1875, § 11, providing that the stockholders of mining, quarrying, and manufacturing companies are jointly and severally liable individually for all moneys due and owing to the laborers, servants, clerks, and operatives of the company if it becomes insolvent, is not synonymous with "employés," and does not include a traveling salesman on

a salary of \$100 per month. "He would be if we were at liberty to accept the term in its broadest sense, as defined by Mr. Wood in his work on Master and Servant, viz.: 'The word "servant" in our legal nomenclature has a broad significance, and embraces all persons, of whatever rank or position, who are in the employ and subject to the direction or control of another in any department of labor or business. Indeed, it may in most cases be said to be synonymous with "employé."'" *Hand v. Cole*, 12 S. W. 922, 923, 88 Tenn. 400, 7 L. R. A. 96, 97.

#### SERVED.

See "Duly Served"; "Not Served for Want of Property"; "Personally Served."

Where a sheriff makes his return "Served," a legal service is understood; that is, that it has been served according to law. *Kennedy v. Baker*, 28 Atl. 252, 254, 159 Pa. 146.

A sheriff's return of summons as "Served" means served on all the defendants. *Marshall v. Lowry* (Pa.) 6 Serg. & R. 281.

A writ or notice is issued when it is put in proper form and placed in an officer's hands for service, but it is not served until the officer has performed the acts which constitute service, or the party to whom it is directed has waived the form and accepted service. Hence an abstract on appeal stating that notice of appeal was issued on defendant and on the clerk on a certain date does not show that the notice was served so as to confer appellate jurisdiction, "issued" not being equivalent to "served." *Oskaloosa Cigar Co. v. Iowa Cent. Ry. Co.* (Iowa) 89 N. W. 1065.

To serve a writ is to deliver it with judicial effect—in such manner as to charge the person with a receipt of it. A return of "Served" to a writ of summons amounts to nothing. It is a mere conclusion of law. The return must disclose the facts upon which such conclusion is based. *City v. Cathcart* (Pa.) 10 Phila. 103.

In computing longevity pay, the words "for every five years he may have served or shall serve in the army of the United States," occurring in Act Cong. July 5, 1838, § 15, include cadet services at West Point; and such services should be computed in reckoning longevity pay prior as well as subsequent to Act Feb. 24, 1881, which provides that additional pay to officers for length of service to be paid with a current monthly pay, and the actual time of service in the army or navy, or both, shall be allowed all officers in computing their pay. *United States v. Watson*, 9 Sup. Ct. 430, 431, 130 U. S. 80, 32 L. Ed. 852.

One has not served a term in prison, within Comp. Laws 1897, § 2112, allowing a prisoner reduction of term for good behavior if he has not already served a second term, though he was sentenced to and confined therein, the convictions having been of offenses not punishable by such confinement. *In re Harney* (Mich.) 96 N. W. 795.

## SERVI.

The "servi," as the Romans used the term, were those employed in husbandry and manufactures. *Ex parte Meason* (Pa.) 5 Bin. 167, 179.

## SERVICE.

See "Actual Military Service"; "Actual Service"; "Car Service"; "Civil Service"; "Constructive Service"; "Extraordinary Services"; "General Services"; "In Service"; "Involuntary Service"; "Legal Service"; "Maritime Service"; "Medical Services"; "Military Service"; "Official Service"; "Ordinary Service"; "Personal Service"; "Professional Services"; "Public Service"; "Real Services"; "Salvage Service"; "Sea Service"; "Special Services"; "Toll Service"; "Transfer Service"; "Voluntary Services."

All services, see "All."

Like service, see "Like."

"Service or labor" within the meaning of Act Cong. Feb. 26, 1885, c. 164 [U. S. Comp. St. 1901, p. 1290], prohibiting the importation of aliens for labor or service, is limited to cheap and unskilled labor and service, and does not include professional labor or service. *United States v. Laws*, 163 U. S. 253, 18 Sup. Ct. 998, 41 L. Ed. 151.

Act Cong. Feb. 26, 1885, c. 164 [U. S. Comp. St. 1901, p. 1290], prohibits the importation and migration of foreigners and aliens under contract to perform labor or service of any kind in the United States. The act provides that the prohibitions of the act shall not apply to professional actors, artists, lecturers, or singers, nor to persons employed strictly as personal or domestic servants. Held, that the words "labor and service" include the services of an alien clergyman residing in England. The words "labor or service" should not be taken in any restricted sense. Every kind of industry, and every employment, manual or intellectual, is embraced within the language used, subject to the specific exceptions. *United States v. Church of the Holy Trinity* (U. S.) 36 Fed. 303, 305.

The word "service" has different meanings. It may mean an advantage conferred; that which promotes interest or happiness;

benefit. One confers an advantage upon himself by striving for his own benefit, and looks upon his labor done in his own behalf as that which particularly furthers his interest and happiness. The word "render" sometimes means to bestow or provide; furnish; to give in answer to requirement of duty or demand. And the words, as used in a statute providing that the earnings of a judgment debtor for his personal services rendered within 30 days next preceding the levy of execution shall be exempt, do not necessarily contemplate that the services be rendered another. One provides for himself and family in answer to one of the highest requirements of duty, and hence a miner is authorized to claim gold dust taken from his claim within 30 days next preceding a levy as exempt from execution. *Dayton v. Ewart*, 72 Pac. 420, 422, 28 Mont. 153, 98 Am. St. Rep. 549.

"Services rendered," as used in a statute according a priority to claims for services rendered in keeping a railroad in repair, meant only services rendered by such as were engaged in manual labor in making repairs. The dividing line is between services rendered in the official and executive management and authority over the work of making repairs and running the road, and such laborers and employes as do this work. *Poland v. Lamolille Valley R. Co.*, 52 Vt. 144, 180.

### Of administrator.

"Services," as used in Revision, p. 76, § 112, directing the orphans' court to apportion commissions among the administrators of an estate, having regard to their respective services, means the pains, trouble, and risk taken by each in the administration. *Address v. Address*, 22 Atl. 124, 125, 46 N. J. Eq. 523.

### Of apprentice.

An apprentice, to gain a settlement in a township, must serve with his or her master or mistress for the space of one full year. If he absents himself from the service and roves abroad, he does not gain a settlement. Subjection to indenture without service under it does not fulfill the words nor the design of the statute, and running away is not service. *Overseers of Poor of Jefferson Tp. v. Overseers of Poor of Pequannock Tp.*, 13 N. J. Law (1 J. S. Green) 187.

### Of auctioneer.

"Services," as used in 2 Rev. St. (5th Ed.) 463, providing that an auctioneer shall not receive a higher rate for his "services" than 2½ per cent., unless by written agreement, are not merely the offering of the goods for sale, but also the duties incidental thereto, such as the advertising of the sale and making the necessary entries of sale. *Leeds v. Bowen* (N. Y.) 2 Abb. Prac. (N. S.) 43, 46.

"Services," as used in Rev. St. c. 17, tit. 1, § 23, fixing the compensation which an auc-



tioneer shall demand or receive for his services, includes every kind of service that may be rendered by him in taking the property into his possession and taking care of it while the sale is under advertisement, preparing the necessary catalogues or schedules, and labeling or numbering the articles, and entering them and the sales in his books, but does not include expenses actually and necessarily incurred and paid by him—as, for instance, the expense of advertising in public newspapers in compliance with his duty under the statute. *Russell v. Miner* (N. Y.) 25 Hun, 114, 115.

“Services,” as used in 1 Rev. St. §§ 23, 24, providing that an auctioneer shall receive a certain per cent. on the amount of sales as compensation for his “services,” means services as an auctioneer, and does not include other sales made by him. *Russell v. Miner* (N. Y.) 61 Barb. 534, 538.

#### Of daughter.

Where a daughter rented a house and carried on the business of a milliner at the time of her seduction, the fact that her mother and younger brother and sisters resided with her and received part of their support from the proceeds of her business, the father lodging elsewhere, did not constitute such “services” as to entitle the father to maintain an action for such seduction. *Manly v. Field*, 7 C. B. (N. S.) 96.

#### Of employé.

An assignment of all right to money due or to become due for services under a building contract includes expenditures as well as labor. *Tracy v. Waters*, 39 N. E. 190, 162 Mass. 562.

“Services,” as used in Code Civ. Proc. § 191, subd. 2, as amended by Laws 1898, c. 574, relating to the taking of appeals in an action to recover wages, salary, or compensation for services, including expenses incidental thereto, etc., means work done by one person at the request of another, the nature of the work, whether of a humble or high grade, being unimportant; and therefore the statute is not to be restricted to owners of claims of employés and laboring men employed at a given rate of wages or compensation, but includes claims for professional services. *Boyd v. Gorman*, 52 N. E. 113, 157 N. Y. 365.

“Services,” as used in Act April 9, 1872, giving a priority of liens for labor and services performed, the operation of works, mines, manufactories, or other business, etc., means such as in the course of a regular employment contributes directly or indirectly to the particular, permanent, and continuous use of such businesses, whether skilled or unskilled in the particular art or craft, but does not include labor or services contrib-

uted to the construction and equipment of such businesses, it being only temporary and preliminary to their operation. Appeal of *Llewellyn*, 103 Pa. 458, 462.

#### Of officer.

“Services,” as used in Gen. St. 1878, c. 8, § 172, providing that the county treasurer shall receive certain percentages for his services, provided that he shall not receive more than a certain amount for his personal services in any one year, include all the labor of performing the duties of treasurer, and receiving, collecting, and disbursing, whether such labor be performed by the treasurer himself or by a deputy or clerk, and all expenses incidental to such performances save those of which the statute specifically directs the allowance. *Yost v. Scott County Com'rs*, 25 Minn. 366, 367.

The word “services” in a statute providing that a public officer shall receive a certain salary as compensation for his services, except, etc., is to be construed as including all his services except such as are specifically excepted. *Erle County Sup'rs v. Jones*, 23 N. E. 742, 119 N. Y. 339.

#### Of ship.

A sailor must be deemed in the “service of the ship” while under the power and authority of its officers, and the phrase is not confined in meaning to acts done for the benefit of the ship or in the actual performance of the seaman's duty. He is entitled to be cured, at the expense of the ship, of any injury received by him in executing an improper order, or inflicted on him directly by the wrongful violence of an officer of the ship in the exercise of his authority as officer to punish him. *Ringgold v. Crocker* (U. S.) 20 Fed. Cas. 813, 814.

#### Of soldiers.

“Service,” as used in a resolution of a town that it would guaranty to all members of a certain company of soldiers organized in the town a certain sum per month while in service, etc., and also pay them certain sums in advance when called into service, should be construed to refer only to the service under authority of the United States. *Howes v. Inhabitants of Middleborough*, 108 Mass. 123, 126.

#### Of the state.

Rev. Code, c. 120, § 11, giving the Attorney General the right of appeal in certain cases against persons in the “service of the state,” should be construed to mean military service. *Attorney General v. Fenton* (Va.) 5 Munf. 292, 295.

#### Of surviving partner.

The word “services,” as used in an agreement between surviving partners and

the executor of a deceased partner, providing that the surviving partners shall account only for profits after paying all expenses, costs, charges, and services, relates to the employment by the survivors of a manager, and does not include the surviving partners' attention to the business, so as to enable them to recover compensation therefor. *Brown v. McFarland's Ex'r*, 41 Pa. (5 Wright) 129, 133, 134, 80 Am. Dec. 598.

#### Of wife.

The term "service," in actions for the loss of service of plaintiff's wife because of injuries, etc., includes any pecuniary injury suffered by the husband from having been deprived of the aid, comfort, and society of his wife, or which may reasonably be expected to result in the future, including charges and expenses incurred, or which he may be put to, in consequence of the wrong. *Butler v. Manhattan Ry. Co.*, 38 N. E. 454, 455, 143 N. Y. 417, 28 L. R. A. 46, 42 Am. St. Rep. 738.

"Service," when applied to the functions of a wife, is not measured by any fixed or conventional standard as to labor actually performed, but may be ascertained by the jury from their common knowledge, based upon the aid, assistance, comfort, and society the wife would be expected to render the husband under the circumstances and conditions in which they may be placed. *Gulf, O. & S. F. Ry. Co. v. Younger* (Tex.) 40 S. W. 423, 424.

The term "services," as used in regard to the wife's services, signifies such services as are due from her, and includes the idea of her society, and not alone such service as a hired domestic might perform. *Selleck v. City of Janesville*, 80 N. W. 944, 946, 104 Wis. 570, 47 L. R. A. 691, 76 Am. St. Rep. 892.

"Services," in the sense in which the term is used in the statement that loss of service is the material element of damages in an action for criminal conversation, does not mean labor performed nor assistance in any material sense. Deprivation of services in this connection does not involve or imply a loss measurable by pecuniary standards of value, such as obtain where the master is deprived of the labor of his servant, or even where the father is deprived of the help of his daughter; but the term is used in a peculiar sense, implying whatever of aid, assistance, comfort, and society the wife would be expected to render or bestow upon her husband under the circumstances and in the condition in which they may be placed, whatever those may be. *Long v. Booe*, 17 South. 716, 718, 106 Ala. 570.

The word "service," as used at common law in relation to the labor performed and aid rendered by a wife, does not properly represent the dignity of the wife's work as

a member of the matrimonial partnership in Texas. She no more owes service to the husband than he to her. Her duties are those of a wife, and are not to be valued as those of a servant or hireling. The husband usually follows a pursuit which makes a return in money, and the value of his labor can be ascertained by comparison with that of other men in like employment with like ability. The wife's labor, while equally valuable to the community, does not command a price in the market, and therefore cannot be proved by experts, as can that of a husband. *Gainesville, H. & W. Ry. Co. v. Lacy*, 24 S. W. 269, 271, 86 Tex. 244.

#### On logs or lumber.

Laws 1887, Act No. 229 (3 How. St. § 8427a), giving any person who performs any labor or service in manufacturing lumber a lien therefor, includes the labor or services of teams furnished by the person who himself, as a laborer or contractor, performs the labor or service; but there can be no lien in favor of the owner of a team let to the laborer or contractor, where the one who makes use of the team is himself entitled to assert a lien for the services at a gross sum for his own work and that of the team. *Mable v. Sines*, 52 N. W. 1007, 92 Mich. 545.

"Services," as used in Laws 1877, c. 95, giving one a lien for labor and services on logs, means not merely the personal or manual labor and services of the claimant, but includes those performed by his teams and servants. *Hogan v. Cushing*, 5 N. W. 490, 491, 49 Wis. 169.

The term "services on logs or lumber," in the meaning of an averment, by a person seeking to recover a lien on logs and lumber, that the lien is for services rendered on logs and lumber, as required to be so stated by *Tay. St. 1769, § 28*, includes both the person who cooks food for a logging crew and the person furnishing the provisions. *Winslow v. Urquhart*, 39 Wis. 260, 268.

#### SERVICE (In Practice).

The word "service," as applied to the commencement of a suit, is that notice given to the defendant which makes him a party to the proceeding, and makes it incumbent on him to appear and answer to the cause or run the risk of having a valid judgment rendered against him in consequence of his default. *Sanford v. Dick*, 17 Conn. 213, 215; *Cross v. Barber*, 15 Atl. 69, 70, 16 R. I. 266.

"Service" means serving the defendant with a copy of the process, or showing him the original if he desires it. *Goggs v. Lord Huntingtower*, 12 Mees. & W. 503, 504.

Delivery of a notice of appeal addressed to the county clerk is service upon such clerk, as required by *Comp. St. 1901, art. 1*,

c. 18, § 37. *Jarvis v. Chase County*, 89 N. W. 624, 625, 64 Neb. 74.

The word "service," as applied to the act of a marshal, ordinarily implies something in the nature of an act or proceeding adverse to the party served, or of a notice to him, and was not intended to cover a case of a warrant deposited with the warden of a penitentiary as a voucher or authority for detaining the prisoner. *United States v. McMahon*, 17 Sup. Ct. 28, 30, 164 U. S. 81, 41 L. Ed. 357.

"Service" is defined in *Burrill's Law Dictionary* as the judicial delivery or communication of papers, execution of process, the delivery or communication of a pleading, notice, or other paper in the interest of the opposite party, so as to charge him with the receipt of it and to subject him to its legal effect. Where a person confined in jail was entitled to have delivered to him, one entire day before the trial, a list of the names of the persons summoned, from which jurors to try him were to be drawn, a list of the 75 persons summoned appearing in the record, followed by this return: "Executed by serving copy of the within on Seaborn Walker Nov. 15, 1874. J. S. Burke Sheriff"—is evidence of a sufficient compliance with this requirement. *Walker v. State*, 52 Ala. 192, 193.

The mailing of a copy of a verified statement of a claim of damages to the town clerk or town board of which the town supervisor is a member is a sufficient service thereof, within the meaning of Highway Law, § 16, providing that no action shall be maintained against any town to recover damages unless a verified statement of the cause of action shall have been presented to the supervisor of the town within six months after the cause of action accrued, and no such action shall be commenced until 15 days after the service of such statement. "While the word 'service' has an accepted meaning in relation to papers served in an action, it seems to us that a construction of this statute would be unnecessarily strict which would give to the word a different meaning when applied to a proceeding which is a condition precedent to the bringing of the action, and part of the remedy itself." *Soper v. Town of Greenwich*, 62 N. Y. Supp. 1111, 1113, 48 App. Div. 354.

When a statute requires service on a person, it means personal service, unless some other service is specified or indicated. *McDermott v. Board of Police for Metropolitan Police Dist.* (N. Y.) 25 Barb. 635, 647.

By "service," in Rev. St. § 1227, providing for the service of a copy of a citation on the local agent of an incorporated or joint-stock company, and declaring that the return of the officer executing the citation

shall be indorsed thereon, and shall state when the citation is served, and the manner of service, conforming to the command of the writ, etc., is meant the particular act of the officer by which the copy of the citation was communicated to the local agent. *Continental Ins. Co. v. Milliken*, 64 Tex. 46, 47.

The term "service," as used in the chapter relating to the collection of taxes, as applied to any notice, summons, demand, or other paper, shall mean delivering it or a copy to the person for whom it is intended, or leaving it or a copy at his last and usual place of abode or of business, or sending it or a copy by mail postpaid if such notice, summons, demand, or other paper relates to taxes upon land, posting it or a copy conspicuously in some convenient and public place in his precinct, and sending a copy by mail postpaid, addressed to him at the city or town in which such land lies. *Rev. Laws Mass. 1902*, p. 229, c. 13, § 1.

#### Service by mail.

Code Civ. Proc. § 1011, authorized the service of papers on an attorney at his office, or, if it be not open, at his residence, and, if the residence is unknown, by depositing the paper in the post office. Held, that a deposit in the post office under such statute, in order to constitute service by mail, must be a deposit in the post office at the place where the attorney making the service resides or has his office, and therefore a deposit in the post office at the residence of the attorney to be served was not a valid service. *Thompson v. Brannan*, 18 Pac. 783, 784, 76 Cal. 618.

#### SERVICE REAL.

"Service real," in the civil law, is "defined to be a service which one estate owes to another, or the right of doing something or having a privilege in one man's estate for the advantage and convenience of the owner of another estate. To constitute such a service there must be two estates—one giving and the other receiving the advantage." Per *Dillon, J.*, in *Karmuller v. Krotz*, 18 Iowa, 352, 357.

#### SERVING A TERM.

Within a statute allowing a prisoner a reduction of term for good behavior if he is not serving a second term, one cannot be considered as serving a term when he is detained in prison without warrant of law. In *re Harney* (Mich.) 96 N. W. 795.

#### SERVIDUMBRE.

"Servidumbre" is the term used in the Spanish law to denote a servitude. *Mulford v. Le Franc*, 26 Cal. 88, 103.

## SERVIENT ESTATE OR TENEMENT. SERVITUDE.

A servient estate is an estate, or some use, in the nature of an easement, on which another estate is dependent, of necessity, for enjoyment. *Dillman v. Hoffman*, 38 Wis. 559, 572.

When one part of an estate is dependent, of necessity, for enjoyment on some use, in the nature of an easement, in another part, the former is the dominant, and the latter the servient, estate. *Galloway v. Bonesteel*, 26 N. W. 262, 65 Wis. 79, 56 Am. Rep. 616.

The term "servient estate," in the law of easements, is used to designate the estate in which another owns an easement. *Stevens v. Dennett*, 51 N. H. 324, 330.

The servient estate is the one upon which the easement is imposed. *Walker v. Clifford*, 29 South. 588, 591, 128 Ala. 67, 86 Am. St. Rep. 74.

The land upon which a burden or servitude is laid is called the "servient tenement." Civ. Code Cal. 1903, § 803; Civ. Code Mont. 1895, § 1252; Rev. Codes N. D. 1899, § 3353; Civ. Code S. D. 1903, § 269; Rev. St. Okl. 1903, § 4054.

## SERVILE LABOR.

Publishing an advertisement in a newspaper issued on Sunday is "servile labor," within the meaning of a prohibitory statute. *Smith v. Wilcox* (N. Y.) 19 Barb. 581, 582.

"Servile labor," as used in a statute relating to work on the Sabbath, is equivalent in principle to "secular business," though differing in expression. *Gladwin v. Lewis*, 6 Conn. 49, 53, 16 Am. Dec. 33.

The terms "traveling," "servile labor," and "working," within the meaning of a statute prohibiting such acts on a Sabbath, does not include the act of arbitrators in making an award. *Story v. Elliot* (N. Y.) 8 Cow. 27, 30, 18 Am. Dec. 423.

In construing a statute declaring that there shall be no servile labor or working on the Lord's Day, except works of necessity or charity, the court said: "I consider that this provision treats 'servile labor' as one distinct class of what is forbidden, and 'working,' without the adjective, as another; that it has adopted the latter phrase as the most comprehensive that the language can supply to cover the action and employment of mind or body in the pursuits of business." *Campbell v. International Life Assur. Soc. of London*, 17 N. Y. Super. Ct. (4 Bosw.) 298, 316.

See "Additional Servitude"; "Apparent Servitude"; "Involuntary Servitude"; "Negative Servitude"; "Personal Servitude"; "Positive Servitude"; "Urban Servitudes."

A servitude or easement is a right which the owner of one estate, the dominant, has over another estate, the servient, which does not belong to him. They are charges of one estate for the benefit of another, and are rights in *alieno solo* as distinguished from rights of ownership proper. *Nellis v. Munson* (N. Y.) 24 Hun, 575, 576 (citing 3 Kent, Comm. marg. p. 435).

The term "easement" or "servitude" is used to designate some privilege existing in one not the owner of real estate, constituting a privilege in reference to the land. There are two very usual methods of creating an easement or imposing a servitude on land: The owner of a tract of land may convey a portion of it, and in the deed of conveyance may retain an easement in it for the benefit of the portion which he does not dispose of; or he may in the deed convey to his grantee an easement in the land which he retains in his possession. These easements are appurtenant to the land, and pass with it to successive grantees. *Rowe v. Nailly*, 32 Atl. 198, 199, 81 Md. 367.

A servitude is defined to be a charge imposed on one heritage for the use and advantage of a heritage belonging to another proprietor. *Manbeck v. Jones*, 21 Pa. Co. Ct. R. 300, 302.

"Servitude" is defined to be a right which subjects a land or tenement to some service for the use of another land or tenement which belongs to another master. *Los Angeles Terminal Land Co. v. Muir*, 68 Pac. 308, 312, 136 Cal. 36.

In civil law a "servitude," which is but a single right of property detached from the general ownership and granted to another, and is called in our law an "easement," is a burden affecting lands by which the proprietor is restrained from the full use of his property, or is obliged to suffer another to do certain acts upon it, which, were it not for that burden, would be competent solely to the owner; and they are divided, in reference to their origin, into natural, legal, and conventional. Where two contiguous fields belong to different proprietors, one of which is higher than the other, the inferior field is obliged to receive the water that flows from the superior, and this is given as an example of a servitude constituted by nature. *Laumier v. Francis*, 23 Mo. 181, 184.

Easements are property; servitudes are burdens on property; and an owner is enti-

tled to complete dominion over and enjoyment of his property, except in so far as he voluntarily relinquishes those rights; and it is immaterial whether the easement or servitude is created by public or private grant, or by prescription. And the courts vigilantly guard a dominant tenement in its full possession of an easement, and a servient one from an increase of the servitude, regardless of whether the injury follow an abridgment of the easement or an enlargement of the servitude. *St. Louis Safe Deposit & Savings Bank v. Kennett's Estate*, 74 S. W. 474, 481, 101 Mo. App. 370.

"Servitude" means the same as "easement," and is a right which one proprietor has to some profit, benefit, or beneficial use out of, in, or over the estate of another proprietor. *Ritger v. Parker*, 62 Mass. (8 Cush.) 145, 147, 54 Am. Dec. 744.

"A servitude is as well known to the civil law as an easement is to the common law, and servitudes were acquired under the civil law in the same manner as other property. \* \* \* He who is the owner of a thing and has the free administration of it may grant a servitude, and a servitude may be established on conditions and for a limited time." *Blain v. Staab*, 65 Pac. 177, 178, 10 N. M. 743.

The word "servitude," as used in the civil law, meant the rights to an easement, such as the right of way and the like. The term is equally significant with "easement" or "incorporeal hereditament." *Corning v. Gould* (N. Y.) 16 Wend. 531, 538.

Servitudes imposed for the public or common utility relate to the space which is to be left for the public use by the adjacent proprietors on the shores of navigable rivers, and for the making and repairing of levees, roads, and other public or common works. Civ. Code, art. 665; *Whann v. Hiller*, 34 South. 689, 690, 110 La. 566.

A right of way over the land of another is designated in the common law as an "easement" and in the civil as a "servitude," and is defined to be a charge imposed upon one heritage for the use and advantage of another heritage belonging to another proprietor. *Kieffer v. Imhoff*, 26 Pa. (2 Cassey) 438.

### **SERVITUDE IN GROSS.**

A "servitude in gross" is a personal servitude imposed on land for the benefit of persons owning a right, irrespective of ownership of the land. *Smith v. Cooley*, 2 Pac. 880, 881, 65 Cal. 46.

### **SERVITUDE OF DRAIN.**

The right of drain consists in the servitude of passing water collected in pipes or

canals through the estate of one's neighbor. Civ. Code La. 1900, art. 714.

### **SERVITUDE OF DRIP.**

Every owner is bound to so construct his roofs that the rain falling on them shall not fall on the land of his neighbor, but on his own or the public way. This fall of water gives rise to the servitude of drip. The servitude of drip is that by which any one engages to permit the waters from the roof of his neighbor to fall on his estate, or that by which any one obligates himself to suffer the water from his own roof to fall on the estate of his neighbor. Civ. Code La. 1900, art. 713.

### **SERVITUDE OF LIGHT.**

Servitudes of light are of two kinds—one which gives the owner of a house the right of opening windows in a wall held in common for the admission of light, with the right also of preventing his neighbor from raising any building which can obstruct the admission of light; and the other which gives the right of preventing one's neighbor from opening his wall, or a wall held in common, for the admission of light from a yard or other place, or which limits him to certain lights which are conferred by his title. Civ. Code La. 1900, art. 717.

### **SERVITUDE OF VIEW.**

Servitudes of view are of two kinds: One which confers the right of safe view with the power of preventing one's neighbor from raising any buildings which obstruct it; and the other which gives an owner the right of preventing his neighbor from having any view or lights on the side on which their estates unite, unless he exercises these servitudes according to his title. Civ. Code La. 1900, art. 716.

## **SESSION.**

See "Extraordinary Session"; "In Session"; "Joint Session"; "Next Session"; "Regular Session."

"The literal signification of the word 'sessions' is 'sittings.' The learned Doctor Johnson in his dictionary defines 'sessions' to be a meeting of the justices, as sessions of the peace." *People v. Powell* (N. Y.) 14 Abb. Prac. 91, 93.

The word "session," as used in Rev. St. § 1759, par. 19, authorizing the publication of a statement of the acts and proceedings of a board of county commissioners "at the final adjournment of the meeting, session, or term of the board, and after all of the business of the term has been completed,"

held to be synonymous with the word "term." *Ravenscraft v. Blaine County*, 47 Pac. 942, 943, 5 Idaho, 178.

"Session" and "term," as applied to courts, are not convertible or synonymous, and where a statute provided that the court, at its first regular session after the filing of a petition with the clerk, should order an election, etc., the court said: "If the word 'term' had been used, and the regular term of the court had expired without a session, after the filing of a petition, then the petition could not be acted upon, according to the strict letter of the law, at a subsequent term." *Robertson v. State*, 70 S. W. 542, 543, 44 Tex. Cr. R. 270 (citing *Lipari v. State*, 19 Tex. App. 431).

According to parliamentary law, strictly speaking, an original meeting and an adjourned meeting constitute the same meeting; but it is held that in Gen. St. 1878, c. 13, §§ 49-53, relative to meetings of the board of county commissioners, and providing that when a petition is made for the establishment, change, or vacation of a county road, the county auditor shall lay it before the board at their next session, and, after the lapse of 30 days, at the next meeting of the board they shall proceed to determine the prayer of the petition, the words "session" and "meeting" are not used in any strictly technical sense, but have reference merely to a time when the board is lawfully convened and in session for the transaction of business. *Burkleo v. Washington County*, 38 Minn. 441, 442, 443, 38 N. W. 108.

#### Of court.

A "session" signifies the time during the term which the court sits for the transaction of business, and the session commences when the court convenes for the term, and continues until final adjournment, either before or at the expiration of the term. It is in this sense that the word "session" is used in Rev. St. art. 3229, providing that it shall be the duty of a court, at its first regular session after the filing of a petition for an election under a local option law with a clerk thereof, to order an election. A petition not filed until the first day of the term of a court at which the special election was ordered, but which was filed before the court actually met and convened, was filed in time to authorize an action by the court at that time. *Lipari v. State*, 19 Tex. App. 431, 433.

In a statute requiring indictments to be filed during a session of the court, it is held that the word "session" is not used in the sense of "open session," so as to require the indictments to be filed when the court is actually open for the transaction of the business, but is used in the sense of "term," or, as otherwise expressed, in its ordinary sense, as meaning the time or term during which

a court, legislative body, or other assembly sits, with no other interval than short intermissions or daily adjournment; the time between the first meeting of an assembly and its final adjournment. *Stefani v. State*, 24 N. E. 254, 256, 124 Ind. 3.

Under a statute authorizing an insurance commissioner to petition for the annulment of the charter of an insolvent insurance company and for a receiver, and to bring such petition to the superior court of the county of defendant's location, if in session, and, if not, to a judge of the Supreme Court of Errors, it is held that such a petition cannot be brought to a judge of the superior court during a regular term, but in the interval of a day to day adjournment. The court observes that the word "session" appears to refer, not to the time during any particular day which the court may be sitting, but to a session continued by adjournment from day to day in the ordinary course of business. *Mansfield v. Mutual Ben. Life Ins. Co.*, 29 Atl. 137, 63 Conn. 579.

"Sessions," as used in Cr. Code, § 74, providing that adjournments from day to day and from time to time "are to be construed as recesses in the sessions, and shall not prevent the court from sitting at any time," means the time during which the court is in fact holding court at the place appointed, and engaged in business. In re *Gannon*, 11 Pac. 240, 242, 69 Cal. 541.

#### Same—As synonymous with term.

The word "sessions" as used in Code Civ. Proc. Cal., providing that the superior courts shall always be open, legal holidays, and nonjudicial days excepted, and they shall hold their sessions at the county seats of the several counties respectively, is equivalent to the word "term," as used in the acts of Congress relating to the removal of causes from state courts to federal courts. *MacNaughton v. Southern Pac. C. R. Co.* (U. S.) 19 Fed. 881, 882.

Where statutes provide that all vacancies in the office of township trustee shall be filled by the board during county business in term time or by the auditor in vacation, and require terms of court to be held in certain months of the year, and authorize a session in another month for a particular purpose, the word "session" cannot be construed as synonymous with "term," not being intended to prescribe a period of fixed duration, but to imply an indefinite period of such duration as may be found necessary to the accomplishment of the objects in view, as distinguished from the ordinary meaning of "term," which implies a period of prescribed duration; and hence the court had no authority at such session to fill a vacancy in the office of township trustee.

Heim v. Brammer, 44 N. E. 638, 639, 145 Ind. 605.

There is a broad distinction between an adjourned session and an adjourned term of the court. The word "session" means a meeting of the court. "Term" has a definite meaning, well known and well understood. Counsel argues that the words "session" and "term" are synonymous. It is evident, however, that Rev. St. U. S. § 1935, providing that the Supreme Court of Arizona may hold adjourned terms when ordered by the judges, does not, by such phrase, mean sessions, but distinct and separate terms. *Bryan v. Pinney*, 17 Pac. 97, 2 Ariz. 390.

#### Of legislature.

The word "session," as used in Const. § 21, providing that "the judges of all the courts of record in Cook county shall, in lieu of any salary provided for in the Constitution, receive the salary provided by law until the adjournment of the Assembly of the first session after the adoption of this Constitution," means a regular, and not a special, session of the Legislature. *People v. Auditor of Public Accounts*, 64 Ill. 82, 87.

An extraordinary session of the Legislature is not a "session," within the meaning of Const. art. 3, §§ 4, 5, providing that the Legislature shall apportion the state into Assembly districts at the first session after such enumeration. *People v. Monroe County*, 20 N. Y. Supp. 97, 101, 65 Hun, 263.

The word "session," as used in Const. Minn. art. 4, § 11, providing that within three days after the adjournment of the Legislature the Governor may approve, sign, and file in the office of the Secretary of State any act passed during the last three days of the session, and the same shall become law, means the actual assemblage of the Legislature for business. *John V. Farwell Co. v. Matheis* (U. S.) 48 Fed. 363, 364.

The phrase "session of the Legislature," in Const. art. 3, §§ 4, 5, requiring an enumeration of the inhabitants of the state to be made under the direction of the Legislature at the end of every 10 years, and providing that the Senate and Assembly districts shall be reapportioned by the Legislature at the first session after such enumeration, includes an extraordinary session, such session being a new session, and not merely a continuance of the adjourned regular session. *People v. Rice*, 31 N. E. 921, 135 N. Y. 473.

#### SESSIONS OF THE PEACE.

In Jacob's Law Dictionary the term "sessions of the peace" is defined as "a court of record held before two or more justices of the peace for the execution of the authority given them by their commission and certain acts of Parliament," and the justices

of the sessions have power to hear and determine trespasses against the public peace and many offenses by statute. Chitty in his Criminal Law (volume 1, pp. 133, 134, c. 4) says the term "sessions of the peace" is used to designate a sitting of justices for the execution of those purposes which are confided to them by their commission and by several acts of Parliament. Of these sessions there are four kinds—petit, special, quarter, and general. Bacon in his Abridgment (title "Courts of Sessions, etc.") says sessions held for the general execution of the authority of the justices of the peace, and which are usually holden in the four quarters of the year, are called "general sessions," and sessions holden on a particular occasion for the execution of some particular branch of the authority of justices of the peace are called "special sessions." And he proceeds to state, in regard to the organization of such courts, as follows: "By St. 34 Eliz. 3, c. 1, it was enacted that two or three of the best reputation in the counties shall be assigned keepers of the peace by the King's commission, and, at what time need shall be, the same with others wise and learned in the law shall be assigned by the King's commission to hear and determine trespasses and felonies done against the peace in the same counties and to inflict punishment," etc. *People v. Powell* (N. Y.) 14 Abb. Prac. 91, 93.

#### SET.

This word appears to be nearly synonymous with "lease." A lease of mines is frequently termed a "mining set." Black, Law Dict.

#### SET APART.

In a treaty providing that certain land shall be set apart to certain Indians, the words "set apart" are sufficient to convey title in fee simple to the land reserved. *Meehan v. Jones* (U. S.) 70 Fed. 453, 454.

Gen. St. § 496, providing that in all cases of divorce obtained, except for the cause of adultery, the court may set apart such portion of the husband's lands and property for the wife's support and the support of their children as shall be deemed just and equitable, should be construed to mean that the court has power to decree the husband's title to such lands and property to the wife if it is necessary to do so in order to provide proper support for the wife and children. *Powell v. Campbell*, 20 Pac. 156, 159, 20 Nev. 232, 2 L. R. A. 615, 19 Am. St. Rep. 350.

Property owned by one person and used by another for a school purpose is not "used and set apart for educational purposes," within the meaning of such terms as used in Rev. St. 1881, § 6276, cl. 5, exempting from

taxation every building used and set apart for educational purposes. *Travelers' Ins. Co. v. Kent*, 50 N. E. 562, 563, 151 Ind. 349.

Act 1820, c. 11, providing that it shall be lawful for each individual, against whom an execution may issue, to "select and set apart" one farm horse and cow, etc., means the taking of one or more articles from other articles of a like character; but where the party owned but one farm horse, it would be absurd to make the right of the defendant in the execution depend on his declaration to the officer that he claimed the benefit of the law. *State v. Haggard*, 20 Tenn. (1 Humph.) 390, 393.

### SET ASIDE.

See "Motion to Set Aside Judgment."

To set aside is to annul; to make void. *Brandt v. Brandt*, 67 Pac. 508, 510, 40 Or. 477; *State ex rel. Graves v. Primm*, 61 Mo. 166, 171.

"Set aside," as used in reference to a juror, referring to his being set aside because of objections being raised to his serving by one or the other of the parties to the action, is not synonymous with "excused," which means when a person is removed from jury duty on his own application, for his convenience, or on the court's own motion. *Santee v. Standard Pub. Co.*, 55 N. Y. Supp. 361, 362, 36 App. Div. 555.

When it is said that a voluntary deed is void as against the creditors of a grantor, or will be set aside, the terms "void" and "set aside" are to be understood as meaning only that the conveyance, while good as against all others, shall not operate to defeat the equity of the creditors of the grantor. Hence an insurance policy requiring sole and unconditional ownership is not void when taken out by the grantee of realty by deed of gift, though the deed has been adjudged void as against the grantor's creditors. *Steinmeyer v. Steinmeyer*, 42 S. E. 184, 185, 64 S. C. 413, 50 L. R. A. 319, 92 Am. St. Rep. 809.

Sales are usually set aside for some cause affecting their validity ab initio. But it is, says the court, scarcely accurate to speak of setting aside a valid sale, when the evident purpose of the proceeding is to ascertain the rights and liabilities resulting therefrom. *Brooke v. Eastman* (S. D.) 96 N. W. 699, 702.

### SET AT LIBERTY.

As used in the statute declaring that all slaves set at liberty, in case they come to want, will be relieved by the owners or their heirs, the expression "set at liberty" denotes the putting of the slave in a permanent

condition of freedom, and implies the extinguishment of the right which the master had over his slave, and not a mere temporary cessation. *Columbia v. Williams*, 3 Conn. 467, 471.

### SET FIRE TO.

"Set fire to," as used in an indictment charging that the defendant did willfully set fire to or burn a dwelling house, is equivalent to "burn," and either term means that the house or some part thereof must be consumed by fire. *Benbow v. State*, 29 South. 553, 554, 128 Ala. 1.

In an indictment for arson under Rev. Code, p. 587, c. 160, making it an offense to burn a house, the phrase "set fire to" is not synonymous with "burn." *Howel v. Commonwealth* (Va.) 5 Grat. 664, 670.

"The act of 9 Geo. I, c. 22, which was passed to extend the punishment for arson to cases of rescue of any person in lawful custody for the offense of arson, and for hiring any person to aid in committing it, and also to take away the benefit of clergy from the offense known in its day in England as the 'Black Act,' first used the words 'set fire to': 'If any person or persons shall set fire to any house,' etc. After the passage of this act, questions arose in indictments under it whether this change of language had really changed the nature of the offense, and whether it was necessary to prove an actual burning in order to make the offense complete. The judges held that even under this statute an actual burning must be proved. \* \* \* Statutes on the subject of arson have generally used the words 'set fire to,' and have always received the same construction as under the act of George I." *State v. Dennin*, 32 Vt. 158, 163.

"It has been held that the words 'set fire to' are substantially synonymous with the word 'burn' when used with reference to a house. Ordinarily and in common acceptance the phrase 'set fire to' would be understood to convey a different meaning from the word 'burn' when applied to a house or anything else. A person might in one sense set fire to a house and powder magazine without burning either, for a person would set one on fire and burn it, while it might not affect the other, although in contact. Mr. Bishop says (1 Cr. Law, § 326) that the words 'set fire to' have not been minutely defined, but they mean substantially the same as 'burn.'" *Graham v. State*, 40 Ala. 659, 664.

It is not necessary that an indictment for arson, which is the crime of burning, or causing to be burned, the dwelling house, etc., shall state in terms that defendant "set fire"; an averment that "defendant willfully and maliciously did burn and cause



to be burned" being sufficient. *People v. Myers*, 20 Cal. 76, 78.

Under Comp. Laws, § 7552, which describes the distinct offenses of "burning the dwelling of another," and of "setting fire to a building, whereby another's dwelling has been burned," an information charging respondent with setting fire to a dwelling house describes an offense of the first class, notwithstanding the use of the words "set fire to," which words have been long appropriated to common-law indictments. *People v. Fairchild*, 11 N. W. 773, 774, 48 Mich. 31.

### SET FOR TRIAL.

Setting a case for trial is an entry of an order made in the cause by the court, either of its own motion, in regulating its business, or rules of the court made conformable to the statute, or by agreement of parties, by which a day certain is fixed, on or after which the case may be called for final disposition or trial. *Moore v. Sargent*, 14 N. E. 466, 468, 112 Ind. 484.

### SET FORTH.

In Code 1876, § 3457, providing that every person who wishes to avail himself of the provisions of the chapter relating to mechanics' liens shall give a certain notice before filing of the lien, to the owner, that he holds a claim against such building or improvement, setting forth the amount and to whom it is due, and for what, "setting forth" means placing or putting the items in a place to be seen or viewed. It means that the notice in writing must clearly state the amount of the items for which the lien is claimed, so as to apprise the owner or any other person of all necessary particulars of his claim. *Seibs v. Engelhardt*, 78 Ala. 508, 510.

### SET LINE.

"Set line," as used in V. S. 4592, prohibiting the use for fishing of a pound net, seine, gill net, set net, fyke, set line, fishing otter, or trawl, denotes a fishing line of a certain kind or species, its character not depending upon the manner of its use, and not a common fishing line with a hook attached, which becomes a set line if tied to some object on the shore. Writers upon the subject of fishing state that a set line is a line with baited hooks fastened to it, set or anchored for taking fish (*Standard Dict.* 1638); and "a line to which a number of baited hooks are attached, and which, supported by a buoy, is extended on the surface of the water" (*4 Ency. Dict.* 4216); and, further: "Fishing lines may be classed as hand lines, and set lines, long lines, or trawls. These three names are applied to long lines having attached to them at regular intervals lines

armed with hooks. At either end is an anchor to hold the trawl in place, furnished also with a line and buoy to indicate its position" (*3 Johnson's Universal Cyc.* 390). *State v. Stevens*, 38 Atl. 80, 81, 69 Vt. 411.

### SET-OFF.

Where parties have had dealings so as to produce mutual debts or credits or reciprocal demands growing out of the same transaction, it is the balance only which exists as the debt; and, in the case of bankruptcy of one of the parties, a set-off of their mutual demands is not a means of paying one debt in preference to other debts which the bankrupt owes, for, to the extent of the demands set off or compensated, there was no debt. From the moment they were contracted they extinguished each other. Hence, the operation of a set-off is, not to pay, but to ascertain a debt made up of the difference between the amounts of respective debts and credits. *In re Globe Ins. Co.*, 2 Edw. Ch. 625, 627.

A "set-off" is defined by Webster to be the act of admitting one claim to counter-balance another. In 3 Bl. Comm. 304, it is defined to be a claim which a defendant has on a plaintiff, and which he sets up or places against plaintiff's demand. Where plaintiff in an action of right waives all but nominal damages, defendant cannot introduce evidence of a set-off for improvements, under the statute providing that, where plaintiff in an action of right shall be entitled to damages for withholding the use or injuring his property, defendant shall be allowed to set off any permanent improvements he may have made thereon at their fair value. *Daniels v. Bates* (Iowa) 2 G. Greene, 151, 153.

A "set-off" is defined in Horner's Rev. St. 1897, § 348, to consist of matter arising out of debt, duty, or contract, liquidated or not, held by the defendant at the time the suit was commenced, and matured at or before the time it is offered as a set-off. *Paxton v. Vincennes Mfg. Co.*, 50 N. E. 583, 585, 20 Ind. App. 253.

Under rule 8 of the court of common pleas (section 3), requiring that when a statement of set-off is filed by a defendant he should notify the plaintiff thereof, an answer by defendant denying any indebtedness to plaintiff, and alleging that plaintiff is indebted to him for a certain sum, for refusal to deliver goods purchased, alleges a set-off requiring notice to be served. *E. S. Higgins Carpet Co. v. Latimer*, 30 Atl. 1050, 1051, 165 Pa. 617.

2 Rev. St. § 57, provides that a set-off must consist of matter arising out of a debt, duty, or contract, liquidated or not, held by the defendant at the time the suit was commenced, and matured at or before the time

when it is offered as a set-off. *Irish v. Snelson*, 16 Ind. 365, 366.

By Code 1873, § 2659, each counterclaim must be stated in a distinct division, and must be: (1) When the action is founded on a contract, a cause of action also arising on a contract or ascertained by a decision of the court; or (2) a cause of action in favor of the defendants or some of them, against the plaintiffs or some of them, arising out of the contracts or transactions set forth in the petition, or connected with the subject of the action; or (3) any new matter constituting a cause of action in favor of the defendant, or all of the defendants if more than one, against the plaintiff, or all of the plaintiffs if more than one, and which the defendant or defendants might have brought when suit was commenced, or which was then held, either matured or not, if matured when so plead. The three subdivisions of this section are the same as sections 2886, 2889, 2891, of the Revision of 1860. The only difference is that the first subdivision above set out is called a "set-off," the second a "counter-claim," and the third a "cross-demand." *Sherman v. Hale*, 41 N. W. 48, 76 Iowa, 383.

A cause of action barred by the statute of limitations cannot be pleaded as a set-off. *Richardson v. Penny*, 61 Pac. 584, 586, 10 Okl. 32.

Rev. St. 1801, § 348, provided that a set-off, among other things, must be held by the defendant at the time the suit was commenced. *Gregory v. Gregory*, 89 Ind. 345, 346.

The word "defense," as used in the statute relating to foreclosure of mechanics' liens, providing that the defendants shall have any defense the builder might have to any action on the contract, does not include a set-off. In strictness, set-off is not a defense at all, since it neither destroys the plaintiff's right of action nor denies that the amount claimed is due. On the contrary, it passes these defenses for the purpose of exhibiting a cause of action against the plaintiff. This is not a defense; it is an adjustment. *Naylor v. Smith*, 44 Atl. 649, 650, 63 N. J. Law, 596.

Under Rev. St. 1899, § 8168, providing that whenever any circuit court shall render final judgment in causes in which the parties shall be reversed, and shall sue and be sued in the same right and capacity, such court may, whether such judgment be rendered in the same court or not, if required by either party, set off such judgment, the one against the other, and issue execution in favor of the party to whom the balance may be due, and credit the execution with the amount of the set-off, a judgment for costs in favor of the defendant, rendered by the appellate court, may be set off against a

judgment obtained by plaintiff on a retrial. *Zerbe v. Missouri, K. & T. Ry. Co.*, 80 Mo. App. 414, 418.

Under the statute, any claim or contract in favor of the principal defendant against the plaintiff, or any former holder of a note sued on, may be pleaded as a set-off. *Sefton v. Hargett*, 113 Ind. 592, 593, 15 N. E. 513, 514.

#### **Answer distinguished.**

See "Answer."

#### **As cross claim or action.**

A set-off is a cross-action by the defendant against the plaintiff, which is allowed by statute to avoid a multiplicity of suits when the debts are mutual—that is, when the parties are the same, and the debts are due in the same right. *Hurdle v. Hanner*, 50 N. C. 360, 361.

A "set-off" means a cross-claim, for which an action might be maintained against the plaintiff; and it is very different from a mere right to a deduction from, or reduction of, plaintiff's demand, on account of some matter connected therewith, and which might be given in evidence under the general issue, such as payment. *Rackley v. Pearce*, 1 Ga. (1 Kelly) 241, 243.

The nature of a set-off is predicated upon the grounds that it constitutes in effect a cross-action by defendant against plaintiff, and requires that there be mutuality of claims. In cases of statutory set-off the right thereto must exist between all the parties plaintiff and all the parties defendant, and from and to those persons only who are parties to the action, except in cases for equitable consideration. Where one of the co-obligees in a joint bond assigned his rights therein to the other, who brought suit on the bond, a note given to the obligor by the assigning obligee and another was not a proper subject for set-off. *Carpenter v. Fulmer*, 95 N. W. 403, 404, 118 Wis. 454.

#### **As a cause of action upon a contract, judgment, or award.**

A set-off is a cause of action upon a contract, judgment, or award in favor of the defendant against plaintiff, or against him and another, and it cannot be pleaded except in an action upon a contract, judgment, or award. A defendant who pleads a set-off admits his liability on the cause of action stated, but claims he is entitled to a credit by way of a set-off. *Louisville & N. R. Co. v. Whitlow's Adm'r* (Ky.) 43 S. W. 711, 712, 41 L. R. A. 614.

A set-off means a counter demand which the defendant has against the plaintiff. A set-off has always been restricted to demands arising on contracts, and damages from slander, assault and battery, deceit, and other

cases sounding merely in damages have never been considered the subjects of set-off. Therefore damages arising from a deceit in the sale of a negro cannot be set up by way of set-off in an action for the purchase money, so as to entitle the purchaser to recover damages from the seller. *Johnson v. Wideman* (S. C.) *Rice*, 325, 344.

Section 96 of the Civil Code provides that a set-off is "a cause of action arising upon a contract, judgment, or award in favor of a defendant against a plaintiff, or against him and another. It cannot be pleaded except in an action upon a contract, judgment, or award." Held, that damages arising from the nonperformance by plaintiff of a building contract with defendant are available as a set-off in an action by a nonresident for the price of merchandise, though such damages are unliquidated. *Forbes v. Cooper*, 11 S. W. 24, 88 Ky. 285.

"A set-off can only be pleaded in an action founded on contract, and must be a cause of action arising upon contract or ascertained by the decision of a court." Rev. St. § 5075. Under this statute, in an action on contract, defendant may by answer set up as a set-off any cause of action he may have against the plaintiff arising upon contract, whether the same be a liquidated demand or for unliquidated damages. *Needham v. Pratt*, 40 Ohio St. 186, 189.

A claim for money or goods embezzled or stolen is not a proper subject of set-off, it not being a demand arising upon a judgment or contract expressed or implied, in the sense in which the term "contract" is used in the statute authorizing set-off. *Pierce v. Hoffman*, 4 Wis. 277, 278.

A set-off is defined in 2 Rev. St. p. 39, § 57, to consist of matter arising out of a debt, duty, or contract, liquidated or not, held by the defendant at the time the suit was commenced, and matured at or before the time it is offered as a set-off. *Johnston v. Niemeyer*, 10 Ind. 350, 351.

An unliquidated demand growing out of unsettled partnership accounts may, the partnership having been dissolved, be pleaded as a set-off. *Irish v. Snelson*, 16 Ind. 365, 366.

A set-off is a cause of action existing in favor of a defendant, and against a plaintiff, between whom a several judgment might be had in the action, and arising on contract or ascertained by the decision of a court, and can only be pleaded in an action founded on contract. *Bates' Ann. St. Ohio* 1904, § 5071.

#### **As included in counterclaim.**

See "Counterclaim."

#### **As defense.**

See "Defensa."

#### **As a demand arising out of an independent transaction.**

A set-off must be independent of and not connected with the contract made the foundation of the cause of action in the petition. *Richardson v. Penny*, 61 Pac. 584, 586, 10 Okl. 32.

A set-off is any independent cause of action arising on contract, or ascertained by the decision of a court, and can be pleaded only in an action on a contract. Rev. St. § 2886; *Musselman v. Galligher*, 32 Iowa, 383, 389.

A set-off is a money demand by the defendant against the plaintiff, and refers to a debt or demand independent of and unconnected with the plaintiff's cause of action. It may exceed the plaintiff's claim or fall short of it. *Boston Silk & Woolen Mills v. Hull* (N. Y.) 1 Sweeny, 359, 363.

"Set-off" is defined as a debt for which suit might be maintained by the defendant against the plaintiff, or, in other words, a debt for a certain specific, pecuniary amount, and recoverable in an action *ex contractu*. It is in a strict sense a cross debt or demand due to the defendant, unconnected with the plaintiff's claim, so that it could not be shown in payment or reduction of the amount due thereon, as at common law. *Simpson v. Jennings*, 19 N. W. 473, 474, 15 Neb. 671.

A plea in set-off sets up an independent cause of action, and may be used, or not, as a defense, at the pleasure of defendant. If he forbears to use it, his right first to establish his claim by a separate action is not impaired. Defendant contracted to dig a cellar and cellar wall for plaintiff by a certain time at a fixed price, but did not complete it within the time, whereby plaintiff suffered damage. After the work was done, defendant brought suit to recover the balance of the contract price due for the work, and recovered judgment by default for the full amount thereof, and collected the judgment. Subsequently plaintiff brought an action to recover his damages for the breach of contract. It was held that the judgment and the satisfaction thereof were not a bar to plaintiff's right to recovery. *Davenport v. Hubbard*, 46 Vt. 200, 206, 14 Am. Rep. 620.

A set-off is allowed where the defendant has a debt arising out of a transaction independent of the contract on which the plaintiff sues, and desires to avail himself of that debt in the existing suit, either to reduce the plaintiff's recovery or to defeat it altogether, and, as the case may be, recover a judgment in his own favor. *Avery v. Brown*, 31 Conn. 398, 401.

A set-off is a money demand by the defendant against the plaintiff, and refers to a debt or demand independent of and unconnected with the plaintiff's cause of action.

it may exceed the plaintiff's claim or fall short of it. *Boston Silk & Woolen Mills v. Eull* (N. Y.) 37 How. Prac. 299, 301.

A set-off is a distinct cause of action arising upon contract. *Dietrich v. Ely* (U. S.) 63 Fed. 413, 11 C. C. A. 266.

In a set-off the ground taken by defendant is that he may owe plaintiff what he claims, but that a part or the whole is paid, by reason and justice, by a distinct debt which the plaintiff owes him. *Grisham v. Bodman*, 20 South. 514, 516, 111 Ala. 194.

A set-off is a counter demand growing out of an independent transaction, for which an action might be maintained by the defendant against the plaintiff. *Cumberland Glass Mfg. Co. v. State*, 33 Atl. 210, 211, 58 N. J. Law, 224; *Brabazon v. Seymour*, 42 Conn. 551, 554; *Annan v. Houck* (Md.) 4 Gill, 325, 331, 45 Am. Dec. 133; *Ansley v. Bank of Piedmont*, 21 South. 59, 62, 113 Ala. 467, 59 Am. St. Rep. 122.

A set-off is a distinct demand, the subject of a cross-action, and not a payment; and a man may plead it when sued, or not plead it, and reserve it for a separate suit. If he plead it, the judgment is conclusive upon it. He may withdraw it upon trial, but if he does not, and it is disallowed, it is barred by the judgment. *Kennedy v. Davisson*, 33 S. E. 291, 292, 46 W. Va. 433.

A set-off is, in a strict sense, a cross-demand, unconnected with plaintiff's claim, so that it could not be shown in payment or reduction of the amount due thereon at common law. *Cook v. Mills*, 87 Mass. (5 Allen) 36, 37.

A set-off is a distinct claim in behalf of the defendant against the plaintiff, and does not include mere matter of defense. *Johnson v. Kelley*, 31 Atl. 849, 850, 67 Vt. 386.

A set-off is an assertion of a counter distinct and independent demand and cause of action, affording, to the extent to which it is sustained, a legal reason why the defendant should not be called upon to pay the demand sued. *Fiske v. Steele*, 25 N. E. 291, 152 Mass. 260.

A set-off is a demand growing out of an independent transaction, whether liquidated or unliquidated, not sounding in damages, merely subsisting between the parties at the commencement of the suit. *Lawton v. Ricketts*, 16 South. 59, 60, 104 Ala. 430; *St. Louis & T. R. Packet Co. v. McPeters*, 27 South. 518, 520, 124 Ala. 451.

#### Discount distinguished.

A set-off is an independent debt or demand which the debtor has against his creditor, and which he can use to counterbalance

the demand of the latter against him, either in whole or in part. A set-off is distinct from a discount, for a discount is a right which the debtor has to an abatement of the demand against his creditor, which right may exist, though the debt may be due and unpaid. Therefore an affidavit verifying a demand against the estate of a decedent, stating that the demand was just and due claimant, was wholly unpaid, and that there was no "just set-off against the same," was insufficient, the statute requiring that it should state that there was no "discount" against the demand. *Trabue's Ex'r v. Harris*, 58 Ky. (1 Metc.) 597, 598, 599.

#### As originating in equity.

Set-off first had its origin in courts of equity, where its signification was a pleading filed by the respondent in which he confessed his indebtedness to the plaintiff, but alleged that, because of an indebtedness existing by the plaintiff to him, the plaintiff ought not to recover more than the difference between the two claims. At common law there was no such thing as a cross-action or set-off, and, if the plaintiff was indebted to the defendant, the latter was compelled to bring a separate suit or resort to a court of equity to have his claim set off. *Wat. Set-Off*, § 10. The defendant might, however, recoup, or show that the plaintiff had not sustained damages to the extent claimed, and thus reduce or altogether defeat the plaintiff's recovery, but he could not recover a judgment for the excess. *Id.* § 456. The procedure in courts of equity for the allowance of a recoupment or set-off was materially different from the law courts; the forms being barred from the ecclesiastical courts. The person against whom the bill in equity was exhibited was called the "respondent," and he was permitted to set up his defense by demurrer, plea, answer, or to disclaim, and, when it became necessary to give full and complete relief to all the parties, the defendant might file a cross-bill, which was generally considered as a defense; and it is in pursuance of the chancery practice that counterclaims and set-offs have been denominated "answers" and "defenses" in the statutes of the several states. The adjudications, however, have many of them lost sight of this distinction, and have treated them as cross-actions. *Branham v. Johnson*, 62 Ind. 259. See *Willis v. Browning*, 96 Ind. 149, 152, and cases cited.

The doctrine of equitable set-off existed long prior to the adoption of the Code, and it was well settled that a court of equity would apply it where the demands were connected, or where the one sought to be set off formed the consideration of the other. *Forbes v. Cooper*, 10 Ky. Law Rep. 864, 866, 11 S. W. 24, 88 Ky. 285.

"Courts have not recognized set-off as a natural equity. Before the statute of set-

off, courts of chancery acted on that doctrine. Barbour, in the Law of Set-Off, says, if a court tries a case of natural equity not within the statute, it will permit an equitable set-off, if from the nature of the claim or from the suggestion of the parties it is impossible to obtain justice by a cross-action. *Eigenmann v. Clark*, 51 N. E. 725, 726, 21 Ind. App. 129.

Set-off was originally nothing more than an equitable defense which the Legislature has thought fit, in plain and simple cases, to subject to the jurisdiction of the courts at common law, reserving to chancery its original jurisdiction of cross-demands which do not fall within the statute. *Hibert v. Lang*, 30 Atl. 1004, 1005, 165 Pa. 439.

While set-off in equity is generally governed by the same principles as at law, courts of equity sometimes allow a set-off where, for some technical reason, it could not be allowed at law. The insolvency of the party against whom it is claimed frequently affords equitable grounds for allowing it. A technical set-off is wholly of statutory origin, but courts of equity exercise an original jurisdiction over the subject, and will, when reason and justice require it, enforce a counterclaim, though not within the letter of the statute. Where defendant made deposits in a bank which held a note against him, nearly matured, on failure of the bank before the maturity of the note, defendant's deposits constituted a common-law set-off against the note in the hands of the receivers. *Colton v. Dovers' Perpetual Building & Loan Ass'n*, 45 Atl. 23, 26, 90 Md. 85, 46 L. R. A. 388, 78 Am. St. Rep. 431.

**As applicable only to mutual demands, debts, and credits.**

Mutuality is essential to the validity of a set-off. *Proctor v. Cole*, 104 Ind. 373, 379, 3 N. E. 106.

The term "set-off," in its proper sense, is applicable only to mutual demands, debts, and credits. *Stokes v. Stokes*, 40 S. E. 662, 663, 62 S. C. 346.

The term "set-off," in its proper use, is applicable only to mutual demands, debts, and credits, and is not proper in describing the right of an executor of a creditor to retain a sufficient part of a legacy given by the creditor to the debtor to pay a debt due from him to the creditor's estate. *La Foy v. La Foy*, 10 Atl. 266, 43 N. J. Eq. 206, 3 Am. St. Rep. 302.

Debts, in order to be set off against each other, must be mutual; that is, they must be due to and from the same person in the same capacity. *Murray v. Toland* (N. Y.) 3 Johns. Ch. 569, 573.

To constitute an equitable set-off the debts need not be strictly mutual. It is suffi-

cient that they are mutual credits. *Dale v. Cooke* (N. Y.) 4 Johns. Ch. 11, 13.

The word "set-off" implies reciprocal demands existing between the same persons at the same time. *Stadler v. First Nat. Bank*, 56 Pac. 111, 117, 22 Mont. 190, 74 Am. St. Rep. 582.

A set-off is a demand which a defendant makes against the plaintiff in a suit, for the purpose of liquidating the whole or a part of his claim; in law, when the defendant acknowledges the justice of the plaintiff's demand on the one hand, but on the other sets up a demand of his own to counterbalance that of the plaintiff, either in whole or in part. The term "set-off" implies mutual demands between the plaintiff and the defendant. The one party, when demanded of by the other to pay, responds that he also has a demand against the defendant, which he proposes to set off in whole or in part satisfaction of the demand made against him. In *re Oliver* (U. S.) 109 Fed. 784, 787.

Whenever it is necessary to effect a clear equity or avoid irremediable injustice, set-off will be allowed, although the debts are not mutual. *Cosgrove v. Cosby*, 86 Ind. 511, 515.

A technical set-off applies only to mutual debts. *Blair v. A. Johnson & Sons* (Tenn.) 76 S. W. 912, 913.

Whenever it is necessary to do equity or prevent irremediable injustice, set-off will be allowed, although the debts are not mutual. In cases of insolvency or of joint credit given on account of individual indebtedness, the equity is obvious, and set-off will be allowed. *Wulschner v. Sells*, 87 Ind. 71, 75.

**As requiring mutuality of parties.**

A set-off can only be pleaded where there is mutuality of parties. The cause of action sought to be pleaded as a set-off must exist in favor of all the defendants against the plaintiff. *Richardson v. Penny*, 61 Pac. 584, 586, 10 Okl. 32.

A set-off cannot exist where there is no mutuality. A claim in favor of one only of several defendants cannot be set off against a note executed by them. But the statute creates, in favor of sureties, an exception to this rule. *Menaugh v. Chandler*, 89 Ind. 94.

A set-off, authorized at law under our statute (Laws 24th Sess. c. 90), applies only to the case of two or more persons dealing together, and one of them suing the other, and then the party sued may plead the general issue, and give notice of the matter he intends to set off; and if, by means of the set-off, the plaintiff is overpaid, the jury are directed to certify the balance due the defendant, for which defendant shall have

judgment and execution against the plaintiff. *Alsop v. Caines* (N. Y.) 10 Johns. 396, 399.

A note sought to be used as a set-off must be owned solely by the person seeking so to use it, and not by him and another jointly. *Proctor v. Cole*, 120 Ind. 102, 111, 22 N. E. 101.

The discharge in bankruptcy of one of two joint debtors transforms the debt in equity into a several one against the other, so that an assignee may make it a set-off against a judgment held by the other against him. *Cosgrove v. Cosby*, 86 Ind. 511, 515.

#### **Payment distinguished.**

The distinction between payment and set-off is expressed in *Wat. Set-Off*, p. 8, as follows: "A payment is by consent of the parties, either express or implied, appropriated to the discharge of a debt." A debt that has been paid is not subject, therefore, to set-off in an action at law. It is only to such a debt as is confessed as existing it may be interposed. *St. Louis & T. R. Packet Co. v. McPeters*, 27 South. 518, 520, 124 Ala. 451; *Kennedy v. Davisson*, 33 S. E. 291, 292, 46 W. Va. 433.

#### **As a personal privilege.**

By our law set-off is not a compensation balancing debts pro tanto as in the civil law, but mere matter of defense. The party is not bound to make use of it. He has his election, and, if he does not assert it, his debt is not extinguished. It is a personal privilege, and not an incident or accompaniment of the debt. *Burton v. Willen*, 33 Atl. 675, 679, 6 Del. Ch. 403.

#### **Recoupment distinguished.**

"Recoupment" differs from "set-off" in several important particulars: First, it is confined to matters arising out of the same transaction; secondly, it has no regard to whether the claim be liquidated or unliquidated; thirdly, if the defendant's claim exceeds the plaintiff's, he cannot in that action recover the balance due to him. *Baltimore & O. R. Co. v. Jameson*, 13 W. Va. 833, 838, 31 Am. Rep. 775.

There is a technical distinction between "set-off" and "recoupment." Judge Bronson, in *Batterman v. Pierce* (N. Y.) 3 Hill, 174, thus distinguished them: "When the demands of both parties spring out of the same contract or transaction, the defendant may recoup, though the damages on both sides are unliquidated; but he can only offset where the demands of both parties are liquidated, or are capable of being ascertained by calculation." *Parker v. Hartt*, 32 N. J. Eq. (5 Stew.) 225, 230.

The meaning of "set-off" is correctly stated in *Abbott's Law Dictionary*, with au-

thorities cited, as follows: "Set-off differs from recoupment in that it is more properly applicable to demands independent in their nature and origin, while recoupment implies a cutting down of a demand by deduction arising out of the same transaction." *St. Louis Nat. Bank v. Gay*, 35 Pac. 876, 877, 101 Cal. 286.

By Code, §§ 2909, 2910, recoupment and set-off are distinguished; recoupment being made to apply where both parties rely on the same contract, and set-off where they urge different contracts. *Fontaine v. Baxley*, 17 S. E. 1015, 1017, 90 Ga. 416.

A "set-off" is to be distinguished from "recoupment." *Medart Pulley Co. v. Dubuque Turbine & Roller Mill Co.*, 96 N. W. 770, 771, 121 Iowa, 244.

#### **As a statutory right.**

Set-off is not a common-law defense, but the creature of statute. It is not a denial of plaintiff's claim, and in order to be asserted it must be declared on with the same formality that any demand is declared on in the original writ, and the party against whom it is filed must answer in the same manner as the defendant in any other action. It is substantially a cross-action, and, being but a creature of statute, it can be availed of only in the mode prescribed by statute. *Barnstable Sav. Bank v. Snow*, 128 Mass. 512, 513.

A right to set-off is wholly statutory, and under 2 Hill's Code Wash. § 806, when a party is sued by the assignee of a chose in action, he cannot plead against the assignee a set-off which he holds against the assignor, unless the demand existed at the time of the assignment, and belonged to the party in good faith before notice of the assignment. *Harrisburg Trust Co. v. Shufeldt*, 87 Fed. 669, 671, 31 C. C. A. 190.

A set-off is a counter demand which a defendant holds against a plaintiff, arising out of a transaction extrinsic of the plaintiff's cause of action. Set-off is a purely statutory right. The state is not embraced in the statute of set-off unless named and bound by it. *Raymond v. State*, 54 Miss. 562, 563, 28 Am. Rep. 382.

Set-off was unknown to the common law. *Jewett Car Co. v. Kirkpatrick Const. Co.* (U. S.) 107 Fed. 622, 625.

The right of a defendant to set off against plaintiff's claim an independent demand which he has against the plaintiffs, which is now so generally recognized both by the statute law of England and by similar law in the various states of the Union, had its origin in the Roman law. The right of set-off being a purely equitable right, the power of the common-law courts to entertain jurisdiction of this right now depends, and has always depended, on the existence of a

statute conferring jurisdiction on them in such matters. *Hecht v. P. H. Snook & Austin Furniture Co.*, 41 S. E. 74, 75, 114 Ga. 921.

### SET ON FOOT.

"Set on foot," as used in Act Cong. April 20, 1818, § 6, providing for the punishment of any person who shall within the territory or jurisdiction of the United States set on foot any military expedition or enterprise to be carried on from thence against the territory or dominion of any foreign prince or state with which the United States is at peace, is scarcely distinguishable from "beginning." To "set on foot" may imply some progress beyond that of beginning it. Any combination of individuals to carry on the expedition is "setting it on foot," and the contribution of money or anything else which shall induce such combination may be a "beginning" of the enterprise. Charge to Grand Jury—Neutrality Laws (U. S.) 30 Fed. Cas. 1021, 1022.

### SET OUT.

"Set out," as used relative to pleadings, means to recite or state in full. *First Nat. Bank v. Engelbercht*, 58 Neb. 639, 641, 79 N. W. 556.

The use of the words "set out," in reference to the facts necessary to be set out in an indictment, means no more than the word "aver" or "allege." *United States v. Watkins* (U. S.) 28 Fed. Cas. 419, 436.

### SET SCREW.

A set screw is a screw sometimes cupped or pointed at one end, and screwed through one part, as of a machine, tightly upon another part, to prevent the one slipping upon the other. *Potter v. Knox County Lumber Co.*, 44 N. E. 1000, 146 Ind. 114.

What is known in mechanics as a "set screw" is a screw employed to hold or move objects to their bearings, as the bits in a cutter-head or brace, etc. *Mast & Co. v. Rude Bros. Mfg. Co.* (U. S.) 53 Fed. 120, 124, 3 C. C. A. 477.

### SET UP.

See "Specially Set Up."

In ejectment an instruction that defendant's possession would not become adverse until it set up some claim to the land is misleading, since the phrase "set up" may be construed to refer only to declarations of ownership, whereas acts of ownership may show adverse possession. *Lucy v. Tennessee & C. R. Co.*, 8 South. 806, 92 Ala. 246.

In Rev. St. § 3186 (Laws 1893, c. 88), permitting the bringing of an action to quiet

title to land by any person setting up a claim thereto, the words "setting up a claim" refer to some assertion of right or interest in real estate, the effect of which is necessarily to throw a cloud over the title, and which claim is liable to be used by the party asserting it for an improper purpose to the injury of the real estate owner, and is not limited to cases where the claim set up is valid on its face. *Fox v. Williams*, 66 N. W. 357, 359, 92 Wis. 320 (citing *Maxon v. Ayers*, 28 Wis. 612).

Rev. St. § 709 [U. S. Comp. St. 1901, p. 575], declares that the federal Supreme Court shall have jurisdiction of a case of a denial by a state court of any title, right, privilege, or immunity claimed under the Constitution or any treaty or statute of the United States, if such right or privilege was specially set up and claimed in the proper way. Held that, where a decision sought to be reviewed is that of the Supreme Court of a state reviewing a decision of the trial court involving a question of right, the term "specially set up or claimed," as used in the statute, meant that the right, by virtue of the statute of the United States, was specially set up and claimed in the trial court. *Brooks v. State of Missouri*, 8 Sup. Ct. 443, 124 U. S. 394, 31 L. Ed. 454.

### Alibi.

Where defendant in a criminal prosecution sought to break the state's case by testimony tending to show that he was elsewhere at the time of the commission of the offense charged in the indictment, in common expression he "set up an alibi." *Sherlock v. State*, 37 Atl. 435, 60 N. J. Law, 31.

### Defense.

"Set up a defense," as used in Code, § 4612, providing that when a person accused of maliciously killing or maiming animals shall set up a defense that the act was not done maliciously, but to prevent damage to a growing crop, he must show that the crop was fenced in a certain manner, does not mean that the defendant shall specially plead such defense, but simply that such a defense might be urged in addition to a denial of the killing, provided the defendant showed the facts required as to the fencing. *Wormly v. State*, 70 Ga. 721, 723, 724.

### Gaming device or table.

To set up a gaming table is "to provide whatever may be necessary for the game, and, either by acts or words, to propose to play it. There is nothing like structure or erection in the idea of setting up a gaming table, any more than building a house is necessarily included in the idea of setting up a tippling house, or than making a road is indispensably connected with the power to

establish a post road." *Commonwealth v. Burns*, 27 Ky. (4 J. J. Marsh.) 177, 180.

Gen. St. c. 47, art. 1, § 6, providing that any one who shall "set up or keep a gaming table," etc., shall be punished, etc., should be construed to include only those interested in such gaming table or having an agency in it, etc., and not to include a mere spectator who renders a momentary or occasional assistance to the dealer in taking in or paying bets or such other act. *Vowells v. Commonwealth*, 83 Ky. 193, 197.

In a statute prohibiting the setting up and using a gambling device, the phrase "set up" is one of very wide latitude of meaning, but quite capable of being generally understood. It does not necessarily and exclusively apply to the construction or setting up of some physical object or design, as billiard or roulette tables, but it may, and indeed is, more frequently used in a figurative sense. Thus, it is said that a man has set up the business of a merchant or the trade of a carpenter, or that he has set up in life with fair prospects; and where a storekeeper engaged in a game of poker with cards in his store, continuing the game all night, there was good reason for saying that he had set up the occupation of a gambler. *Frisbie v. State*, 1 Or. 264, 266.

In holding that setting up and establishing games of hazard and address, prohibited by statute, included the act of defendant in suffering games of cards and dice to be played in his establishment for money, and the furnishing the cards and dice for the play, the courts say that "set up" and "establish" are words of various and comprehensive meanings, and are applied to a great variety of human actions; as, to set up a school, a factory, a store, a business, a standard, a banner, a government, a shout, a cry, a complaint, a scheme, a play, a game. "To establish" implies more permanency than "to set up," and embraces the idea of stability as well as beginning an enterprise. *Commonwealth v. Carson* (Pa.) 6 Phila. 381, 383.

#### Meeting.

In the peculiar phraseology of the Society of Friends, a meeting is said to be "set up" when it has been organized according to the usages of the society. *White Lick Quarterly Meeting of Friends*, by Hadley v. *White Lick Quarterly Meeting of Friends*, by Mendenhall, 89 Ind. 136, 142.

#### Newspaper or printing press.

A covenant not to set up or establish, or cause to be set up or established, in the same town, a newspaper, or printing press in opposition to the covenantees, is broken when a new press is established at that place by a third party, and the covenantor is employed therein as manager, receiving for

his compensation a certain portion of the profits. *Anderson v. Faulconer*, 30 Miss. 145.

#### Notice.

Rev. Laws, p. 766, § 3, requiring an administrator to give a certain notice by setting up notice in five public places in the county for a certain period of time, means to give notice. The phrases, "setting up notice," and "to give notice," both of which are found in such section, mean the same thing. *Coppuck v. Wilson*, 15 N. J. Law (3 J. S. Green) 75, 81.

#### SETTING.

The term "setting," as used in speaking of a dog setting birds, "has a somewhat technical meaning, and means that he was standing and intently looking in one direction. In dog parlance, therefore, 'setting' means standing, and the attitude is also called 'pointing.'" *Citizens' Rapid-Transit Co. v. Dew*, 45 S. W. 790, 100 Tenn. 317, 40 L. R. A. 518, 66 Am. St. Rep. 754.

#### SETTING DOG.

A setting dog is one kept for the purpose of killing and destroying game. *Hayward v. Horner*, 5 Barn. & Ald. 317.

#### SETTING OF COURT.

Before setting of court, see "Before."

#### SETTLE—SETTLEMENT.

See "Actually Settled"; "Family Settlement"; "Final Settlement"; "Full Settlement"; "Judicial Settlement"; "Voluntary Settlement"; "Well Settled."

Webster defines "settle" as meaning, in law, "to adjust; to liquidate; to balance, as an account; to pay, as a debt." *Applegate v. Baxley*, 93 Ind. 147, 149; *National Bank v. Norton* (N. Y.) 1 Hill, 572, 576.

"Settle" has a double meaning, and is used alike to denote an adjustment of a demand and a payment; so that it is an ambiguous term, and evidence may be introduced to show the sense in which it is used. *Auzerais v. Naglee*, 15 Pac. 371, 373, 74 Cal. 60.

A "settlement" is a contract between two parties by means of which they ascertain the state of the accounts between them and strike a balance. *Bouvier* defines it, as to contracts, as "an agreement by which two or more persons who have dealings together so far arrange their accounts as to ascertain the balance due from one to another." *Jackson v. Ely*, 49 N. E. 792, 794, 57 Ohio St. 450.

The word "settlement," as ordinarily used, may mean a compromise, for the sake



of peace, of a claim, the validity of which is denied; or it may signify the payment of a claim to the extent of which it is conceded to be due. *Pentz v. Pennsylvania Fire Ins. Co.*, 48 Atl. 139, 140, 92 Md. 444.

"Settled," as used in Acts 1851, c. 213, providing that no action shall be maintained on any demand or claim which has been settled, canceled, or discharged, does not mean a liquidation or adjustment of the amount due, but such a settlement as was intended to extinguish the claim or demand. *Austin v. Smith*, 39 Me. 203, 205.

A contract employing a lawyer to collect certain claims, and providing that he should be paid 25 per cent. in case the creditor should "settle, compromise, or receive" the same, does not authorize the lawyer to receive the debtor's own notes without payment or security, and he cannot collect the 25 per cent. commission thereon. *Mills v. Fox* (N. Y.) 4 E. D. Smith, 220.

A reservation of a power to settle the firm's business, contained in a partnership dissolution, does not authorize such partner to bind the partnership by the renewal of a note. *National Bank v. Norton* (N. Y.) 1 Hill, 672, 576.

"Settled," as used in an indorsement on the back of a mortgage, reciting that "the within instrument was settled" by a renewal note and mortgage given by a purchaser of the mortgaged property, operated as a renewal and extension of the same debt, and not a payment of the debt or discharge of the lien of the first mortgage. *Miller v. Griffin*, 15 South. 238, 239, 102 Ala. 610.

A fire policy in a mutual company, providing that any loss should be "ascertained and settled by the committee," did not mean that the loss should be submitted to "arbitration" in its proper sense, but the settlement was merely a condition precedent to the right of action. *Scott v. Avery*, 5 H. L. Cas. 811; *California Annual Conference v. Seitz*, 15 Pac. 839, 841, 74 Cal. 237.

The word "settlement," as used in an act relating to the use of deadly weapons, means any point within 300 yards of any inhabited house in the territory of New Mexico. *Comp. Laws N. M.* 1897, § 1380.

#### As adjust.

"To settle" is either synonymous with "to adjust," or it means "to pay." *People v. Green* (N. Y.) 5 Daly, 194, 201 (citing *Webst. Dict.*).

The words "to settle" do not necessarily mean "to pay," but may mean "to adjust; to liquidate." *Fort v. Gooding* (N. Y.) 9 Barb. 871, 877.

The word "settle," when applied to an unliquidated claim or demand, means its

mutual adjustment between the parties and an agreement upon a balance. *Baxter v. State*, 9 Wis. 38, 44; *State v. Staub*, 23 Atl. 924, 928, 61 Conn. 553.

The term "settled" or "to be settled for" does not necessarily mean payment. One lexicographer defines "settle" to mean "to adjust differences, claims, or accounts; come to an agreement" (*Cent. Dict. & Ency.*); and another says settlement implies the mutual adjustment of accounts—an agreement upon the balance (*And. Law Dict.* 944). *Toombs v. Stockwell*, 92 N. W. 288, 131 Mich. 633.

Within certain limitations, in ordinary use the words "adjust" and "settle" have different meanings. They are not infrequently used in the sense of "pay." They are synonymous, and in some of their uses are equivalent to fixing, to arrange; in others, to determine, to establish, to regulate. *Lynch v. Nugent*, 46 N. W. 61, 62, 80 Iowa, 422.

The word "settle," in an order on an administrator to settle his final account, means that the administrator shall file or present his account in court, so that it can be considered and adjusted by the court. *Salomon v. Holdom*, 72 Ill. App. 346, 352.

#### As final settlement.

"Settle," as used in Rev. St. 1878, § 1825, providing that, in case of death of an insane person while under guardianship, the power of such guardian shall cease, and he shall immediately settle the decedent's accounts, and deliver the estate and effects of his ward to his personal representative, should be construed in its usual signification, as that which implies a determinate condition; a something finally established by mutual agreement; a final settlement. *Coleman v. Farrar*, 20 S. W. 441, 445, 112 Mo. 54.

#### General account implied.

Where the word "settled" was written across the face of two duebills, the term implies that the accounts were general, and not special, accounts. *Dorsey v. Kollock*, 1 N. J. Law (Coxe) 35.

#### As liquidated.

The word "settlement" is synonymous with the word "liquidated." *Parris v. Hightower*, 76 Ga. 631, 634.

#### Mutual consent implied.

An entry on the appearance docket of the court, reciting that suit therein was settled and signed by plaintiff's attorney, implies that it was settled by the parties. *Beament v. Trenton Locomotive & Machine Mfg. Co.*, 32 N. J. Law (3 Vroom) 513, 514.

In reference to accounts, "settle" implies the mutual adjustments of accounts between

different parties, and an averment that a committee "settled" with the plaintiff expresses the plaintiff's consent to such settlement. *Baxter v. State*, 9 Wis. 38, 44.

A settlement is not affected by the fact that the creditor receives only what the debtor concedes to be due, or that he takes the money under protest, still asserting his claim for the balance. But where the claim is unliquidated, and he accepts a certain sum in full, such claim is settled. *Chicago, R. I. & P. Ry. Co. v. Mills* (Colo.) 69 Pac. 317, 318.

"Settlement" means a determination by agreement, and is so used in a motion passed by directors of an insurance company that a settlement for a loss be left to the company's director from the township of the insured. *Miller v. Consolidated Patrons' & Farmers' Mut. Ins. Co.*, 84 N. W. 1049, 1050, 113 Iowa, 211.

#### Office held at will.

The word "settled" has, from the frequency of its application and universal understanding, the precision of a technical term, and undoubtedly means to place a person in a permanent seat or to fix him in a stable course of life. But an office held at will is no settlement; it has neither permanency nor stability. *Whitney v. City of Brooklyn*, 5 Conn. 405, 413.

#### As pay.

A promise to "settle" a liquidated demand, respecting which there was no dispute between the parties, is a promise to pay the same. *Stillwell v. Coope* (N. Y.) 4 Denio, 225, 226; *Pinkerton v. Bailey* (N. Y.) 8 Wend. 600, 601; *Brody v. Doherty*, 30 Miss. 40, 44; *Taylor v. Miller*, 18 S. E. 504, 505, 113 N. C. 340; *Moore v. Hyman*, 35 N. C. 272, 274; *Hopkins v. Warner*, 41 Pac. 868, 869, 109 Cal. 133; *Tuggle v. Minor*, 18 Pac. 131, 133, 76 Cal. 96; *Edson v. Fuller*, 22 N. H. 183, 190.

The word "settlement" does not necessarily mean payment or satisfaction, though it may mean that. It means liquidation of amount, arrangement of difficulties, adjustment, etc. A chose in action received from a third person is not necessarily a satisfaction of a prior debt, and the burden of proof is on the debtor to show that satisfaction meant payment. *Nettleton v. Sherwood*, 1 Pa. Com. Pl. 140.

Bouvier defines "settlement" to mean "payment in full," so that it would seem that an insurance company, in writing to insured in reference to payment of the first year's premium on his policy, "Your note for ——— dollars, given in settlement of premium due on policy," etc., accepted the note in payment for such premium. *Stewart v. Union Mut. Life Ins. Co.*, 155 N. Y. 257, 266, 49 N. E. 876, 878, 42 L. R. A. 147.

"Settle" means to adjust, to liquidate, to pay, and, as contained in a referee's report stating that he found that a certain claim had been settled, meant that the same had been paid. *Gandolfo v. Appleton*, 40 N. Y. 533, 541.

"Settled," as used in an agreement that discount was not to be allowed when the goods were delivered, but when the note given therefor was settled, means paid. *Kelley v. Thompson*, 56 N. E. 713, 714, 175 Mass. 427.

"Settled," as used in a statement, "I have settled that matter," does not suggest a consideration, for the word should be construed, not in the sense of paid, but only in the sense of having brought the matter to a conclusion. *Redding v. Redding's Estate*, 38 Atl. 230, 232, 69 Vt. 500.

"Settle" does not always mean a payment in money, but it may consist of the mere striking of a balance, where there may have been interest accounts, a compromise, composition, payment in goods, or the procurement of a release. *Kearney v. Collins* (Pa.) 2 Miles, 13, 14.

In an action against a surety to recover on a bond, it was shown that, when the surety had asked the owner of the bond what condition it was in, the holder had stated that the principal had paid or settled the bond, and he (the security) need give himself no further uneasiness about it. In considering this defense the court said: "The words 'paid' and 'settled,' when used in common conversation in relation to a debt, are understood equally as conveying the idea that the debt is discharged; particularly when, in reply to the question of one so deeply interested in knowing as the security, it is said that the principal has settled the debt, and that he need give himself no further uneasiness about it." *Waters v. Oreagh* (Ala.) 4 Stew. & P. 410, 414.

"Settle up and liquidate," as used in a bond conditioned to settle up and liquidate certain debts due the obligee, was construed to mean "pay." *Wilson v. Stilwell*, 9 Ohio St. 467, 75 Am. Dec. 477.

A finding reciting the settlement of a certain interest by the giving of a note construed to mean a payment of the note, and not the computation or adjustment of the amount of interest due. *Goenen v. Schroeder*, 18 Minn. 66, 75 (Gil. 51, 59).

Under a lease of a newspaper route from a publishing company, lessor was to furnish lessee papers required, and lessee was to pay 10 cents per week for each copy delivered to his subscribers, and on its termination the subscription lists were to be delivered to lessor, from which it was entitled to collect any balance due from lessee; but, if such balance could not be collected, the surrender

of the lists was not to effect a complete settlement of lessee's account. During the lease, lessee was to apply on account all the money he could conveniently collect at the end of each week, and was to make a complete settlement thereof on the 10th of each month. Held, that the term "settlement," as used therein, meant payment. *McKinney v. Statesman Pub. Co.*, 56 Pac. 651, 653, 34 Or. 509.

The term "settlement," when applied to the settlement of a lawsuit, means payment, or accord and satisfaction, or something equivalent to accord and satisfaction, admissible as a defense under the general issue. The entry "N. P.," or "Neither party," made by the agreement of counsel in a former action on the same cause, is admissible in evidence under the general issue on the question of settlement. *Curtis v. Egan*, 53 N. H. 511, 512.

The proper meaning of the word "settle" is to go into a settlement; to adjust, fix, or determine a balance which may be on the one side or the other. But it is certainly a word of somewhat equivocal import, and may by the context or the surrounding circumstances be explained to mean "pay." But the expression, "When you come back we can settle," plainly implies an accounting together, and not a promise of payment by one to another, and will not remove the bar of the statute of limitation. *Bell v. Crawford* (Va.) 8 Grat. 110, 123.

The word "settlement," in a finding that a note was given in settlement of interest to date, where the parties had agreed to and had computed the interest due on the note, at about 2½ per cent. a month after maturity, instead of 5, as stipulated in the note, held to have been used in the sense of payment, not of computation or adjustment. *Goenen v. Schroeder*, 18 Minn. 66, 75 (Gil. 51, 59).

The receipt of a note in settlement of a debt is to be counted substantially the same thing as on account of the debt or in payment of the debt, and is on the implied understanding that the note will be paid and that the maker is solvent. *Combination Steel & Iron Co. v. St. Paul City Ry. Co.*, 49 N. W. 744, 745, 47 Minn. 207.

#### Receipt imported.

At the foot of the bill of parcels the word "settled," accompanied with a signature, imports a receipt and acquittance, and in an indictment for forging the acquittance it was not necessary to aver that the word had such import. *Rex v. Martin*, 7 Car. & P. 549.

#### Bill of exceptions or case.

"Settled" and "allowed," as used in Civ. Code, § 548, relating to the preparation of a case for presentment to the Supreme Court, are synonymous. *Atchison, T. & S. F. R. Co. v. Cone*, 15 Pac. 499, 37 Kan. 567.

Code Civ. Proc. § 301, providing that, when an appeal is taken from the decision of the judge on a motion for a new trial, "a bill of exceptions must be settled in the usual form, upon which the argument of the appeal must be had," empowers the judge to decide what shall be embraced in such bill. *Montana Lumber & Produce Co. v. Howard*, 25 Pac. 1024, 10 Mont. 296.

"Settle," as used in reference to settling a bill of exceptions, means to approve; so that the settling of a bill of exceptions by the judge declares that the notes of the testimony of witnesses, as taken down by counsel, constituted the testimony given on the trial. *Denver & R. G. R. Co. v. United States*, 51 Pac. 679, 681, 9 N. M. 309.

"Settlement of a case," as used in Code Civ. Proc. § 2545, providing that either party may, upon the settlement of a case, request a finding upon any question of fact, or ruling on any question of law, and may take exception to such finding or ruling, or refusal to find or rule, means the settlement of a case on appeal. In *re Prout's Estate*, 11 N. Y. Supp. 160.

The words "settles the case," in Laws 1892, c. 14, art. 1011a, subd. 8, providing that the Supreme Court may issue writs of error, "when the judgment of the Court of Civil Appeals, reversing a judgment, practically settles the case, and this fact is shown in the petition for a writ of error," mean "fixes the rights of the parties"; and under such section a writ of error does not lie where a judgment was reversed by the Court of Civil Appeals, and the cause remanded for the introduction of parol evidence, to enable a construction of the instrument on which the rights of the parties depended. *Gallagher v. McHugh*, 85 Tex. 446, 21 S. W. 1033.

#### Estate of decedent.

"Settled," as used in an expression, "before my estate is settled," will be considered to mean the payment of funeral expenses, debts, legacies, etc. In *re Batchelor's Estate*, 77 N. W. 941, 942, 119 Mich. 239.

"Settled," as used in a will providing that, on his wife's death before his estate is settled, the sum given to or settled on her before marriage should pass to the residue, does not mean "settlement" in the popular sense of the term, but the stage of proceedings when the funeral expenses, debts, and legacies are paid, and when nothing remains but to proceed with the distribution of the residue. *Calkins v. Smith's Estate*, 1 N. W. 1048, 41 Mich. 409.

The words "settlement of an estate," as used in Pub. St. c. 136, § 26, providing that, after settlement of an estate, devisees shall be liable for its debts, means such an actual settlement of it that the claimant could not have obtained full satisfaction of his claim

against the estate under the preceding provisions of the statute by any proceeding against the executor or administrator, if he had used the diligence which the statute requires. *Forbes v. Harrington*, 50 N. E. 641, 643, 171 Mass. 386.

Testatrix, after directing the payment of debts, legacies, and charges of administration, gave the residue of her property to her children in equal shares, one of which passed to a trustee, who was not the same person as the executor. The executor was empowered to sell personal and real estate as the proper and convenient settlement of the estate might require. The greater part of the estate was realty, and the personality was insufficient to pay debts, legacies, etc. Held, that the words "settlement of the estate" should be construed to have been used in their ordinary meaning, as referring to the settlement of the probate account, and not to include the partition or distribution of the estate among the devisees, and that hence the power of sale only authorized the executor to sell land for the payment of debts, legacies, and charges of administration, and not for the purpose of dividing the proceeds among the devisees. *Allen v. Dean*, 20 N. E. 314, 315, 148 Mass. 594.

The word "settlement," in Rev. St. 1808, §§ 12, 13, providing that an agreement of distribution "shall be accepted and allowed for a settlement of said estate," and the words "valid distribution," in the statute as changed by Rev. St. 1875, p. 372, § 5, providing that it "shall be a valid distribution of the estate," mean the same thing. They both describe the effect or result of one and the same thing in the settlement of estate, namely, that it ascertains and determines the individual shares of the distributees in and to specific property. *Appeal of Mathews*, 45 Atl. 170, 171, 72 Conn. 555.

The phrase "settlement of estates of deceased persons," in Const. art. 11, § 16, providing that county courts shall be courts of record, and shall have original jurisdiction of settlements of the estates of deceased persons, evidently refers to the adjustment of the claims and demands in favor or against an estate. That does not necessarily include the word "distribution," which is the act of dividing or making an apportionment. *In re Creighton*, 11 N. W. 313, 12 Neb. 280.

#### SETTLED ACCOUNT.

See "Account Settled."

#### SETTLED ESTATE.

The meaning of "settled estate," whether in legal or in popular language, as contradistinguished from "estate in fee simple," is un-

derstood to be one in which the powers of alienation, devising, and transmission according to ordinary rules of descent are restrained by the limitations of the settlement. It would be a perversion of language to apply the term "settled" to an estate taken out of a settlement and brought back to the condition of an estate in fee simple. *Micklethwait v. Micklethwait*, 4 C. B. (N. S.) 790, 858.

#### SETTLED INSANITY.

"Settled insanity" is the term applied to delirium tremens, which is a kind of insanity produced by alcoholism, caused by the breaking down of the person's system by long-continued or habitual drunkenness, and brought on by abstinence from drink. It is thus termed, to distinguish it from "temporary insanity," or drunkenness directly resulting from drink. *Evers v. State*, 20 S. W. 744, 748, 31 Tex. Cr. R. 818, 18 L. R. A. 421, 37 Am. St. Rep. 811.

#### SETTLED LIMITS OF THE UNITED STATES.

The words "settled limits of the United States," in a policy of insurance, restrict the insured within the geographical boundaries of the United States, including the territories, organized and unorganized, and not merely to the inhabited portions or the region of settlements. *Casler v. Connecticut Mut. Life Ins. Co.*, 22 N. Y. 427, 431.

#### SETTLED MINISTER.

St. 1821, c. 107, § 6, exempting "settled ministers" from taxation, means those holding a certain fixed connection between the minister and the society, in contradistinction to those occasional connections which furnish no proof even of habitation in the towns or parishes where they exist, and includes a person ordained as a Congregational minister in another state in regular standing and installed over a town in this state. *Gridley v. Clark*, 19 Mass. (2 Pick.) 403, 411.

The term "settled minister" means a minister who is ordained over some particular society, either incorporated or unincorporated, which is entitled to his services and obligated to him for his support in some form or other. The term does not include a minister who is merely authorized to preach whenever he shall see fit, but who has no fixed place or society over which he can be considered to be settled; and therefore he is not entitled to exemption from taxation under a statute authorizing the exemption of ordained ministers in the towns, etc., where they are settled. *Ruggles v. Kimball*, 12 Mass. 337, 338.

St. 1808, p. 470, § 2, providing that no person other than a magistrate or justice of

the peace or ordained minister, and that only in the county where he dwells and during the time he continues settled in the work of the ministry, shall join any persons in marriage, means a person authorized to perform ministerial functions, and particularly the celebration of marriage, resident in the county where he performs them, and who has the charge of a particular church and congregation. He must not be an itinerant, but a local preacher. A minister having a local residence in the town, and the charge of a certain church and society in that place, who at the request of the church preached to them from the time of his ordination, during which time they contributed by voluntary contribution for his support as their minister and local preacher and deacon, he owning and considering such church as his church, and the church owning and considering him as being their minister and local deacon; he during all the time steadily exercising all the powers and privileges authorized by his commission, is a "settled minister," within the meaning of the statute. *Kibbe v. Antram*, 4 Conn. 134, 139.

A deacon of the Methodist Episcopal Church, licensed to preach and actually preaching as a traveling circuit preacher upon a circuit including the town in which he dwells, is not "settled in the work of the ministry," within the meaning of a law declaring that marriages shall be celebrated by those settled in the work of the ministry. *Town of Goshen v. Town of Stonington*, 4 Conn. 209, 219, 10 Am. Dec. 121.

#### SETTLEMENT (In Poor Laws).

See "Existing Settlement"; "Legal Settlement."

Within the meaning of the statute relating to paupers, by the term "settlement" is meant such a residence in a town as entitles a person to support or assistance upon becoming a pauper. When a person acquires a settlement in a town, a duty is imposed upon that town to furnish him support, if he become poor and in need of assistance. *Town of Westfield v. Town of Coventry*, 44 Atl. 66, 67, 71 Vt. 175.

The word "settlement," in reference to paupers, has become in a manner technical, in so much that, when it is said that a person has a settlement in a particular town, it means that in case of need he has a right to support from the inhabitants of that town. *Inhabitants of Jefferson v. Inhabitants of Washington*, 19 Me. (1 App.) 293, 300.

The word "settled" has no precise or determinate meaning. In popular language, it intends going into a town or place to live and take up one's abode. A person is said to be settled where he has his domicile or home.

Settlement means no more. *Avery v. Inhabitants of Tyringham*, 3 Mass. 160, 166, 3 Am. Dec. 105.

#### Dwelling place and home distinguished.

See "Dwelling Place"; "Home."

#### As legal settlement.

Comp. Laws, § 4534, provides that a pauper shall gain a settlement in a township by residence for a year. Comp. Laws, c. 69, provides that the burden of supporting the indigent insane at public expense shall be borne by the county where he has acquired a legal settlement. An indigent person became insane within one year after moving from one county to another, and was committed to the insane asylum from the county in which he was found, and supported by that county. Held, that the county from which he was sent to the asylum was entitled to be reimbursed by the county from which he had moved, since the Legislature, by the term "legal settlement," used in chapter 69 as to indigent insane, meant the same thing defined by section 4534 in regard to paupers. *Jackson County v. Hillsdale County*, 83 N. W. 408, 409, 124 Mich. 17.

The use of the word "settlement" in the common law to express the relation of a person to a place or locality is confined almost exclusively to that portion which relates to the dispensation of public charity for the support of those who are unable to earn a livelihood in consequence of any bodily infirmity, idiosyncrasy, lunacy, or other unavoidable cause (Comp. St. 1901, c. 67, § 1), and who are commonly called "paupers." It is thus most frequently employed in the reported cases and the statutes of several states, and was so used in Comp. St. 1901, c. 40, § 26, providing that the expenses of an insane person shall be collected by the county from another county in which the insane person has a legal settlement. The term is defined by Webster as the legal residence or establishment of a person in a particular town or parish, which entitles him to maintenance if a pauper, and subjects the town or parish to his support. In *Inhabitants of Warren v. Inhabitants of Thomaston*, 43 Me. 406, 69 Am. Dec. 69, the court says: "The place of one's settlement is a place where such person has the legal right to support as a pauper." *Clay County v. Adams County* (Neb.) 95 N. W. 58, 59.

#### Residence distinguished.

"Settlement," as used in Rev. St. c. 32, § 1, providing that any person 21 years of age who shall reside in any town for the term of five years together, and shall not during that term receive, directly or indirectly, any supplies or support as a pauper from any town, shall thereby gain a settlement in such town, is not synonymous with "res!"

“dwelling place,” or “home.” The place of one’s settlement is a place where such person has a legal right to support as a pauper. It may be in a place other than one where such pauper has his dwelling place, home, or residence. A person may have a settlement in a place where he has never had a residence, as by derivation. *Inhabitants of Warren v. Inhabitants of Thomaston*, 43 Me. 406, 418, 69 Am. Dec. 69.

The word “settlement,” as used in a statute relating to paupers, has a different meaning from the word “residence” in other statutes. For voting purposes it is enough for an elector to have resided in a township 20 days, though to entitle him to support as a pauper a year has long been necessary. The term “legal settlement” is defined but in one statute, and is there used in connection with the poor laws, and provides that a pauper shall gain a settlement by residence in a township for one year; and the term “legal settlement,” as used in *Comp. Laws*, c. 69, relating to the indigent insane, means the same thing defined by such section in regard to paupers. *Jackson County v. Hillsdale County*, 83 N. W. 408, 409, 124 Mich. 17.

#### SETTLEMENT (Public Lands).

“The term ‘settlement,’ in our legislation in relation to public lands, has been generally used to designate the place of the location of lands.” *Hurdle v. Elliott*, 23 N. O. 174, 177.

To constitute a “settlement” of state land, within the contemplation of the statute, the intention to settle must exist, accompanied by such acts as show a consummation of that intention within the time fixed by statute. If the settlement is once an accomplished fact, a subsequent abandonment is immaterial; but if, before the fact is accomplished, the intention to settle is abandoned, no actual settlement has been effected. *State v. Strain* (Tex.) 25 S. W. 1003, 1004.

The word “settle,” when applied to lands, imports the idea of a permanent habitation. Thus a settler, within the pre-emption laws of the United States, was only one who actually resided on the land “settled.” *Burleson v. Durham*, 46 Tex. 152, 160.

Act Cong. May 23, 1844, entitled “An act for the relief of citizens in towns on the lands of the United States, under certain circumstances,” provided that “whenever any portion of the surveyed public lands has been or shall be settled on and occupied as a town site, and therefore not subject to entry under the existing pre-emption laws, it shall be lawful, in case such town or place shall be incorporated, for the authorities thereof, and, if not incorporated, for the judges of the county court, \* \* \* to enter at the proper land office and at the minimum price the

land so settled and occupied in trust for the several use and benefit of the occupants thereof, according to their respective interests.” Held, that the words “settled and occupied” meant a bona fide use and improvement of the land, and had no reference to selected lands. *In re Selby*, 6 Mich. 193, 204.

Act Dec. 30, 1786, defines “settlement” to be an actual personal residence on land with the manifest intention of making it a place of abode and the means of supporting a family. Such a settlement entitles the settler to a warrant for not exceeding 400 acres of land and an allowance including his improvements. A mere improver has no such right. *Zubler v. Schrack*, 46 Pa. (10 Wright) 67, 70.

The word “settlement,” as used in *Sp. Laws* 1862, c. 20, relating to the settlement of lands granted to a railroad company, means a settlement with a view to pre-empt the land, as authorized by the laws of the United States; and a settlement which satisfies the United States pre-emption laws is a settlement within the meaning of the act. *Peterson v. First Division St. P. & P. R. Co.*, 6 N. W. 615, 617, 27 Minn. 218.

The word “settlement,” as used in the constitutional provision relating to the purchase of school lands, not exceeding 160 acres, by an actual settler, means such land as a person actually settled, residing on the land, may declare an intention to appropriate, including his improvements, the whole not to exceed 160 acres. “Settlement” is a thing having extent, and not an act; a place restricted only by a maximum area. *Perkins v. Miller*, 60 Tex. 61, 63.

The settlement contemplated by the pre-emption laws, providing that one intending to purchase land under the provisions of the act shall, within 30 days after the date of settlement, file with the Register of the district a written statement describing the land settled upon, etc. (Act Sept. 4, 1841, § 15; *Bright* Dig. 474, § 88), must be the settlement of a qualified person. *Boyce v. Danz*, 29 Mich. 146, 150.

Act Dec. 30, 1786, defines a “settlement,” under the pre-emption laws, to be “an actual, personal, resident settlement, with a manifest intention of making it a place of abode and the means of supporting a family, and continued from time to time, unless interrupted by the enemy or going into the military service of the country during war.” Under this provision, continuity of actual residence and possession is the final principle of a pre-emption right and a part of its legal definition. “Settlement” must not have the smallest cast of abandonment. Short intervals of nonresidence, such as may frequently happen between the going out of one tenant and the coming in of another, or a temporary absence on business, so the animus rever-

tendi exists, will not be considered a discontinuance of the personal residence after it has been once fully completed; nor will it be so where the settler is expelled from his residence on the land by private force, provided he resorts to proper means to have himself restored. *Jacobs v. Fogard*, 25 Pa. (1 Casey) 45, 47.

The term "settlement," as used in the act relating to public lands, means an actual, personal, resident settlement, with a manifest intention of making it a place of abode and the means of supporting a family, and continued from time to time, unless interrupted by the enemy or by going into the military service of this country during the war. 2 P. & L. Dig. Laws Pa. 1894, col. 3735, § 34.

The word "settle," as applied to lands, conveys the idea of a permanent inhabitation. *Burleson v. Durham*, 46 Tex. 152, 160 (citing *Webst. Dict.*).

#### **Improvement distinguished.**

In our acts of assembly, and in common parlance, there is a difference between an "improvement" and a "settlement." An improvement may be made by clearing land, and cultivating it without residing on it. A settlement requires an actual residence. The idea of the Legislature, with regard to the meaning of a settlement, is precisely defined in Act Dec. 30, 1876. It is "an actual, personal, resident settlement, with a manifest intention of making it a place of abode and the means of supporting a family." The term is so used in Act Sept. 22, 1794, by which it is enacted that no application shall be received in the land office for any land within the commonwealth, except for such lands whereon a settlement has been or thereafter shall be made, grain raised, and a person or persons residing thereon. *Bixler v. Baker* (Pa.) 4 Bin. 213, 217.

#### **SETTLEMENT AS USUAL.**

The phrase "settlement as usual," as used in an offer to lease certain mining property for 18 months at a certain royalty, settlement as usual, related to one of two well-understood premises: First, to a former method of computation and time and manner of payment existing between the same parties; or, second, to a well-known and established custom of the district—either one of which would be sufficiently definite to constitute a part of the contract. *Cochrane v. Justice Min. Co.*, 26 Pac. 780, 781, 16 Colo. 415.

#### **SETTLEMENT OF ACCOUNT.**

The phrase "settlement of account," as used in a letter inclosing a check in "settlement of account," is equivalent to the words

"apply on account." *Widner v. Western Union Telegraph Co.*, 16 N. W. 653, 654, 51 Mich. 291.

A settlement is the looking over of the mutual accounts of two or more persons who have had business transactions, and agreeing upon a balance between them. The mere making up by one person of his account with another, with whom he has had business transactions, and the sending of the same to him, and its retention by such other without objection, does not necessarily constitute a settlement of an account stated. If such other keeps the account and fails to object within a reasonable time, the facts raise a presumption or inference of acquiescence. That is all. *Rose v. Bradley*, 91 Wis. 619, 622, 65 N. W. 509, 510.

#### **SETTLER.**

See "Actual Settler."

A "settler" in any particular locality means any one who has taken up his permanent abode in that locality. The word is ordinarily applied to those who first come to a country or section of a country, either partially or wholly inhabited, and who make their residence there. We may speak of the early settlers of a long-inhabited country, but the term is hardly applicable to any other class of residents of such a country. *Hume v. Gracy*, 27 S. W. 584, 86 Tex. 671.

As used in the statutes of Virginia and Kentucky granting land to "settlers," the word meant those who penetrated the wilderness in pursuit of future residence, and, having found a place, began to improve, with a view to a permanent home. Such person was a settler from the time he built his half-faced camp or erected his tent, provided he did it with the intention of remaining and living at that spot. The term "settlement" is sometimes in common parlance used to designate the settlement right or number of acres granted to a settler in consideration of his settling and remaining the requisite time on the land, and in that sense it may sometimes be used in legislative and judicial proceedings. But the term "settlement," as used in the statute granting lands to settlers and speaking of their settlement, means nothing more nor less than locating one's self on the land with a view to a permanent resident. Actual settlement is a comprehensive term, a *nomen generalissimum*, which includes more than a dwelling house. Generally it should, in the abstract and popular sense, be deemed co-extensive with the claim of title under which the occupant settles on a part in the name of the whole tract, which he claims as his own; and then the entire tract is an indivisible unit, and altogether identifies the settlement. To constitute an actual settle-

ment on land to which there is an adverse interfering claim, however, the occupant must have built his dwelling house, or extended his close, or made other appurtenant improvements within the limits of the adversary claim conflicting with that under which he settled. *Davis v. Young*, 32 Ky. (2 Dana) 209, 306, 312.

"Settler," within the pre-emption acts, disposing of the public domain, is synonymous with "actual settler," or "bona fide settler," and means a purchaser who not only occupies public land, but actually resides thereon with a view to residence. *Burleson v. Durham*, 46 Tex. 152, 160.

As used in Pol. Code, §§ 3442, 3443, providing that "settlers upon swamp and overflowed lands belonging to the state, who occupy the same for farming or grazing purposes, and whose occupation is evidenced by actual inclosure or by ditch or monuments showing the extent thereof, are preferred purchasers for such land," does not mean the same as "actual settlers" or "actual residents." The "preferred right of purchase does not depend upon residence." The purpose simply was to give the man who makes the improvement upon the swamp land a reasonable chance to purchase it and to prevent his improvements from being appropriated by others. This purpose does not require that he shall actually reside on the land. "Settlers" on swamp and overflowed lands are those who "occupy the same for farming or grazing purposes." "Occupation" is ordinarily synonymous with "actual possession," and, as there may be actual possession without residence, it would seem to follow that there may be occupation, and consequently settlement, without residence. The word "settlers" does not require residence upon the land. *McIntyre v. Sherwood*, 22 Pac. 937, 938, 82 Cal. 139.

#### SETTLING OF DIFFERENCES.

The phrase "settling of the differences" is used in Boards of Trade, etc., to designate the settlement closing a transaction by which one party sells and the other buys property for future delivery, but where the understanding is that there shall be no actual delivery of the goods, but that at the appointed time the purchaser is merely to receive or pay the difference between the contract and the market price. *Plank v. Jackson*, 26 N. E. 568, 569, 128 Ind. 424.

#### SEVENTH.

A testator bequeathed a legacy to the "seventh" or youngest child of A. at testator's death. A. had six children, and had had another, who soon died. Afterwards the plaintiff was born, and was the seventh child living, but eighth in order of birth. Held, that the plaintiff could not take under

the description of the "seventh child," and that the bequest went to the youngest child. *West v. Lord Primate of Ireland*, 3 Brown, C. C. 148, 149.

#### SEVENTY.

A "seventy" is a member in good standing in the Mormon Church, whose duty it is to teach and preach the doctrines of the church. *United States v. Brown*, 21 Pac. 461, 462, 6 Utah, 115.

#### SEVERABLE CONTRACT.

A "severable contract" is a contract liable simply to be severed. In its origin and until severed, it is entire; a single bargain or transaction. The doctrine of severableness, in contracts, is an invention of the courts, in the interests of justice, to enable one who has partially performed, and who is entitled on such partial performance to something from the other side, to sustain an action in advance of complete performance. *Norrington v. Wright* (U. S.) 5 Fed. 768, 771.

As a general rule the consideration to be paid, and not the subject or thing to be performed, determines to which class a contract belongs. If the consideration is single, the contract is entire; but, if the consideration is expressly or by necessary implication apportioned, the contract is severable. A contract to serve for a year at a fixed salary per month is severable. *Clay Commercial Tel. Co. v. Root* (Pa.) 4 Atl. 828, 829.

A contract is said to be severable when the part to be performed by one party consists of several distinct and separate items, and the price to be paid by the other is apportioned to each item to be performed, or is left to be implied by law; and the same rule holds where the price to be paid is clearly and distinctly apportioned to different parts of what is to be performed, although the whole is in its nature single and entire. *Dowley v. Schiffer*, 13 N. Y. Supp. 552, 553.

If the part to be performed by one party consists of several distinct and separate items, and the price to be paid by the other is apportioned to each item to be performed, or is left to be implied by law, such a contract will generally be held to be severable; and the same rule holds where the price to be paid is clearly and distinctly apportioned to different parts of what is to be performed, though the latter is, in its nature, single and entire. *Osgood v. Bauder*, 39 N. W. 887, 889, 75 Iowa, 550, 1 L. R. A. 655.

#### SEVERAL.

##### As all.

A will providing that, after the death of the testator's widow, the estate should go



to "his several children," refers to all of testator's children living and dead as a class, and does not exclude the grandchildren of a deceased son of the testator. *Outcalt v. Outcalt*, 8 Atl. 532, 42 N. J. Eq. (15 Stew.) 500.

As used in Act March 29, 1869, § 8, providing that, before the corporation created by such act shall commence business, the stockholders shall pay the "several amounts subscribed" in full, and no increase of said capital stock shall be made at any time unless the amount thereof shall be paid into such corporation at the time of the issue of such stock, and the whole capital stock, including such increase, shall not exceed in amount the actual value of the property of such corporation at the time of the issue of such increased stock, must be construed to mean the "several amounts subscribed," which together make up the full amount of the capital stock, and not the "several amounts subscribed," which may aggregate less than the capital stock. This meaning is evident from the language of the second clause of section 8, "And no increase of said capital stock shall be made," etc., as the words "said capital stock" refer back to the words "several amounts subscribed"; "said capital stock," in the second clause, being the same thing as the "several amounts subscribed" in the second clause. The two expressions are used interchangeably. If the amounts of every increase of the capital stock must be paid in, the same ruling and the same policy would require the original capital stock itself to be paid in. The natural construction, then, is this: that before the corporation shall commence business the amounts subscribed to make the capital stock shall be paid in full, and any increase over the amounts so subscribed shall also be paid in full at the time of issuing stock therefor. *People v. National Sav. Bank* (Ill.) 11 N. E. 170, 172.

Act 1891, entitled "An act to provide for the depositing of state and county funds in banks," which provides (section 1) that the State Treasurer shall deposit and at all times keep on deposit, for safekeeping, in a state or national bank doing business in the state, the amounts of money in his hands belonging to the "several current funds" in the state treasury, means all the moneys belonging to the state in the possession and under the control of the State Treasurer. *State v. Bartley*, 58 N. W. 172, 173, 39 Neb. 353, 23 L. R. A. 67.

A composition agreement between a debtor and "the undersigned, their several creditors," was signed by a portion of the creditors of such debtor, but not by all. It being claimed that the words "their several creditors" were synonymous with "all their creditors," and the agreement not binding

until all the creditors had signed it, the court said: "We are not prepared to adopt that construction. Among the synonyms of the word 'several' given by lexicographers are 'various,' 'diverse,' 'sundry,' 'consisting of a small number, more than two.' But the dictionaries furnish no authority for saying that several means 'all.' If it was intended that the signature of all the creditors was intended to the validity of the instrument, it was easy to say so." *Strickland v. Harger* (N. Y.) 16 Hun, 465, 467.

In construing a will in which testator left property to his executors, in trust to pay the income thereof to testator's brothers and sisters equally during their joint lives, and after the several deaths of said brothers and sisters then to divide the property equally among the children of such brothers and sisters, respectively, "and, in case either of said brothers or sisters shall die leaving the others surviving, then the income intended for the one so dying shall be paid to the issue or representative of the one so dying," the court said: "The claim that the word 'several' should be considered 'respective' cannot be maintained with propriety. Such a construction would require the division of the whole property upon the death of one of the cestuis que trust, when it is evident and conceded that the testator intended that all of them should enjoy the income during their respective lives; and, besides, the plain meaning is that, whenever the division is made, it must be made between all the children of the four, and not between the children of the one or more who may die leaving survivors." *Colton v. Fox*, 67 N. Y. 348, 352.

#### As each.

The word "several" is defined by Webster as "each particular or a small number singly taken." As used in Const. 1834, authorizing the "several counties and incorporated towns to impose taxes for the county and corporation purposes, it means that each particular county, or a small number or any number of the counties singly taken, may be so authorized. *Lauderdale County v. Fargason*, 75 Tenn. (7 Lea) 153, 168.

#### As more than one.

Act Cong. Feb. 28, 1853, providing that, whenever there are or shall be several charges against the same person for the same act or transaction, the whole may be joined in one indictment on separate counts, etc. Held, that the word "several" was used in such statute in its popular sense, meaning more than one. It does not mean "separate" charges—that is, the same charge separately made against several defendants; but the term "several" related to the charges, and not to the persons, Congress meaning to provide for the joinder of several charges aris-

ing out of the same transaction in one indictment. *United States v. Durkee* (U. S.) 25 Fed. Cas. 939, 940.

"Several," as used in a letter of recommendation by defendants to plaintiffs, stating that the bearer of such letter desires to buy several hundred dollars' worth of groceries, and stating that he was good for all he bought, and plaintiff could safely sell him a bill, and recommending him to plaintiff, hoping that he would be treated satisfactorily, means "more than two hundred, but not very many hundred, but seven hundred is included in the term as used." *Einstein v. Marshall*, 58 Ala. 153, 154, 25 Am. Rep. 729.

The word "several," in relation to number, means two or more. *Rev. Codes N. D.* 1899, § 5122; *Civ. Code S. D.* 1903, § 2456; *Rev. St. Okl.* 1903, § 2795; *Code Civ. Proc. Mont.* 1895, § 3463.

### SEVERAL DEFENDANTS.

In *Code N. Y.* § 5096, providing that judgment may be given for or against one or more of several plaintiffs and for or against one or more of several defendants, the term "several defendants" means joint defendants, and does not refer alone to cases of several liability. *North Star Boot & Shoe Co. v. Stebbins*, 54 N. W. 593, 595, 3 S. D. 540.

### SEVERAL FISHERY.

See, also, "Sole and Exclusive Fishery."

A "several fishery" is an exclusive right of fishing, which is derived from the owner of the soil. *Freary v. Cooke*, 14 Mass. 488, 489; *Holford v. Bailey*, 13 Q. B. 426, 445; *Hardin v. Jordan*, 11 Sup. Ct. 808, 814, 140 U. S. 371, 35 L. Ed. 428.

The right of "several fishery" is dependent upon and connected with the ownership of the soil under water; and when such ownership is established the right may attach as well to an arm of the sea, where the tide ebbs and flows, as to fresh waters. *Trustees of Brookhaven v. Strong*, 60 N. Y. 56, 64.

The word "several," as applied to a right of the sort of a fishery, has acquired a meaning quite technical. Ever since the pleadings were in English, being clearly the same and with no other meaning than the word "separalis" had before, and though the words "sole and exclusive" may be capable of having the same meaning, they may also have a very different meaning, and in a pleading relating to a fishery are not equivalent to the word "several." *Holford v. Bailey*, 3 Q. B. 1000, 1018.

### SEVERAL OWNERSHIP.

The ownership of property by a single person is designated as a sole or several ownership. *Civ. Code Cal.* 1903, § 681.

### SEVERAL TRACTS.

*Rev. St. art.* 3475, provides that, should the partition commissioners deem it necessary, they may cause the real estate to be surveyed into "several tracts or parcels"; and article 3476 prescribes that the commissioners shall divide the real estate to be partitioned into as many "shares" as there are persons entitled thereto, each share to contain one or more tracts or parcels, as the commissioners may think proper. Held, that the words "several tracts or parcels" do not mean the same thing as the word "shares"; for one or all of these may be composed of several of the tracts or parcels into which the land may have been divided. *Houston v. Blythe*, 10 S. W. 520, 521, 71 Tex. 719.

### SEVERALLY.

See "Jointly and Severally"; "Separately and Severally."

#### As each.

The word "severally," in a note which provides that the subscribers jointly and severally promise to pay, etc., operates and renders each of the signers personally liable to the payment thereof. *Bradlee v. Boston Glass Manufactory*, 33 Mass. (16 Pick.) 347, 351.

The expression "severally liable," when applied to a number of persons, usually implies that each one is liable alone. As used in *Code*, § 136, subd. 2, providing that where an action is against two or more defendants, and the summons is served on one or more, but not on all, of them, if the action be against defendants severally liable, the plaintiff may proceed against the defendants served in the same manner as if they were the only defendants, it shows an intention to allow a plaintiff to proceed against the defendants served, provided they were liable severally, or in distinction from such as were not served, and that the words "severally liable" in that connection are to be understood as referring to all the defendants served as if they were one person. *Pruyn v. Black*, 21 N. Y. 300, 303.

#### As respectively.

In *Act 1871*, § 3, providing for the election of a president, secretary, and treasurer of a school district, who should severally hold their offices for one year, and whose powers and duties should severally be the same as those of the moderator, assessor, and director, organized under the general laws of the state, etc., "severally" means the same as "respectively," so that the same duties and

powers exercised by the assessors are imposed on the secretary. *Presque Isle County v. Thompson* (U. S.) 61 Fed. 914, 926, 10 C. C. A. 154.

In federal bankruptcy rule 28, providing that every assignee and the clerk of the bankruptcy court "shall deposit all sums received by them severally on account of any bankrupt's estate in one depository, and every clerk shall make a report to the court of the fund received by him and of deposits made," "severally" means "respectively"; the word usually meaning "distinctly," "separately," or "apart from others." *State Nat. Bank v. Reilly*, 14 N. E. 657, 660, 124 Ill. 464.

## SEVERALTY.

The word "severalty," as used in the expression "tenants in severalty," means for the sole, separate, and exclusive dominion of the tenants. *Funk v. Haldeman*, 53 Pa. (3 P. F. Smith) 229, 246.

## SEVERANCE OF STATUTE.

Limitation by judicial construction is not severance of a statute. Severance of a statute takes place only where both sets of provisions, constitutional and unconstitutional, appear upon the face of the statute itself, and the court separates, if the provisions are not interdependent, the constitutional from the unconstitutional, and strikes from the statute the unconstitutional provisions, leaving the constitutional provisions therein. *Ballard v. Mississippi Cotton Oil Co.*, 34 South. 533, 554, 81 Miss. 507, 62 L. R. A. 407, 95 Am. St. Rep. 476.

## SEVERE ILLNESS OR SICKNESS.

"Severe sickness or disease," as used in a question in an application for a life insurance, as follows: "Has the party had during the last seven years any severe sickness or disease?" means those severe attacks of disease which often leave a permanent injury and tend to shorten life. It does not include the ordinary diseases of the country, which yield readily to medical treatment, and, when ended, leave no permanent injury to the physical system. *Halloman v. Life Ins. Co.* (U. S.) 12 Fed. Cas. 383, 384.

An application for a benefit certificate in a mutual benefit association, requiring the applicant to state whether he ever had any "severe illness," should be construed in the ordinary acceptation of the words, and means serious or extreme illness. The term "severe or serious illness" does not mean slight, temporary physical disturbances or ailments, speedily and entirely recovered from, not interfering materially with the pursuit of one's

avocation, producing no permanent effect on the constitution, and not rendering the insurance risk more than usually hazardous. In determining whether the applicant had previously had any "severe illness," it is to be considered whether the illnesses which he had produced any ultimate effect on his health, longevity, or strength, and other similar considerations. The term "severe illness" was used in its common, ordinary sense. A severe illness is only such a one as either may have had in fact, or ordinarily does have, an effect upon the general health or the continuance of the life of the person affected. It includes not only such ailments and disorders as are calculated or tend directly to impair the general health or constitution, or produce death, unless arrested, but also such as indicate, by their presence, history, or development, a vice in the constitution, or such, in other words, as are signs or warnings of danger to life or health, rather than direct causes of danger. It does not include such slight temporary ailments as are calculated neither to affect nor threaten the general health or constitution, or such as do not ordinarily indicate the seeds in the system of serious disorder. *Goucher v. Northwestern Traveling Men's Ass'n* (U. S.) 20 Fed. 596, 597.

"Severe sickness," sufficient under the law to excuse a militiaman for nonappearance at military inspection, means such sickness as prevented the party from giving to his commanding officer within the time stated in the law satisfactory evidence of his inability to appear. *Tribou v. Reynolds*, 1 Me. (1 Greenl.) 408, 409.

## SEVERITY.

See "Intolerable Severity."

## SEWAGE.

"Sewage" is the general drainage of a city or town by means of sewers. *City of Valparaiso v. Parker*, 47 N. E. 330, 331, 148 Ind. 379.

A judgment restraining the city from discharging its "sewage" through its sewer system into a certain river will be understood to refer only to the refuse and foul matter carried through the sewer by the water therein flowing. *Winchell v. City of Waukesha*, 85 N. W. 668, 671, 110 Wis. 101, 84 Am. St. Rep. 902.

The primary meaning of the term "sewage" is that which passes through a sewer. Cent. Dict.; Webst. Int. Dict. A secondary meaning is derived from the usual character of the contents of a sewer, and as used in that sense the word signifies the refuse and foul matter, solid or liquid, which is so carried off. As used in a complaint averring that a

city was causing to flow into a river large quantities of acids, impure substances, waste matter, contents of cesspools, sewage, and other noxious, corrupt, and impure substances, so as to render the waters of the river filthy, noxious, and unclean, the word "sewage" should be construed in its secondary meaning, indicating that the sewage was itself something noxious, corrupt, and impure. *Morgan v. City of Danbury*, 35 Atl. 499, 500, 67 Conn. 484.

#### **Drainage distinguished.**

Formerly the word "sewer" was used to indicate "a fresh-water trench, compassed on both sides with a bank; a small current or little river." *Callis, Sew.* 80. So *St. 25 Hen. VIII, c. 5*, concerning commissioners of sewers, was an act to remedy drainage from the flowing surges and course of the sea in and upon marsh grounds; also land waters and springs upon meadows and other water courses. More recently, however, and probably from the appropriation of the words in acts and ordinances to the common conduits for liquid filth, it is usually associated with such use. Thus, Webster defines "sewer" as a drain or a passage to convey water or filth underground. For "drain" he gives: "A water-course; a sewer." Kent speaks of the right of drain (3 Kent, Comm. p. 436) as a right to convey water in pipes through or over the estate of another. While it cannot be legally said that sewage may not in some cases be included in drainage, yet, when the simple term "drainage" is used, the most obvious suggestion is a drainage of water, and when, in addition, we find that a drainage of water exists, and no suitable provision has been made for sewage from houses which, if included, might result in a nuisance, the term "sewage" cannot be construed to mean the same as "drainage." *Wetmore v. Fiske*, 5 Atl. 375, 378, 15 R. I. 354.

## **SEWER.**

See "Private Sewer"; "Public Sewer."

The original definition of the word "sewer" was a fresh-water trench, artificially made, encompassed with banks on both sides to carry surface water into the sea; but the word is now used to indicate a drain or passage to carry off water and filth underground. *City of Valparaiso v. Parker*, 47 N. E. 330, 331, 148 Ind. 379.

A sewer is a drain or passage to convey water or filth underground; a subterranean canal, particularly in cities. *Hanscom v. City of Omaha*, 7 N. W. 739, 742, 11 Neb. 37 (citing *Webst. Dict.*); *Fuchs v. City of St. Louis*, 67 S. W. 610, 614, 167 Mo. 620, 57 L. R. A. 136; *Gale v. Town of Dover*, 44 Atl. 535, 68 N. H. 403; *Clark v. Peckham*, 9 R. I. 455, 467. See, also, *City of Valparaiso v. Parker*, 148 Ind. 379, 381, 47 N. E. 330.

Sewers are constructed as sanitary measures, for the public good, to carry off all sewage, consisting of human excrements and refuse animal and vegetable matter, which, as the testimony shows, and as everybody knows, constantly and continuously generates gases, noxious and dangerous, as the result of the constant and continuous process of nature. It is intended and is the object of sewers to carry off and guard the community against these gases, as much as it is to carry off the substances from which they spring. Sewers are supposed to be covered, and to be so constructed as to prevent the escape of gases generated in them. It is not intended that they be permitted to disseminate and breed disease, or to cause injury to personal or property rights. If this is not so, then there is no need of sewers; and while it is necessary, in order that the city may, in the exercise of its ministerial function, properly repair and maintain its sewers, that there should be certain openings or manholes, to permit ingress thereto and egress therefrom, and hence it becomes necessary to occasionally remove the covers, the city would be remiss in its duty were it to deliberately remove the covers for the purpose of permitting the escape of all the vile, noxious, and dangerous gases which, through nature's laws, are constantly produced therein. *Fuchs v. City of St. Louis*, 67 S. W. 610, 614, 167 Mo. 620, 57 L. R. A. 136.

#### **Culvert synonymous.**

Under a statute making a town liable for injuries caused by culverts, the town was liable for an injury by breaking through the covering of a sewer; a culvert being a covered drain under a road. *Gale v. Town of Dover*, 44 Atl. 535, 68 N. H. 403.

#### **As drain or ditch.**

See, also, "Drain."

Sewers are closed or covered waterways, while ditches are drains which are or may be open and so arranged as to take surface water. *State Board of Health v. City of Jersey City*, 35 Atl. 835, 838, 55 N. J. Eq. 116.

"Sewer" is defined by Webster as a drain or passage to carry off water and filth underground; the subterranean channels, particularly in cities. It has also been applied to an underground structure for conducting the water of a natural stream. In *Clay v. City of Grand Rapids*, 60 Mich. 451, 27 N. W. 596, it is said that sewerage includes all kinds of drainage or water discharge. A sewer is usually closed, but not necessarily so, and is ordinarily applied to drains in the city, whether of water, or filth, or both. What is a ditch or drain in the country is called a sewer in the city, and vice versa; but, under a statute authorizing towns to construct sewers, a town has no authority to construct a drain or ditch. *Aldrich v. Paine*, 76 N. W. 812, 814.

106 Iowa, 461 (citing *Bennett v. City of New Bedford*, 110 Mass. 433).

"Sewers," as used in Act May 16, 1891 (P. L. 75), relating to the opening of streets and the creation of sewers and drains, should be construed to include drains or ditches, open or covered. *Strohl v. Borough of Ephrata*, 85 Atl. 713, 178 Pa. 50.

**As local improvement.**

See "Local Improvement."

**Machinery and structures included.**

A sewer is a drain or passage to convey off water and filth underground; and, where the topography of the country prevents a discharge therefrom by force of gravitation, the structures and machinery by which such sewage is disposed of will be regarded as an essential part of the sewer. *Drexel v. Town of Lake*, 20 N. E. 38, 40, 127 Ill. 54.

"Sewer," as used in St. 9 Vict. c. 120 (metropolis local management act), declaring jurisdiction of the metropolitan commissioners of sewers, includes a sea wall built to prevent an island from being inundated, as well as a drain. The word in its general sense may mean the whole apparatus used to prevent accumulation of water on the surface, and this includes a wall, as well as a drain pipe. *Poplar Board of Public Works v. Knight*, El. Bl. & El. 408, 429.

**SEWERAGE PLANT.**

Under the Constitution, authorizing a city to purchase a sewerage plant, it was contended that the fact that the sewerage company's property consisted mainly of some thousands of feet of constructed sewers, not yet connected with any machinery or other apparatus, such property did not constitute a plant. But the court held that a building in which an engine and pumps are established for the distribution of water, but from which there are no pipes or conduits leading, may be called a waterworks plant, and a system of pipes intended for the distribution of water, but with no provision by which the distribution can be made, may with equal propriety be so called, and hence the word "plant" applies to the physical means provided for the accomplishment of the ends for which they were established, though they did not constitute a complete plant. *Brennan v. Sewerage & Water Board*, 32 South. 563, 569, 108 La. 569.

**SEWING MACHINE.**

As household furniture, see "Household Furniture."

**SEWING MACHINE COMPANY.**

"Sewing machine company," as used in Tax Act 1886, § 2, par. 17, imposing a tax

on "every sewing machine company selling or dealing in sewing machines," means a company which manufactures sewing machines. *Singer Mfg. Co. v. Wright*, 25 S. E. 249, 250, 97 Ga. 114, 35 L. R. A. 497.

**SEXTON.**

A "sexton" is the keeper of the holy things belonging to the divine worship. 3 Burns' Ecc. Law [6th Lond. Ed.] 342. With us he is a person who has the care of a house of public worship, and who discharges certain duties connected therewith, which differ more or less according to the requirements or practice of the religious sect to which the congregation belongs for whom he acts. *Stern v. Congregation Schaare Rachmin* (N. Y.) 2 Daly, 415, 417.

**SEXUAL INTERCOURSE.**

See, also, "Carnal Knowledge."

Sexual intercourse means actual contact of the sexual organs of a man and woman and an actual penetration into the body of the latter. *State v. Frazier*, 39 Pac. 819, 822, 54 Kan. 719.

**SHACKERS.**

The term "shackers," when applied to hogs, is used to designate hogs fed upon mast, such as beech nuts and acorns. *Bartlett v. Hoppock*, 34 N. Y. 118, 119, 88 Am. Dec. 428.

**SHAFT.**

The term "shaft," as used in the act relating to mines and mining, means a vertical opening through the strata, which is or may be used for the purpose of ventilation or drainage, or for hoisting men or material in connection with the mining of coal. 2 P. & L. Dig. Laws Pa. 1894, col. 3110, § 193; *Id.* col. 3150, § 349.

**SHALL.**

May construed as shall, see "May."  
Shall be entitled, see "Entitle."

"Shall pay," as used in a contract that it is agreed by the party of the second part that the royalty he shall pay unto the party of the first part shall amount to a certain sum, is used, not by way of an agreement to pay, but by way of a description of the royalties referred to in the preceding clause of the contract providing for the payment of them, and is not, therefore, an agreement to pay that particular amount named. *Ebert v. Lowenstein*, 58 N. Y. Supp. 889, 890, 42 App. Div. 109.

The use of the words "shall go" do not import a contingency, or make anything necessary to precede the vesting of a remainder, but only express the time when the remainder shall take effect in possession, and not when it shall become vested. *Middleton's Heirs v. Middleton's Devises* (Ky.) 43 S. W. 677 (citing *Williams v. Williams*, 91 Ky. 554, 555, 16 S. W. 361; *Williamson v. Williamson*, 57 Ky. [18 B. Mon.] 375).

Under a statute requiring that arbitrators "shall meet and act together," it is the duty, when three arbitrators have been agreed upon and appointed to hear and determine the controversy, that they shall all meet. Two of them have no authority to hear testimony in the absence of a third, and an award made upon testimony so taken is void. *Dunphy v. Ford*, 2 Mont. 300, 301.

#### Compulsion implied.

"Shall pay off or discharge," as used in Civ. Code, § 2990, providing that every indorser who shall pay off and discharge the judgment shall be entitled to control the execution, has the same significance as "compelled to pay." *Ezzard v. Bell*, 28 S. E. 28, 30, 100 Ga. 150.

#### As indicating future, present, or past.

The word "shall," in its common and ordinary usage, unless accompanied by qualifying words which show a contrary intent, always refers to the future. Webster says, in reference to the early use of the word in the English language: "In the early English, and hence, in our English Bible, 'shall' is an auxiliary, mainly used in all persons to express simple futurity." It is held that the word "shall," as used in Laws 1891, p. 246, providing that any final judgment of any court shall be considered to be paid in full after 10 years from its rendition, indicated an intention that the act should be prospective only. *Jones v. Stockgrowers' Nat. Bank*, 67 Pac. 177, 178, 17 Colo. App. 79.

The terms "now" and "hereafter" signify time present and to come, and from the period at which they are used. The words "shall" and "will" indicate time in the future to the same period. *Chapman v. Holmes' Ex'rs*, 10 N. J. Law (5 Halst.) 20, 26.

An agreement that the creditors "shall and will" release an insolvent does not amount to an extinguishment of the debts; it being prospective only, and not relating to an immediate release. *Thomas v. Courtney*, 1 Barn. & Ald. 1, 8.

"Shall be," as used in a contract containing a proviso that, if defendant shall sell or lease certain machines in any foreign country at less rates than those in this country, the royalty rate to be paid shall be a certain per cent., in lieu of the per cent. thereinbefore provided, suggest the meaning

"from thence on." They point to a something which before had no existence. They mark the division between the "now" and the "hereafter." To paraphrase the clause makes the reading practically this: "Now, for the present, and while the present circumstances continue, the royalty is fixed at — per cent.; but, if a foreign market be entered, the royalty thereafter shall be — per cent. *National Sewing Mach. Co. v. Willcox & Gibbs Sewing Mach. Co.* (U. S.) 74 Fed. 557, 559, 20 C. O. A. 634.

"Shall be," as used in Sess. Acts 1863, p. 13, exempting from militia duty in the state all overseers who are or shall be exempted or detailed under acts of Congress, is in the future, and means "shall hereafter be." In *re Strawbridge*, 39 Ala. 367, 375.

Laws 1874, c. 66, § 1, providing that whenever a married man shall be deserted by his wife, or a married woman shall be deserted by her husband, for the space of one year, he or she may bring action asking for a decree which shall debar the deserting person from any right or estate in the other's lands, refers to a future desertion; that is to say, to a desertion beginning after the statute goes into effect. In other words, as respects the class of cases provided for, the law is purely prospective. *Giles v. Giles*, 22 Minn. 348, 349.

"Shall die," as used in Act March 29, 1887 (P. L. p. 63), providing that whenever an estate shall be devised to a brother, who "shall die" during the life of the testator, leaving children surviving testator, the devise shall not lapse, means "die after the statute shall have taken effect." It is impossible to give these words retrospective operation. Their meaning clearly has reference to the future, and that future is not after the making of the devise, but after the taking effect of the statute. *Murphy v. McKeon*, 32 Atl. 374, 376, 53 N. J. Eq. (8 Dick.) 406.

The word "shall," as used in the transfer tax law, providing that such acts shall be imposed when any such person or corporation as described becomes beneficially interested in possession or expectancy to any property by such transfer, whether made before or after the passage of the act, refers clearly to future, and not to past, events. In *re Birdsall's Estate*, 49 N. Y. Supp. 450, 563, 22 Misc. Rep. 180.

The use of the words "shall be," in a statute providing that, whenever any animal or animals shall be killed or injured by the cars or locomotives or other carriages used by any railroad in this state, the owner thereof may go before some justice of the peace, etc., shows that the statute is not retroactive. The amendment applies only to such animals as shall be killed. "Shall be" indicates the

future, and not the past. *Indianapolis & C. R. Co. v. Kercheval*, 16 Ind. 84, 88.

"Shall," as used in Act June 4, 1879, providing that if any banker shall receive any deposits when insolvent, whereby the deposit so made shall be lost to the depositor, the banker so receiving such deposit shall be deemed guilty of embezzlement, etc., is used in the future tense and indicative of a future event, and the word indicates that, although bankers are insolvent and receive a deposit while so insolvent, yet the crime is only consummated where the banker, by his failure, suspension, or voluntary liquidation, deprives the depositor of the benefit of such part of his deposit as remains to his credit; and hence, if such deposit is repaid on checks before suspension or failure, the crime is not consummated, notwithstanding the bank was insolvent when the deposit was received. *Meadowcroft v. People* (Ill.) 45 N. E. 991, 997.

When used as a command, "shall" necessarily indicates the future as to its performance. Thus a statute providing that fences of barbed wire shall not be constructed by railroad companies does not apply to fences constructed prior to the passage of the act. *Stisser v. New York Cent. & H. R. R. Co.*, 52 N. Y. Supp. 861, 862, 32 App. Div. 98.

"Shall be given," as used in the act of 1782, providing that 25,000 acres of land shall be given to Maj. Gen. Greene, his heirs and assigns, within the bounds of the lands reserved for the use of the army, imported an absolute donation, and not merely an intention to give in the future. *Rutherford v. Greene*, 15 U. S. (2 Wheat.) 196, 197, 4 L. Ed. 218.

"Shall be and are hereby granted," as used in a special act granting land, operates as an immediate transfer of interest, and not a promise of transfer in the future. *Shanklin v. McNamara*, 26 Pac. 345, 87 Cal. 371.

The words "shall be and are hereby granted," in Act Cong. Sept. 28, 1850, granting to Arkansas and other states the swamp land within their boundaries, import an immediate transfer of interest, not a promise to transfer in the future. *Wright v. Roseberry*, 7 Sup. Ct. 985, 987, 121 U. S. 488, 30 L. Ed. 1039.

"Shall be married," as used in Act Cong. Feb. 10, 1855, § 2, providing that any woman who might lawfully be naturalized under existing laws, married or who shall be married to any citizen of the United States, shall be deemed and taken to be a citizen, refer, not to the time when the ceremony of marriage is celebrated, but to the state of marriage. They mean that whenever a woman, who under previous acts might be naturalized, is in a state of marriage to a citizen, whether his citizenship existed at the passage of the act or subsequently, or before or after the

marriage, she becomes by that fact a citizen also. *Kelly v. Owen*, 74 U. S. (7 Wall.) 496, 498, 19 L. Ed. 283, 284.

As used in Rev. St. § 1339, relating to injuries by reason of defective highways, and providing that, "if any damage shall happen," no action can be maintained unless previous notice in writing be given, did not necessarily refer to future actions only, on account of the tense, but would apply to existing actions. *Plum v. City of Fond du Lac*, 8 N. W. 283, 285, 51 Wis. 393.

"Shall have a claim," as used in Pub. St. p. 696, § 19, giving a mechanic's lien upon every building for the erection, etc., of which any person shall have a claim, is construed to "mean and refer to the time of the passage of the act and subsequently, and comprehends claims of such nature existing when the act was passed." *Mason v. Heyward*, 5 Minn. 74, 77 (Gil. 55, 56).

Const. art. 4, § 1, provides that the judicial power shall be vested in certain named courts and such other courts as the General Assembly shall from time to time by law establish. Ordinarily, if such section were construed alone, "shall" might import a future operation only, and to imply that judicial power could be vested only in statutory courts to be established subsequently to the time when the Constitution became operative. Yet, when construed in connection with the other provisions of the Constitution and schedule, such a restricted operation cannot reasonably be given to it, so far as concerns the inferior courts and their jurisdiction. *Forbes v. State*, 43 Atl. 626, 628, 2 Pennewill, 197.

A testator, in bequeathing a legacy to such of certain persons as should be living at his death, with provision that, in case any of them "shall die in my lifetime," leaving any child or children, such child or children should stand in their parent's place, did not mean death in the testator's lifetime after the making of the will, but death before testator's decease, whether happening before or after making of the will; that is, equivalent to the expression "shall be dead at the time of my death." *Outcalt v. Outcalt*, 8 Atl. 532, 533, 42 N. J. Eq. (15 Stew.) 500 (citing *In re Chapman's Will*, 32 Beav. 382).

"Shall," as used in St. 8 & 9 Vict. c. 60, § 1, excluding in the computation of the five years' residence which is to make paupers irremovable the time during which a person shall receive relief from any parish, applies to cases to which the relief has been given before the passing of the act. The word "shall" denotes rather the happening of the event on which the exception is to apply within the time assumed to have been before computed than the future relation of such event to the time when the statute

passed. It denotes the subjunctive mood, rather than the future time. *Reg. v. Christchurch*, 12 Q. B. 149, 154.

"Shall be," as used in St. 3 & 4 Wm. IV, c. 27, § 7, providing that the right of action where any person shall be in possession of land as tenant at will shall be deemed to have first accrued at the determination of such tenancy, etc., "refers only to a present or future state of facts, and cannot be construed as referring to a past tenancy." *Evans v. Page*, 5 Adol. & El. (N. S.) 767, 772.

"Shall be brought," as used in a statute providing that, whenever any action shall be brought to recover a penalty, appeals shall be allowed, does not authorize appeals in cases posterior to the time of the legal commencement of the act, but includes future actions only. *Perkins v. Perkins*, 7 Conn. 558, 563, 18 Am. Dec. 120.

"Shall be commenced," as used in 2 Rev. St. p. 620, § 1, providing that the defendant may require security for costs when a suit "shall be commenced" in the name of any person, being insolvent, who shall have been discharged from his debts, or whose person shall have been exonerated from imprisonment, does not apply to suits commenced previous to the enactment of the statute. *Gomez v. Garr* (N. Y.) 18 Wend. 577.

The word "shall," in the phrase "when any person shall die intestate," in Gen. Laws 1897, c. 157, § 1, providing that any heir or grantee may institute proceedings for assignment of the estate, will be construed liberally, and applies to cases both past and future; such being the case in remedial statutes. *Fitzpatrick v. Simonson Bros. Mfg. Co.*, 90 N. W. 378, 380, 86 Minn. 140.

The words "shall be," in a statute providing that no property hereinbefore mentioned or represented shall be liable to attachment, execution, or sale on any final process issued from any court in this state, was construed not to operate to limit the statute to a mere prospective operation, and the statute was held to be retroactive, and to include process issued upon antecedent, as well as subsequent, demands. *Grimes v. Bryne*, 2 Minn. 89, 95 (Gil. 72, 78).

Gen. St. c. 52, art. 2, § 10, providing that any "married woman who shall come" to the commonwealth without her husband, he residing elsewhere, may acquire property, contract, and bring and defend actions as an unmarried woman, applies to a married woman who came to the state before the statute took effect, as well as to one who comes afterwards. *Maysville & L. R. Co. v. Herrick*, 76 Ky. (13 Bush) 122, 125.

As used in a treaty with Spain, providing that grants of land made by Spain before the 24th of January, 1818, "shall be rat-

ified and affirmed" to the persons in possession of the lands, the words, being in reference to perfect titles, should be construed to mean "are" ratified and affirmed, in the present tense. *United States v. Wiggins*, 39 U. S. (14 Pet.) 334, 339, 10 L. Ed. 481.

The use of the words "shall be," instead of "may be," to signify indeterminateness, rather than futurity, is not unknown. Where an assignment, made under Pub. St. c. 247, § 12, to dissolve an attachment, excepted out of the grantor's estate, following the words of the statute, "so much thereof, other than debts secured by bills of exchange or negotiable promissory notes, as is or shall be exempted from attachment by statute," etc., it was held that the words "as is or shall be exempted" must be construed to include any such property as was exempt at the date of the assignment. *Clapp v. Sherman*, 14 R. I. 299, 301.

#### As permissive or mandatory.

Shall as permissive or mandatory when used in statutes, see "Shall (In Statutes as Permissive or Mandatory)."

Though the words "shall or may," in acts of Parliament, have been considered as imperative, they may have a different meaning in a marriage settlement. Where a proviso in such settlement was that £1,000 "shall or may" be laid out by the trustees in the purchase of lands, the words give the trustee an election either to continue in the personal securities or to invest it in land. *Stamper v. Millar*, 3 Atk. 212.

"Shall and may," as used in a proviso of a settlement of funds then existing in the form of personal security, that the trustees shall and may pay out such funds in the purchase of lands, are to be construed as giving the trustees an election either to continue the fund in personal security or to purchase lands therewith. *Stamper v. Millar*, 3 Atk. 212.

The word "shall," as used in a condition of a sheriff's sale, providing that, "if the purchaser does not comply with the conditions, the property shall be resold," does not bind the sheriff, on the failure of the purchaser, to make a second sale, though requested so to do by defendant in execution. *Woodhull v. Neafie*, 2 N. J. Eq. (1 H. W. Green) 409.

#### As indicating possibility.

Act Cong. June 22, 1874 (Supp. Rev. St. p. 79), enacts that any owner or other person, who shall, with intent to defraud the revenue, make or attempt to make any entry of imported merchandise by means of any fraudulent or false invoice, affidavit, letter, or paper, or by means of any false statement, written or verbal, by means whereof



the United States shall be deprived of the lawful duties accruing upon the merchandise embraced in such invoice, shall for each offense be imprisoned not exceeding two years. Held, that the word "shall" was used in the sense of "will" or "may." *United States v. Boyd* (U. S.) 24 Fed. 692, 695.

**As rendering provision self-executing.**

Const. Kan. art. 12, § 2, declaring the liability of stockholders and corporations, and requiring that such liability shall be secured, etc., is not merely a direction to the Legislature to make provision for such liability, but of itself declares it, and renders the Constitution to this extent self-executing. *Whitman v. National Bank of Oxford*, 20 Sup. Ct. 477, 478, 176 U. S. 559, 44 L. Ed. 587.

"Shall," as used in Const. art. 10, § 18, providing that there shall be a State Board of Equalization, consisting of the Governor, State Auditor, State Treasurer, Secretary of State, and Attorney General, does not require any further legislation to constitute such officers the board of equalization. Whether the word "shall" imports futurity, or not, depends upon the subject of the sentence and the context with which it is related. *Hannibal & St. J. R. Co. v. State Board of Equalization*, 64 Mo. 294, 304.

While the provision of Rev. St. art. 4278, that, if any railway corporation shall fail to comply with certain conditions, it "shall forfeit its corporate existence and its power shall cease so far as relates to that portion of said road then unfinished," is self-executing, and the failure to comply with the condition forfeits the charter without any judicial decree, yet such forfeiture relates only to the unfinished portion of the road, and not to the entire property acquired, or to the completed part of the road. *Sulphur Springs & M. P. Ry. Co. v. St. Louis, A. & T. Ry. Co. in Texas*, 22 S. W. 107, 108, 2 Tex. Civ. App. 650.

The words "shall be ratified and confirmed," as used in the treaty of 1819 by which Spain ceded Florida to the United States (8 Stat. 258, 259), declaring that the grants of land previously made by the king of Spain shall be ratified and confirmed to the persons in possession, import that they shall be ratified and confirmed by the force of the instrument itself. Although the words are properly words of contract, stipulating for some future legislative act, yet they are not necessarily so. *Viterbo v. Friedlander*, 7 Sup. Ct. 962, 972, 120 U. S. 707, 30 L. Ed. 776.

**SHALL (In Statutes as Permissive or Mandatory).**

The words "may" and "shall," when used in a statute, will sometimes be read in-

terchangeably, as will best express the legislative intent. The word "may" will be construed to mean "shall" when the public or third persons have a claim that the power ought to be exercised; but, when the word "shall" is used, where no right or benefit to any one depends on its imperative use, that word may be held directory merely, and by legislative intention to be used synonymously with the word "may." *People v. Sanitary Dist. of Chicago*, 56 N. E. 953, 956, 184 Ill. 597.

The word "shall" may be held to be merely directory when no advantage is lost, when no right is destroyed, or when no benefit is sacrificed, either to the property or the individual, by giving it that construction; but, if any right to any one depends upon giving the word an imperative construction, the presumption is that the word was used in reference to such right or benefit. But, where no right or benefit to any one depends upon the imperative use of the word, it may be held to be directory merely. *Wheeler v. City of Chicago*, 24 Ill. (14 Peck) 105, 76 Am. Dec. 736 (quoted in *First Nat. Bank v. Neill*, 13 Mont. 377, 34 Pac. 180, 182).

The word "shall," as used in a statute, will be construed as meaning "may," where no public or private right is impaired by such construction; but where the public are interested, or where the public or third persons have a claim de jure that the act shall be done, it is imperative, and will be construed to mean "must." *City of Madison v. Daley* (U. S.) 58 Fed. 751, 753.

"Must" or "shall" in a statute is not always imperative, but may be consistent with an exercise of discretion. *In re O'Hara*, 82 N. Y. Supp. 293, 296, 40 Misc. Rep. 355 (citing *In re Thurber's Estate*, 162 N. Y. 244, 252, 56 N. E. 638, 639).

Const. art. 4, § 23, providing that the Legislature shall establish but one system of town and county government, which shall be as nearly uniform as practicable, is not merely directory, but is mandatory. *State v. Dousman*, 28 Wis. 541, 542.

"Shall," as used in 2 Gen. St. 1897, c. 158, § 60, providing for the assessment of taxes against shares of stock of banks, and providing that such banks shall pay the tax assessed upon stock, and shall have a lien upon the same, will be construed to mean "may." *First Nat. Bank of Seneca v. Lyman*, 53 Pac. 125, 126, 59 Kan. 410.

The word "shall" in the homestead law, requiring that the owner of the property shall make the claim of homestead when levied on, is merely directory. *Goldman v. Clark*, 1 Nev. 607, 611.

Code, § 1365, describing the form of oath that the assessors shall attach to the assessment roll, is mandatory, and failure to take

the oath to the roll invalidates the assessment. *Warfield-Pratt-Howell Co. v. Averill Grocery Co.*, 93 N. W. 80, 119 Iowa, 75.

The clause "shall be filled," in St. 1863, p. 605 (Consolidation Act) § 14, providing, "In case of a vacancy in the office of superintendent, the board of education may appoint a person to fill the vacancy until the regular election next following, when the office shall be filled by election of the people," is not to be considered as importing futurity, but is mandatory in its nature, and is a declaration that when the next regular election arrives the office shall be—must be—filled by the people. *People v. Babcock*, 123 Cal. 307, 311, 55 Pac. 1017, 1019.

"Shall be completed," as used in Act 1849, § 10, chartering the York & North Midland Railway Company, and providing that the same shall be completed within five years, could not be construed as imposing an obligation on the company of which specific performance could be enforced, but was rather a condition which, if not performed, would authorize the Queen to declare a forfeiture of the charter. *York & N. M. Ry. Co. v. Reg.*, 1 El. & Bl. 856, 863.

#### Judicial duties and proceedings.

In Rev. St. § 692, providing that a final decree shall be allowed in certain cases, "shall" means "must," when the decree is asked for by one who stands in such relations to the cause that he can demand it. *Ex parte Jordan*, 94 U. S. 248, 251, 24 L. Ed. 123.

"Shall," as used in Gen. St. tit. 11, § 91, providing that the court of probate, in allowing an appeal, shall make such order of notice to the parties adversely interested as it shall deem reasonable, is merely directory. *Appeal of Donovan*, 40 Conn. 154, 155.

Rev. St. c. 78, § 9, provides that, if for any reason the panel of grand jurors shall not be full, the court "shall" direct the sheriff to summon from the body of the county a sufficient number of persons having the qualifications of jurors to fill the panel. Held, that such statute was directory, and not mandatory; that the word so used in this connection means merely leaving it to the discretion of the court whether or not to fill the panel. *Beasley v. People*, 89 Ill. 571, 575.

In the phrase "shall have power," in a statute providing that within the first three days of the special term the presiding judge shall have power to draw the grand jury, or any number of grand jurors to supply the places of any who may be sick, absent, or excused from service, "shall" means "must." *State v. Miller*, 3 Ala. 343, 346.

"Shall," as used in a statute providing that the court may, in furtherance of justice and on such terms as may be proper, amend

any pleading or proceeding by adding or striking out the name of any party, etc., and providing that the court shall in every stage of the action disregard any error or defect in the pleading or proceeding which shall not affect the substantial rights of the parties, is synonymous with the term "may" as used in the statute. *Cooke v. Spears*, 2 Cal. 409, 412, 56 Am. Dec. 348.

In Code, § 196, providing that the court or judge granting or refusing a new trial shall state in writing the grounds on which the same is granted or refused, "shall" is directory only. *Borkheim v. Firemen's Fund Ins. Co.*, 38 Cal. 505, 506.

In Act June 19, 1871 (P. L. 261), providing that, where corporations are acting outside their franchises, the court shall by injunction, at the suit of private parties or other corporations, restrain such injurious acts, "shall" is not mandatory. The word "shall," when used by the Legislature to a court, is usually a grant of authority, and means "may." *Becker v. Lebanon & M. St. Ry. Co.*, 41 Atl. 612, 613, 188 Pa. 484.

The word "shall," in a statute requiring that notice of attachment against a debtor who has not been found or summoned shall be inserted four weeks in some newspaper, was held incapable of being construed to mean "may." *State v. Click*, 2 Ala. 26, 28.

The term "shall," in the statute relating to attachment, and providing that an attachment process without bond and affidavit is void and shall be dismissed, can be considered in no other light than as a command to the court; for it is a proceeding in which the presence of a defendant is not necessarily contemplated by the law, and it may therefore with great propriety be considered as an imperative direction to the court, which it is bound *ex officio* to enforce. *Tyson v. Hamer*, 3 Miss. (2 How.) 669, 671.

"Shall," as used in Rev. St. c. 148, § 7, providing that, in case of contest of wills, an issue shall be made up whether the writing produced by the will, etc., which shall be tried by a jury, etc., should be construed in the permissive sense, and to mean "may." *Whipple v. Eddy*, 43 N. E. 789, 790, 161 Ill. 114.

The word "shall" in common parlance has a compulsory meaning, yet in law the words "shall" and "may" are often convertible terms. The word "shall," as used in Acts 1894, c. 1, § 10, declaring that all process shall be made returnable to the term next succeeding, means "may." *Farmers' & Merchants' Bank v. Johnson*, 22 Tenn. (3 Humph.) 26, 28.

In the charter of a railroad company, providing that process on such company shall be served on the president by leaving a copy at his address, or at the principal office of

the corporation in the hands of any of its officers, "shall" should be construed "may"; there being no contrary intention manifested as against the equivalent. The word "shall," when used in statute, should be construed as "may," unless a contrary intention is manifested. *Cairo & F. R. Co. v. Hecht*, 95 U. S. 168, 170, 24 L. Ed. 423.

Hill's Code, § 295, provides that after five years an execution shall not issue on any judgment, except on motion asking leave, followed by summons as in actions at law, etc. Held, that the phrase "shall not issue \* \* \* except" means the same as "can be issued only." *Eddy v. Coldwell*, 31 Pac. 475, 478, 23 Or. 163, 37 Am. St. Rep. 672.

"Shall," as used in a statute providing that all final sentences or decrees of the court, where no appeal is given to the prerogative court, shall be subject to removal by certiorari to the Supreme Court, is not imperative, but is synonymous with "may." *Ludlow v. Ludlow's Ex'rs*, 4 N. J. Law (1 Southard) 387, 394.

"Shall," in a statute providing that costs shall be awarded, etc., gives a party the legal right to costs, of which the court cannot deprive him. *Wood v. Brown* (N. Y.) 6 Daly, 428.

"Shall," as used in 2 Rev. St. p. 309, § 37, providing that a party, on application, and payment of all the costs and damages covered in an action of ejectment, shall have a second trial, is imperative. *Rogers v. Wing* (N. Y.) 5 How. Prac. 50.

In Code Civ. Proc. § 509, providing that if any party shall include in his verified memorandum of costs any item to which he is not entitled, and his adversary shall prevail with a motion to retax, there shall be taxed as a part of such motion a docket fee of \$25, the word "shall" will be construed as mandatory. The moving party's right to his compensation as given by the statute for the trouble and expense of his motion depends upon giving the word "shall" an imperative construction. *First Nat. Bank v. Neill*, 34 Pac. 180, 182, 13 Mont. 377.

"Shall," as used in Laws 1895, c. 934, annexing part of the town of East Chester to the city of New York, and requiring the city to pay the town a proportionate part of the debt of the town, and authorizing the town to enforce the same by suit to be brought in the name of the town, in whose favor such award shall be made, not less than six months nor more than a year after the passage of the act, will be construed to mean "may." In *re Lent*, 40 N. Y. Supp. 570, 572, 16 Misc. Rep. 606.

"Shall," as used in Act March 8, 1831, providing that, whenever a recognizance shall be returned to the court of common pleas and minuted on the journal, it shall be consid-

ered of record in such court and proceeded on by process issuing out of such court in the same manner as if such recognizance had been entered into before such court, means nothing more than "may." *State v. West*, 3 Ohio St. 509, 511.

The word "shall" should be construed as "may" in Laws 1899, c. 690, § 4, providing, whenever the Attorney General shall present an application for an order requiring the appearance of persons named therein to submit to an examination touching their violation of the provisions of said act against trade combinations, it shall be the duty of the justice of the Supreme Court to whom such application for an order is made to grant such application, and therefore the justice is charged with the duty of exercising a judicial discretion, in determining, in each case, whether or not the order shall be granted. "The language means no more than if the act provided that the justice 'may,' instead of 'shall,' grant the order. The Legislature is as powerless to coerce judicial action as the courts are to issue mandamus against the Governor or Legislature; each being independent of each of the others within their respective spheres of duty." *People v. Nussbaum*, 66 N. Y. Supp. 129, 133, 32 Misc. Rep. 1.

The word "shall," in a rule of court providing that in all cases where a writ of error shall delay the proceedings from a judgment of the inferior court, and shall appear to have been sued out merely for delay, damages at the rate of 10 per cent., in addition to interest, shall be awarded upon the amount of judgment, is used in a permissive sense, and does not absolutely require an allowance of 10 per cent. damages. "Shall" undoubtedly ought to be construed as meaning "must," for the purpose of sustaining or enforcing an existing right; but it need not be, without creating a new one. Neither under the statute nor under the rule has a party the legal right to demand a judgment in excess of such. *West Wisconsin R. Co. v. Foley*, 94 U. S. 100, 103, 24 L. Ed. 71.

The words "may" and "shall" are frequently used interchangeably in the statutes. The word "shall," as used in Ballinger's Ann. Codes & St. Wash. § 6208, providing that if any executor or administrator shall neglect or fail to return an inventory within the period prescribed, or such further time as the court shall allow, the court shall revoke the letters testamentary or of administration, is not mandatory, but vests discretion in a superior court as to whether the removal in a particular case shall be made or not. *Clancy v. McElroy*, 70 Pac. 1095, 1096, 30 Wash. 567.

"Shall," as used in Hutch. Code, p. 682, § 12, providing that, when legatees, heirs, etc., shall be nonresidents of the state, the executor shall make affidavit of the fact, in order

to have publication made, to give them notice of the presentation of his account, must be taken in the sense of "may." *Cason v. Cason*, 31 Miss. 578, 592.

"Shall," as used in Rev. St. c. 156, § 29, providing that every executor and administrator shall, "as soon as may be after his appointment," give notice thereof by publishing the same in some public newspaper in the state nearest the place in which the deceased person last dwelt, and in such other manner as the court of probate may direct, cannot be construed as mandatory, requiring the notice to be given as soon as might be, but as directory merely, and a disregard of such requirement will not make the notice not given "as soon as may be" invalid. *Bosworth v. Smith*, 9 R. I. 67, 71.

The word "shall," in Shannon's Code, § 5626, providing that the deposition of any person residing in the county where the suit is pending may be taken by any party, but the opposite party may summon the witness, in which case he shall be examined as if summoned by the party taking his deposition, is discretionary, and should be construed as synonymous with "may." *Sherrod & Co. v. Hughes*, 75 S. W. 717, 718, 110 Tenn. 311.

#### Same—Jurisdiction.

"Shall extend," as used in Const. art. 3, § 2, declaring that the judicial power shall extend to all cases in law or equity arising under the Constitution, the laws of the United States, and the treaties made or which shall be made under their authority, should be construed in an imperative sense. They import an absolute grant of judicial power. They cannot have a relative signification, applicable to the power already granted. They are not equivalent to the words "may extend." *Martin v. Hunter's Lessee*, 14 U. S. (1 Wheat.) 304, 327, 4 L. Ed. 97; *Citizens' St. R. Co. v. City R. Co.* (U. S.) 56 Fed. 746, 747.

"Shall," as used in Act Feb. 9, 1855, § 4, entitled "An act to extend the jurisdiction of the county court of Peoria county," and providing that all appeals from the decisions of justices of the peace made or rendered in said county shall be taken to the county court, must be construed to mean "may," since to hold it to be imperative would bring the section in conflict with the eighth section of the fifth article of the Constitution, providing that the circuit court in each county of the state shall have jurisdiction in all cases at law and in equity, and in all cases of appeals from all inferior courts. *Burns v. Henderson*, 20 Ill. (10 Peck) 264, 266.

"Shall," as used in 13 Stat. 99, providing that suits, actions, and proceedings against any association under the act may be had in any circuit, district, or territorial courts held within the district in which such association

may be established, or in any state, county, or municipal court in the county or city in which such association is located, having jurisdiction in similar cases, provided, however, that all the proceedings to enjoin the Comptroller in this act shall be had in the circuit, district, or territorial court of the United States held in the district in which the association is located, is mandatory. *Cooke v. State Nat. Bank of Boston*, 52 N. Y. 98, 105, 11 Am. Rep. 667.

The words "it shall be lawful," in Code 1819, c. 69, § 53, providing that a suit might be instituted where the defendant resided, etc., and, if either of the judges of the general court was interested in any suit which, in the case of any other person would have been proper for the jurisdiction of such judge, that "it shall be lawful to institute such suit in any court within an adjacent circuit," mean the same as "may" in Code 1887, § 214 [1 Code Va. 1904, p. 122], practically identical with the former provision. It would hardly be contended that the words "it shall be lawful," in the former section, were imperative, and meant "must," or "shall," or "may only." Those words, in a statute like that, of themselves merely make that legal and possible which there would be otherwise no authority or right to do. The presumption is that in substituting the word "may" for the term "it shall be lawful," it was only intended to shorten the statute by using a word which in its ordinary signification had the same meaning as the term for which it was substituted. *Harrison v. Wissler*, 36 S. E. 982, 983, 98 Va. 597.

#### Same—Vacation of judgment.

Act 1867, providing that the court shall relieve a party from a judgment taken against him through his mistake, inadvertence, surprise, or excusable neglect, and supply an omission in any proceeding on complaint or motion filed within two years, makes it the imperative duty of the court to relieve a party from a judgment taken against him through his mistake, inadvertence, surprise, or excusable neglect. *Smith v. Noe*, 30 Ind. 117, 125.

In Rev. St. § 3092, providing that the court in which any judgment in ejectment shall have been rendered shall, upon application of the parties against whom the same is rendered within one year from the rendition, vacate such judgment and grant a new trial, "shall" is mandatory. *Haseltine v. Simpson*, 21 N. W. 299, 61 Wis. 427.

#### Legislative duties.

"Shall," as used in Const. art. 3, § 29, providing that it shall be the duty of a General Assembly to enact laws into articles and sections, is merely directory. *Dorchester County Com'rs v. Meekins*, 50 Md. 28, 45.

"Shall be," as used in Const. art. 18, § 1, providing that if any amendment or amendments to this Constitution be proposed in the Senate or Assembly, and if two-thirds shall vote in favor thereof, such proposed amendment or amendments shall be entered in their journals, "are words of command. \* \* \* Such is their natural and ordinary meaning. They are not permissive or directory, to be heeded or not by the Senate and Assembly, but mandatory and peremptory, exacting compliance with and obedience to them, and prohibitory of any action conflicting with them." *Oakland Pav. Co. v. Hilton*, 11 Pac. 3, 9, 69 Cal. 479.

#### Official duties.

In a statute "shall" is mandatory, and excludes the idea of discretion, when addressed to a public official. In re O'Rourke, 30 N. Y. Supp. 375, 377, 9 Misc. Rep. 564.

As used in 1 Rev. St. p. 416, providing that the assessors shall enter in a certain column of the assessment rolls the amount of capital stock of every incorporated company, paid in and secured to be paid in, and of all surplus profits or reserved funds, "shall" is mandatory. *People v. Board of Assessors of City of Brooklyn*, 39 N. Y. 81, 83.

"Shall," as used in Laws 1857, c. 446, amending the charter of New York City, and providing that all resolutions and reports recommending specific improvements involving the appropriation of public money, or taxing or assessing the citizens of the city, shall be published in all the newspapers employed by the corporation, and shall not be passed until after notice has been published at least two days, is mandatory, and not directory. In re Douglass, 46 N. Y. 42, 44.

"Shall and may," in general acts of Parliament or in private constitutions, are to be considered imperatively. Where an act provided that, if trustees of a charity were guilty of drunkenness or debauchery, then the governors shall and may turn them out, they must remove them, if guilty of the acts specified. *Attorney General v. Lock*, 3 Atk. 164, 166.

It is a familiar proposition of statutory construction that where persons are interested in the giving of notice, as all the electors of the town are in the question as to whether there shall be license or no license for the sale of liquors, the use of the word "shall" in directing the manner of notice is mandatory. Thus the failure to comply with Laws 1896, c. 112, § 16, as amended by Laws 1900, c. 367, § 3, providing that the town clerk, at least 10 days before the town meeting, shall post in four public places notices that local option questions will be voted on at the town meetings, and also requiring him to publish the notice in the newspaper of the county or town five days before the vote is taken, is

mandatory, and the failure to give such notice is not a mere irregularity, but renders the vote taken at the town meeting a nullity. In re East 182d St., 70 N. Y. Supp. 373, 376, 34 Misc. Rep. 592.

In St. 1891, c. 87, which requires an entry fee to be paid, and that no petition shall be entered or filed by the clerk until such fee is paid, "shall" should be construed in its directory, and not in its mandatory, sense; and hence the provision of the statute is not a condition precedent to the rights of parties under process duly entered without payment of proper fees in advance. *Clemens Electrical Mfg. Co. v. Walton*, 47 N. E. 102, 103, 168 Mass. 304.

In St. 1888, c. 257, which establishes the salaries for clerks, and states that the clerks of the courts shall collect all fees in advance, "shall" should be construed to have been used in its directory, and not in its mandatory, sense; and such provision was not a condition precedent to the rights of parties under process duly entered without payment of proper fees in advance. *Clemens Electrical Mfg. Co. v. Walton*, 47 N. E. 102, 103, 168 Mass. 304.

In Pol. Code, § 2737, providing that all persons excavating ditches across public highways are required to bridge such ditches at such crossings, and on neglect to do so the road overseer for that road district shall construct the same and recover the cost of construction of such persons by action, "shall" should be construed to mean "may." *Fresno County v. Fowler Switch Canal Co.*, 9 Pac. 309, 310, 68 Cal. 359.

"Shall," as used in an ordinance requiring certain persons to be licensed, and providing that licenses shall be granted to them by the mayor to carry on their respective trades or occupations, is mandatory, and does not give the mayor any discretion as to the granting of such licenses. *Greater New York Athletic Club v. Wurster*, 43 N. Y. Supp. 703, 707, 19 Misc. Rep. 443.

The California statute providing that the sheriff, in selling property on a judgment recovered by the state against the property for delinquent taxes, shall only sell the smallest quantity of the property which any purchaser will take and pay judgment and costs, is mandatory upon the officer, and not directory merely. *French v. Edwards*, 80 U. S. (13 Wall.) 506, 515, 20 L. Ed. 702.

"Shall," as used in a Michigan statute, authorizing the issue of bonds by townships in aid of railroads, and providing that it shall, within 60 days after the question is determined by the vote of the electors, issue its coupon bonds for the amount so determined to be granted, gives the township officers the whole of the 60 days to get the bonds out, but does not imply that they may not issue them

after the 60 days specified. *Chickaming Tp. v. Carpenter*, 1 Sup. Ct. 620, 622, 106 U. S. 663, 27 L. Ed. 307.

The word "shall," in statutes directing that a public body shall do certain acts in laying out streets, was construed in a mandatory, and not a permissive, sense. *Grant v. City of Newark*, 28 N. J. Law (4 Dutch.) 491, 497.

"Shall," as used in St. 1881, p. 59, § 5, providing that the board of commissioners having charge of the erection of an insane asylum may adopt or reject any and all bids not deemed responsible or satisfactory, but in determining bids for the same work or material the lowest responsible bid shall be taken, is mandatory, and the board has no power or authority to accept any other than the lowest responsible bid; but in ascertaining whether or not a bidder is responsible they are required to deliberate and decide, and in doing so they exercise judicial, not ministerial, functions. Hence, where the board acted judicially after faithful examination of all facts within their reach touching the question of responsibility, their decision will not be disturbed in mandamus proceedings to compel them to accept the lowest bid in point of price. *Hoole v. Kinkead*, 16 Nev. 217, 220.

"Shall," as used in Laws 1888, c. 193, § 4, providing that, before land can be taken by the city of Rochester for park purposes, the common council shall at its next regular meeting by resolution declare that the city intends to take the land, is mandatory. Generally, and in its primary meaning, the word "shall" signifies a command, and not a suggestion. The word is imperative, and leaves no discretion. In re City of Rochester, 10 N. Y. Supp. 436, 437.

In Act May 28, 1899, creating sanitary districts and authorizing commissioners thereof to remove obstructions in certain rivers when necessary, and "shall remove" the dams at certain creeks in the Illinois river, the word "shall" will be construed as "may." The power conferred on the district to remove such dams will not be held mandatory, nor the removal necessary or requisite to enable the sanitary district to carry out the purposes for which it was organized. *People v. Sanitary Dist. of Chicago*, 56 N. E. 953, 956, 184 Ill. 597.

"Shall," as used in Chicago Charter, c. 6, § 10, providing that, when the commissioners appointed to ascertain and assess the damages and recompense due to owners of land taken for street purposes have completed such assessment, they shall sign and return the same to the common council within 40 days of their appointment, should be construed as equivalent to "may," and is merely directory; for no advantage is lost, no right destroyed,

no benefit sacrificed, neither to the public nor to an individual, by giving it that construction. The word "shall" will be given an imperative construction when any right of any one depends upon giving it such construction, and hence the signing and return of the assessment roll is not absolutely required within the 40 days, to give it validity, where the council had extended the time for such return, and it was made within the time extended. *Wheeler v. City of Chicago*, 24 Ill. (14 Peck) 105, 107, 76 Am. Dec. 736; *Bonner v. Same*, *Id.*

Act June 14, 1897, § 7, providing that, where a proposed improvement is to be paid for by special assessment, the board of local improvements shall adopt a resolution describing the improvement and fixing the time for a public hearing on the necessity of the estimated cost thereof, etc., is mandatory in character; the board not being vested with any discretionary power on the subject. *Clarke v. City of Chicago*, 57 N. E. 15, 19, 185 Ill. 354.

The word "shall," as used in Act June 14, 1897, § 7 (Hurd's Rev. St. 1899, p. 363, c. 24), providing that, when a local improvement is to be paid for by special assessment, the board of local improvements shall cause an estimate of the cost to be made by the public engineer, etc., is mandatory. *Madderom v. City of Chicago*, 62 N. E. 846, 847, 194 Ill. 572.

Act June 14, 1897, § 7 (Hurd's Rev. St. 1899, p. 363, c. 24), providing that, when a local improvement is to be paid for by special assessment, the board of local improvements shall cause an estimate of the costs to be made by the public engineer, which shall be made a part of its record of the resolution describing the improvements, is mandatory in character, and does not vest the board with any discretionary power on the subject. *Madderom v. City of Chicago*, 62 N. E. 846, 847, 194 Ill. 572.

The word "shall" can only be construed to mean "may" when it is absolutely necessary to prevent an irreparable mischief, or to construe a direction so that it shall not interfere with vested rights or conflict with a proper exercise of power by either of the fundamental branches of government. The word "shall" cannot be so construed in a statute providing that the public authority shall make certain contracts for the cleaning of streets, which is not within the rule. *City Sewage Utilization Co. v. Davis (Pa.)* 8 Phila. 625, 627.

The word "shall," in the constitutional provision declaring that all officers shall qualify and enter upon the discharge of the duties of their office within 15 days after they shall have been duly notified of their election or appointment, is used in a mand-

tory sense, and denotes command. *State v. Johnson*, 26 Ark. 281, 285.

"Shall" as used in a statute providing that the board of health or other proper authority in a city having the right to make contracts for their cleaning "shall" enter into a contract with a certain sewage and utilization company to clean the streets for a certain period at a certain rate will not be construed "may," it not being absolutely necessary to prevent irreparable mischief. *City Sewage Utilization Co. v. Davis* (Pa.) 8 Phila. 625.

The word "shall" in the third section of the act to suppress the evil practice of carrying weapons secretly, which provides that the secretary shall cause an act to be published for three months, is not to be construed in a mandatory sense, and therefore the neglect of the secretary to perform the duty does not invalidate the statute. *State v. Click*, 2 Ala. 26, 28.

In Const. 1895, art. 3, § 5, relating to assembly districts, and providing that towns or blocks which, from their location, may be included in either of two districts, shall be so placed as to make said districts most nearly equal in number of inhabitants, "shall" is used in the sense of "must," and is mandatory. *People v. St. Lawrence County Sup'rs*, 36 N. Y. Supp. 40, 46, 90 Hun, 568.

"Shall," as used in Pub. St. c. 109, § 3, providing that the mayor and aldermen of a place through which an electric line is to pass shall designate where the posts may be located, is to be construed as "may," authorizing the exercise of discretion. *Suburban Light & Power Co. v. City of Boston*, 26 N. E. 447, 448, 153 Mass. 200, 10 L. R. A. 497.

The phrase "shall have the right," in *Laws N. Y. 1875, c. 182, § 22*, providing, under certain circumstances, the board of water commissioners of villages shall have the right to take property, is to be construed in a permissive, and not in a mandatory, sense, and therefore gives the commissioners a discretionary power to act or to refrain from acting. *Colby University v. Village of Canandaigua* (U. S.) 69 Fed. 671, 675.

#### Penal statutes.

In Act March 21, 1873, providing penalties for violation of the game law, providing that all actions therefor shall be actions of trespass, "shall" cannot be construed to mean "may," since it is a penal statute, which cannot be extended by implication. *Buck v. Danzenbacker*, 37 N. J. Law (8 Vroom) 359, 361.

Act Ala. 1827, § 2, providing that, if any person committed for treason is not tried at or before the next stated term of court, it shall be lawful for the court to set such prisoner at liberty on bail, etc., shall be con-

strued to impose a positive duty upon the court, to be performed in every case coming within the terms of the act, and not to vest the court with a discretion. *Ex parte Simonton* (Ala.) 9 Port. 390, 394, 33 Am. Dec. 320.

As used in that part of the statutes relating to crimes and criminal procedure, "shall" may be read "may." *Rev. St. Wyo. 1899, § 5190*.

#### SHALL BE LAWFUL.

##### As mandatory.

"Whenever it is provided that it shall be lawful for a corporation or any officer to act in a certain way, it may be insisted on as a duty for them to act so, if the matter is devolved on a public officer and relates to the public or third persons. *Woodbury, J., in Mason v. Fearson*, 50 U. S. (9 How.) 248, 13 L. Ed. 125. To the same effect is the case of *City of New York v. Furze* (N. Y.) 3 Hill, 612, approved in *Hutson v. City of New York*, 9 N. Y. (5 Seld.) 163, 168, 59 Am. Dec. 526, and *Conrad v. Village of Ithaca*, 16 N. Y. 158, 162." The phrase is used in this meaning in Act April 15, 1834, § 10, making it lawful for the county commissioners to erect public buildings for the accommodation of the courts. *Commonwealth v. Marshall*, 3 Wkly. Notes Cas. 182, 185.

Act Cong. May 26, 1824, § 4, providing that it "shall be lawful" for the corporation of Washington, where there shall be a number of lots assessed to the same person or persons, to sell one or more of such lots for the taxes and expenses due on the whole, means "must." The expression "shall be lawful" is imperative. When it is provided that a corporation or officer may act in a certain way, or it shall be lawful for them to act in a certain way, it may be insisted on as a duty for them to act so, if the matter is devolved on a public officer or relates to the public or third persons. When a public officer is empowered to do acts for others, and it is beneficial to them to have them done, the law holds he ought to do it. It imposes a positive and absolute duty. Under other circumstances, where the act to be done affects no third persons, and is not clearly beneficial to them or the public, the words "may do an act," or "it is lawful" to do it, do not mean "must," but rather indicate an intent in the Legislature to confer a discretionary power. *Mason v. Fearson*, 50 U. S. (9 How.) 248, 257, 13 L. Ed. 125.

"Shall be lawful," as used in statutes, is synonymous with "may," which has always been held equivalent to "shall." *Downer v. Hazen*, 10 Vt. 418, 419.

"Shall be lawful," as used in *Rev. Laws*, p. 786, providing that "it shall be lawful" for

the court to whom any account is reported for allowance, or for the auditors to whom an account is referred, to examine any executor, administrator, guardian, etc., "is equivalent to saying 'the court may,' and 'may' is held to be imperative where third persons have an interest in the application of the power." *Davison v. Davison's Adm'rs*, 17 N. J. Law (2 Har.) 169, 171.

Acts 1836, c. 357, § 13, provides that it shall be lawful for the Commissioner, upon the surrender to him of a patent, inoperative or invalid, from defective description, specifications, etc., to cause a new patent, etc., to be issued, etc. Held, that the words "it shall be lawful" should be construed as mandatory, and to mean that "it shall be the duty" of the Commissioner; that is to say, the true meaning is that the Commissioner is to have no discretion in the case provided for in the section. *Ex parte Dyson* (U. S.) 8 Fed. Cas. 215, 216.

Words which, in their ordinary acceptation and when interpreted exclusive of the context and the subject-matter, imply a discretion or power, such as "may," "it shall be lawful," and the like, become, in the construction of statutes, mandatory where such is the legislative intent. Under P. L. 1889, p. 378, providing that in making changes of street grades it shall be lawful for the municipal authorities to make proper awards for damages, and assess the amount so paid therefor against lands benefited by the change, the duty of a city to make such awards is held to be mandatory. *Clark v. City of Elizabeth*, 40 Atl. 616, 622, 61 N. J. Law, 565.

"Shall be lawful," as used in Act May 30, 1874, providing that it shall be lawful for the board of supervisors to grant liquor licenses, implies discretion, and is used in contradistinction to "must" or "shall." *Ex parte Whittington*, 34 Ark. 394, 398.

#### As permissive.

"Shall be lawful," as used in a special act of Parliament authorizing a railroad to construct its line, declaring that it shall be lawful for the company to make a line to the town of R., etc., were words of permission merely, and not of obligation, and did not impose on the company any enforceable obligation to erect its line to R. *Great Western Ry. Co. v. Reg.*, 1 El. & Bl. 874, 877.

The words "shall be lawful," as used in Acts Legislative Council 1803, p. 256, providing that, in all cases in which it shall appear to the court to require the investigation of long and intricate accounts, it shall be lawful for said court to refer the statement to three proper persons, to be chosen for that purpose by the court, do not *ex vi termini* make it obligatory on the court to refer the statement, and are not synonymous with "it

shall be the duty." When the thing to be done is permitted only in the mode pointed out by the statute, which declares "it shall be lawful" for the court to do so, a refusal to carry the law into effect would be denying a remedy which the Legislature had conferred. Hence the expression must be understood as leaving no discretion. But when the same thing might have been accomplished in another way antecedent to the passage of an act or by distinct provisions of the same law, and an additional authority is conferred to attain the same ends by the term "it shall be lawful," we cannot consider these additional means as exclusive of all others, or as a taking away of those already possessed by the court. Where other provisions of the same statute gave the court the power, either by itself or with a jury, to try the issue joined between the parties, the provision that "it shall be lawful" to send it to referees cannot be considered as taking away that power. It is a different, but not a contrary, mode, cumulative with the other, but not inconsistent with it, and either may be resorted to. *Caulker v. Banks* (La.) 3 Mart. (N. S.) 532, 537.

A deed containing a covenant that, if it should happen that any of the rents should be behind, "it shall be lawful for the grantor, his heirs and assigns, to enter" on the land and distrain for the same, means that he may distrain, but does not require the exercise of such remedy. "By distraining, a man carves out justice, without judge or jury, for himself, and it is well enough to have the option; but no prudent man would use it without a great emergency, much less have such an odious measure forced on him as his only remedy. It is always harsh. The blow comes without a word on the tenant's property, like a bolt from the sky. It is the tiger's process in hunger." *Farley v. Craig*, 15 N. J. Law (3 J. S. Green) 191, 213.

A divorce statute, providing that, after the truth of a certain ground for divorce shall have been ascertained, it shall be lawful for the court to decree a dissolution of the marriage, "ought to be understood as leaving to the court the exercise of that sound discretion which the nature of the case and the principles of equity might require." *Williamson v. Williamson* (N. Y.) 1 Johns. Ch. 488, 489, 491.

#### SHALL BECOME

"Shall become," as used in St. 1855, c. 445, providing that if any pauper having a legal settlement in any city shall become an inmate of the state almshouses, etc., includes paupers who are inmates of the state almshouse at the time the statute was passed, and "shall become an inmate" must be construed as meaning "shall be an inmate."



**Commonwealth v. Inhabitants of Dracut, 74 Mass. (8 Gray) 455, 458.**

### SHALL HAVE.

"Shall have been made," as used in Act April 22, 1856, § 10, providing that, "in all cases of partition of real estate in any court wherein a valuation shall have been made of the whole or parts thereof, the same shall be allotted to such one or more of the parties in interest who shall, at the return of the rule to accept or refuse to take at the valuation, offer in writing the highest price therefor above the valuation returned, is an instance of the future perfect tense. It contemplates a valuation perfected, but perfected in future, and the future of this statute was all subsequent to the date when it was to take effect. *Dewart v. Purdy*, 29 Pa. (5 Casey) 113, 117.

A will providing that, if either of certain children "shall have died" before the death of testator's brother leaving lawful issue, such issue should receive the parent's share, imports a death occurring after the date of the will. In *re Schedel's Estate*, 15 Pac. 297, 299, 73 Cal. 594.

Comp. Laws, § 3237, authorizing a divorce when either party "shall have become a habitual drunkard," is to be construed as meaning that the party shall have become a habitual drunkard after marriage. *Porritt v. Porritt*, 16 Mich. 140, 141.

"Shall have resided," as used in Act Dec. 18, 1800, providing that an alien "who shall have resided in the state two years" shall be capable of holding and transmitting lands, embraces the future, and does not apply exclusively to a past residence. *Beard v. Rowan* (U. S.) 2 Fed. Cas. 1172, 1174; *Id.*, 34 U. S. (9 Pet.) 301, 317, 9 L. Ed. 135.

"Shall have levied," as used in Act June 8, 1869, providing that whenever a husband and wife shall have a joint or separate title to the whole or any part of a homestead or dwelling house and the lot on which the same is situated, and any creditor of the husband shall have levied an execution on the husband's interest therein, it shall be lawful for the wife to tender to such creditor the amount of his said execution, etc., and that thereupon the title acquired to the levy of such execution shall vest in the wife, should be construed to mean "shall have levied after the passage of the act." *Wheaton v. Gorham*, 38 Conn. 408, 412.

The words "shall have levied," when used in a statute providing that, when an officer shall have levied an execution, it is enacted, etc., are susceptible of both past and future application. They may mean future or past, and it becomes a question of legislative intention in each statute. *Norris v. Sullivan*, 47 Conn. 474, 476.

In a will giving property equally to testator's children, living at his death, for life, thereafter to their children, conditioned that, if any child shall have died, previous to his death, leaving children, the share of such child should go to the child's children, "shall have died" was not used in its strict grammatical sense, pointing, not to what had taken place when the will was made, but to what might take place thereafter and before the testator's death, but it refers to what already had taken place when the will was made, as well as to what might take place thereafter and before the testator's death. *Douglas v. James*, 28 Atl. 319, 320, 66 Vt. 21, 44 Am. St. Rep. 817.

The words "shall have received," in a will providing, "In the event of the death of either of my said children before he or she shall have received his or her share," etc., are to be interpreted as meaning "shall have become entitled to receive by surviving me." *Johnes v. Beers*, 18 Atl. 100, 102, 57 Conn. 295, 14 Am. St. Rep. 101.

"Shall have been," as used in Rev. St. p. 1166, providing that, in all cases where public notice for a specified time is required by law to be given before proceedings are had for the public sale of lands for unpaid taxes, no certificate of sale or tax title shall be set aside by reason of any variance between the date of such notice and the actual publication thereof, provided notice shall have been given for the specified number of days prior to such proceedings for public sale, does not relate to the past, and the effect is not to heal all irregularities in notices which have occurred prior to the passage of the statute; but the act is prospective, and applies only to the future. "Shall have been" is a future tense, which represents an event as completed in future time, and does not refer to the past. *Alden v. City of Newark*, 40 N. J. Law (11 Vroom) 92, 96.

The words "shall have been" include past and future cases. Rev. St. Wis. 1898, § 4972.

### SHALL NOT.

The words "shall not," as used in a statute providing that, if any vessel shall depart from any port of the United States without a permit, such vessel shall be wholly forfeited, and if the same shall not be seized the owner shall forfeit a certain sum for every such offense, means "cannot." *Parker v. United States* (U. S.) 18 Fed. Cas. 1179, 1180.

"Shall not be lawful," as used in Act N. Y. April, 1808, creating a corporation to erect and maintain a bridge across the Chenango river at Binghamton, and declaring that it shall not be lawful for any person or

persons to erect a bridge within a distance of two miles of the one provided for, means that the Legislature will not make it lawful by licensing any person or association of persons to erect a bridge. *Chenango Bridge Co. v. Binghamton Bridge Co.*, 70 U. S. (3 Wall.) 51, 81, 18 L. Ed. 137.

## SHAM ANSWER.

The word "sham" is defined by lexicographers as false, counterfeit, or pretended, and it has received the same interpretation when applied to pleadings. A sham answer is one which is known by the party to be false, and is put in for the purpose of delay, or some other unworthy object. *Seward v. Miller* (N. Y.) 6 How. Prac. 312, 313; *Darrow v. Miller* (N. Y.) 3 Code Rep. 241.

The word "sham," as used with reference to allegations in an answer, means that such allegations are false. *Arata v. Telurlun Gold & Silver Min. Co.*, 4 Pac. 195, 196, 65 Cal. 340.

A sham answer is one which is false in fact, though good in form. It may be that the defense is both false in fact and insufficient or frivolous in law; but it is only as a false, counterfeit, or pretended defense that the court will be justified in striking it out as a sham answer. *Walker v. Hewit* (N. Y.) 11 How. Prac. 395, 398.

"Sham" is defined by Webster to mean false, counterfeited, pretended; and Mr. Chitty says it is pleading a matter known by the party to be false, for the purpose of delay or some other unworthy object. The essential element of a sham plea is its falsity, and a defendant must have some unworthy object in view, as vexation or delay. *Nichols v. Jones* (N. Y.) 6 How. Prac. 355, 356.

"A sham answer is one good in form, but false in fact, and not pleaded in good faith." In *re Bartholomew*, 21 Pac. 275, 276, 41 Kan. 273; *City of Terre Haute v. Farmers' Loan & Trust Co.* (U. S.) 99 Fed. 838, 40 C. C. A. 117; *Brown v. Jenison*, 5 N. Y. Super. Ct. (3 Sandf.) 732, 1 N. Y. Code Rep. 156, 157; *Garvey v. Cowler*, 6 N. Y. Super. Ct. (4 Sandf.) 605; *Kiefer v. Thomas* (N. Y.) 6 Abb. Prac. (N. S.) 42, 45; *Hull v. Smith*, 8 N. Y. Super. Ct. (1 Duer) 649, 650; *Struver v. Ocean Ins. Co.* (N. Y.) 2 Hilt. 475, 476; *Littlejohn v. Greeley* (N. Y.) 22 How. Prac. 345, 13 Abb. Prac. 311; *Gjerstadengen v. Hartzell*, 79 N. W. 872, 873, 8 N. D. 424; *Howell v. Ferguson*, 87 N. C. 113, 114, 115; *Cochrane v. Parker*, 39 Pac. 361, 362, 5 Colo. App. 527; *Upton v. Kennedy*, 36 Neb. 66, 53 N. W. 1042.

A sham answer is one that is false, and these words, as applied to an answer, are

synonymous. *People v. McCumber*, 18 N. Y. 315, 320, 72 Am. Dec. 515; *Robert Gere Bank v. Inman*, 5 N. Y. Supp. 457, 458, 51 Hun, 97; *Howe v. Elwell*, 57 App. Div. 357, 358, 67 N. Y. Supp. 1108.

An answer is sham, within Code Civ. Proc. § 538, authorizing the striking out of sham answers, only when it is clearly false. *Andreae v. Bandler*, 56 N. Y. Supp. 614.

A defense is "sham," in the legal meaning of that term, which is so clearly false in fact that it does not in reality involve any matter of substantial litigation. *People v. McCumber*, 18 N. Y. 315, 321, 72 Am. Dec. 515. It is not a frivolous defense to set up, in an action on renewal notes, that the original notes were usurious. *Schnitzer v. Schaefer*, 41 N. Y. Supp. 908, 909, 10 App. Div. 173; *Thompson v. Erie Ry. Co.*, 45 N. Y. 468, 471.

"Sham pleading" is defined by Chitty as the pleading of a matter known by the party to be false, for the purpose of delay or other unworthy object. 1 Chitty, Pl. § 541. Bliss, in his work on Code Pleading, says: "A sham pleading is one good in form and false in fact." In *Bouv. Law Dict.* a "sham plea" is said to be one entered for the mere purpose of delay, concerning a matter which the pleader knows to be false. It will be seen from these definitions that the essential element of a sham plea is its falsity; and yet it is evident that not every false plea can be stricken out upon motion supported by affidavit, as this would be to substitute a trial to the court upon affidavits for a jury trial. An examination of the cases shows that the courts have not adopted any uniform rule in reference to the nature of sham answers. The power to strike out must be exercised with caution. Under it the court cannot determine the truth or falsity of a plea on conflicting evidence. *Patrick v. McManus*, 23 Pac. 90, 91, 14 Colo. 65, 20 Am. St. Rep. 253.

"Mr. Chitty defines 'sham pleas' to be pleas so palpably and manifestly untrue that the court will assume them to be so; pleas manifestly absurd. \* \* \* When it needs argument to prove that an answer or demurrer is frivolous, it is not frivolous, and should not be stricken off. To warrant this summary mode of disposing of a defense, the mere reading of the pleadings should be sufficient to disclose, without deliberation and beyond doubt, that the defense is sham or irrelevant." *Cottrill v. Cramer*, 40 Wis. 555, 559.

An answer containing only general denials may come within the definition of a sham answer, and be stricken out as such; and this, even though it be verified. *C. N. Nelson Lumber Co. v. Richardson*, 31 Minn. 267, 17 N. W. 338.

An answer which is so framed that it does not set up a valid defense, but which states facts that might, by being properly averred, constitute a defense, cannot be regarded as "sham," "irrelevant," or "frivolous." *Struver v. Ocean Ins. Co.* (N. Y.) 9 Abb. Prac. 23, 27.

#### **Frivolous answer distinguished.**

A sham answer is one that is good on its face, but false in fact, and is not the same as a frivolous answer, which is one that denies no material averment in the complaint and sets up no defense. *Hull v. Smith* (N. Y.) 8 How. Prac. 149, 150; *Leferts v. Snedker* (N. Y.) 1 Abb. Prac. 41, 42; *Andreae v. Bandler*, 56 N. Y. Supp. 614. See, also, *Brown v. Jenison* (N. Y.) 1 Code R. (N. S.) 156, 157.

A sham defense is one which is palpably false. A plea, in an action to recover possession of premises, that defendant is in possession as assignee of an unsatisfied mortgage, but not alleging that he entered with the mortgagor's consent, though frivolous, is not sham. *Witherell v. Wiberg* (U. S.) 30 Fed. Cas. 398, 399.

#### **As setting up new matter.**

A sham answer is one good in form, but false in fact, and not pleaded in good faith, and sets up new matter which is false. *Piercy v. Sabin*, 10 Cal. 22, 29, 70 Am. Dec. 692; *Leferts v. Snediker* (N. Y.) 1 Abb. Prac. 41.

A sham answer is one, the falsity of which is clear, undisputed, and which tenders, or purports to tender, an issue on new matter. It has been held that an answer merely denying certain alterations in the complaint, and setting up no new matter, and affirming nothing to be true, cannot be stricken out as sham. *Morton v. Jackson*, 2 Minn. 219, 220 (Gil. 180, 182).

A sham answer is one which takes issue upon some immaterial averment of the complaint and sets up new and irrelevant matter. *Davis v. Potter* (N. Y.) 4 How. Prac. 155, 158.

An answer is not a sham because it is to be inferred that it is false and known to the defendant to be so, since it omits the essential quality of a sham answer, in that it does not set up new matter, and a sham answer must not only be false, but must set up new matter as a defense. Only those pleas are shams which have no foundation in the facts of the case, but only in the ingenuity and imagination of the attorney. The word "sham" must apply to something active, and not to mere denial, and a sham fight, in which the action was all on one side, would not be more extraordinary than a sham answer, which merely put in issue the allegation of the plaintiff without setting up

new matter. *Sherman v. Bushnell* (N. Y.) 7 How. Prac. 171, 172.

An answer can only be properly called sham when it takes issue on some immaterial averment of the complaint, or sets up new and irrelevant matter; and hence an answer which was verified, and denied material allegations of the complaint, on belief only, was not a sham. *Davis v. Potter* (N. Y.) 2 Code Rep. 99, 100.

Under the old pleading a sham plea was a special plea setting up new matter and tendering a fictitious issue. A sham plea is now defined as one presenting apparently a good defense, but which in fact was an ingenious and settled contrivance, which was false and feigned in its essential particulars. Falsity was and is an essential element in a sham pleading; but a false pleading is not a sham pleading, unless it also contains new matter and tenders a new issue on some new allegations; and an answer which contained a general denial of the allegations of the complaint was not a sham answer. *Farmers' & Mechanics' Bank v. Smith*, 15 How. Prac. 329, 331.

A sham answer is a false answer alleging new matter; the falsity thereof being known to the defendant. *Caswell v. Bushnell* (N. Y.) 14 Barb. 393, 395.

A sham answer "is one the falsity of which is clear and undisputed, and which tenders or purports to tender an issue on new matter." *Morton v. Jackson*, 2 Minn. 219, 222 (Gil. 180, 182).

## **SHAM PLEADING.**

A sham pleading is a false pleading. *Fettretch v. McKay* (N. Y.) 11 Abb. Prac. (N. S.) 453, 454.

The distinguishing feature of a sham pleading is its falsity, and it is defined to be one "that the pleader knows to be false," and which is interposed for the purpose of delay or other unworthy motive. *Morton v. Jackson*, 2 Minn. 219, 220 (Gil. 180, 182).

## **SHARE.**

See "Distributive Share"; "On Shares"; "Widow's Share."

A share of a sum of money or other divisible thing is one of the parts into which it may be divided. *De Notteback v. Astor*, 13 N. Y. (3 Kern) 98, 102.

The word "share" ordinarily means a part or definite portion of a thing owned by a number of persons in common. It contemplates something owned in common by two or more persons, and has reference to that part of the undivided interest which belongs

to some one of them. *Turner v. Balfour*, 25 Atl. 448, 449, 62 Conn. 89.

"Share," as used in statutes relating to the widow's share, describes a portion of the estate of the decedent which the law assigns to the widow. *Ward v. Wolf*, 9 N. W. 348, 349, 56 Iowa, 465.

The word "share," as used in a will providing that, whereas, testator's wife had by will given her property to the testator's daughters, such property should be estimated at its fair value, and shares of certain sons should, each share, be a certain sum more than the share, each, given to certain daughters, after the estimated value of such wife's property was added to their respective shares, imports that no son should receive a larger inheritance from both parents than a daughter, but that a son's proportion of the father's property should be large enough to counterbalance the disparity created by the mother's disposition of her estate. *Taylor v. Taylor*, 23 Conn. 579, 584.

The word "share," in the codicil to a will directing that the "share" given to A. by the will be given in trust to another for the benefit of A., was construed to include not only a money bequest in the original will, but also a share of testator's household furniture, watches, plate, etc., given to A. by the original will. *Genet v. Beekman* (N. Y.) 27 Barb. 271, 275.

The word "share," as used in a will bequeathing a certain sum of money to a person in trust to invest in certain lands to be conveyed to certain grandchildren, and directing that in the case of the death of any such grandchildren the share of the child so dying should go to and vest in his or her surviving brothers or sisters, refers to the money, the subject of the bequest, and not the land. *Wood v. Denny* (U. S.) 30 Fed. Cas. 433, 434.

"Share," as used in a will directing that certain money should be divided between testator's grandchildren who might be living at the time the youngest should arrive at full age, and providing that, if any child or grandchild should die before such division and distribution, then his or her share to his or her children, and in all cases the share and portion of any one under age to be kept invested and on interest until he should arrive at full age or be lawfully married, is equivocal, and may indicate either a vested estate in the original legatee, to be divested in case of his death before payment, in favor of issue or survivors, or may mean a future estate to vest, in case of the legatee's death, in the issue or survivors, as substituted legatees, at a deferred period. The testator may have used the word "share" as meaning immediate gifts to each, or simply as descriptive of the portions to be given at the period of final distribution. The testa-

tor must have intended the phrase "share or one dying before distributed" to mean the ultimate amount allotted to that one at the deferred period. *Smith v. Edwards*, 88 N. Y. 92, 108.

"Share," as used in a will providing that, in case any legatee should die before final distribution, his share should go to his issue, or, in default thereof, to the survivors, does not indicate a gift already made. It is equivocal, and may mean an immediate gift, or be merely descriptive of gifts to be made in the future. *Dougherty v. Thompson*, 60 N. E. 760, 763, 167 N. Y. 472.

The usual meaning of "share" in a will is that portion of the estate which has already been set apart to a legatee, and becomes such contemporaneously or subsequently to the decease of the testator, but never antedates such decease. *Shepard's Heirs v. Shepard's Estate*, 14 Atl. 536, 540, 60 Vt. 109.

#### Division with others implied.

"Share," as used in Code 1871, § 1286, establishing the rule that a devise or bequest to the wife of the testator shall be construed to be intended in bar of her dower in land or share of the personal estate, respectively, unless it is otherwise expressed in the will, "implies a division with others having only a portion, enjoying with others; and hence the statute is not applicable to a widow of a testator dying without surviving children." *Wall v. Dickens*, 6 South. 515, 516, 66 Miss. 655.

#### Fee indicated.

The word "share" has been of doubtful effect in determining the quantity of an estate given by a devise, but by a legislative act a devise of "my share" of land is a devise in fee. *McClure's Heirs v. Douthitt*, 3 Pa. (3 Barr) 447.

"Share," as used in a will providing that testator's daughter should keep her share in her own sole and separate right, or until her children should marry or become of age, and, should she die without leaving issue, her portion should revert to her brothers, is more applicable to a fee than to a life estate. They seem to imply that she has an interest in the principal as such, and not merely a right to the income. *Phelps v. Phelps*, 11 Atl. 596, 597, 55 Conn. 359.

#### Income included.

"Share of my estate," in a will providing that, "in the event of the death of any of my children without living heirs of their body, their share of my estate shall be added to the sum held in trust for the benefit of my wife during her natural life," means the principal of the share, and not the income, because the principal is to be added to the

sum; that is, the principal held in trust for the wife, since the income of the son's share would not be added to the principal of the wife's estate. *Glover v. Condell*, 45 N. E. 173, 178, 163 Ill. 566, 35 L. R. A. 360.

Where a testator devised property to his son, in trust for the benefit of the son and his children, and empowered the son to appoint by will in what manner and on what trusts such property should be held by the son's children, and the son's will directed that the income be divided equally among his children, and further provided that, if any of his children died during the continuance of the trust, his or her share shall belong to his or her children, etc., but such child dying may by will divide his or her share among his or her children, the word "share," as used in the son's will, means a share of the corpus of the estate, and not of the income. *Johnson v. Childs*, 23 Atl. 719, 721, 61 Conn. 66.

Where a will makes a gift over of the whole shares of devisees and legatees dying before a given period or event, the word "shares" includes every interest, accruing as well as original. *Lombard v. Witbeck*, 51 N. E. 61, 66, 173 Ill. 396.

It is a general canon of interpretation that the term "shares," when used in a will bequeathing testator's property in shares, is limited to the original portion, unless particular expressions extend this meaning. Thus, in pursuance of this rule, it was held that the use of the term in a will in which testator provided an annuity for his wife payable out of his estate, and then gave the residue to the executor for the sole use and benefit of his children in certain shares, and directed maintenance of their respective portions and payment of shares after a majority, and payment over, in case of death of issue, to the survivors, operated to make a will pass an absolute vested interest to the children in their respective portions as tenants in common, and, with a provision in regard to payment and executory bequests over, related only to the corpus and principal of the estate, and not to the income, and that the legatees were entitled absolutely to the profits and income of their shares from the time of the testator's death. *Parsons v. Lyman* (N. Y.) 4 Bradf. Sur. 268, 306.

As used in a trust deed, following a marriage settlement, which provided that, if the wife should die in the lifetime of the husband leaving children, the trustee should pay and deliver the "interest, dividends, principal, and profits to such children as shall survive" the wife, "to their sole use equally as tenants in common, and, if any of the said children shall be under age at the death of the" wife, "to reserve the delivery and payment of its share until such child be married or become of age," was not limited to the share of

the principal which a minor heir would be entitled to receive after the death of the wife, but included as well the interest, dividends, and profits of the fund, which, therefore, the husband was not entitled to receive as the minor heir's guardian after the death of the wife, but before the child married or became of age. *Willeys v. Abbott*, 11 N. J. Eq. (3 Stock.) 396, 399.

Where an estate was devised to a person, with remainders to several persons, provided that, on the death of any one of them, his share shall be divided among the others, "share" should be construed to mean accruing or augmenting share, and not the original share only. *Doe v. Birkhead*, 4 Exch. 110, 126.

#### Portion synonymous.

"Share," as used in a codicil to a will relating to the share and portion of the testator's estate given to his daughter, is synonymous with the word "portion," which, when applied to property acquired from one's ancestor, is the most comprehensive that can be used, and is broad enough to include, and is intended to cover, all the property or estate thus received. "Portion" is defined in *Bouv. Law Dict.* 350, to be that part of a parent's estate, or all the estate of one standing in the place of a parent, which is given to a child. *Lewis' Appeal*, 108 Pa. 133, 136.

#### SHARE AND SHARE ALIKE.

Under a will giving to each of the three children of the testator equal proportions, "share and share alike," each child takes an equal third part of the estate. *Everitt v. Everitt*, 29 N. Y. 39, 92.

The words "share and share alike," as used in a will devising property to testator's children "share and share alike," and directing that the property remain intact for 10 years after testator's death, without disposition by the devisee, is to be construed as giving each of such children an undivided one-third part or share. *Brown v. Brown*, 66 N. Y. Supp. 218, 219, 54 App. Div. 6.

Testator bequeathed the residue of his estate to his adopted daughter, G., and to G.'s child or children living at the time of the testator's death, "to be equally divided, share and share alike," between G. and such child or children. Held, that the words "share and share alike," as used in such devise, should be construed to require a division in equal parts between or among the mother and the several children as individuals, and not by moieties between the mother, G., on the one hand, and the children, as a class, on the other. *Graves v. Graves*, 8 N. Y. Supp. 284, 55 Hun, 58.

The term "share and share alike," as used in a will bequeathing property to be di-

vided among several beneficiaries, share and share alike, "does not necessarily mean that all the persons named should receive an equal share in the property, but such direction may be satisfied by being applied to a division between classes, and not to that between individuals, as, for instance, where testator made a residuary legacy to his living brothers and sisters, naming them, and to the heirs of the deceased sister, to be divided in equal shares between them, the heirs of the deceased sister take, not an equal share with other persons named, but per stirpes." In *re Swinburne*, 14 Atl. 850, 852, 16 R. I. 208.

#### **As per capita.**

A devise to heirs, "share and share alike," will be construed as a direction that such heirs are to take per capita, and not per stirpes. *Daggett v. Slack*, 49 Mass. (8 Metc.) 450, 454; *Dukes v. Faulk*, 16 S. E. 122, 124, 37 S. C. 255, 34 Am. St. Rep. 745; *Richards v. Miller*, 62 Ill. 417, 425; *Best v. Farris*, 21 Ill. App. 49, 51, 52; *Provenchere's Est. Leg. Gaz. R.* 68, 69; *Post v. Herbert's Ex'rs*, 27 N. J. Eq. (12 C. E. Green) 540, 547.

The use of the words "share and share alike," in a devise of land to testator's wife for life, and after her death to his heirs and her heirs, their heirs and assigns, forever, share and share alike, was construed to import that the heirs of the husband and wife should take per capita as of the same class, and not by representation. In so holding, the court cited *Stevenson v. Lesley*, 70 N. Y. 512, which case involved the construction of a will in which the testator used the words "share and share alike," and in which they were construed as a direction to divide per capita, and it was said that that case, though the subject of much criticism, never was rejected as authority, though its application had been closely confined to cases where nothing in the context of the will could be referred to, to control the language. Undoubtedly, and very justly, the rule has yielded, and should yield, as it has been said, to a very faint glimpse of a different intention in the context. *Bisson v. West Shore R.*, 38 N. E. 104, 106, 143 N. Y. 125.

The phrase "equally to be divided among them," or "share and share alike," when added to a will devising property to a beneficiary and his heirs, have been held to prevent the application of the rule in *Shelley's Case*, since they require a division per capita among the donees of the remainder, while under the law of descent the heirs take per stirpes and representatively, and to give the rule operation the same persons will take the same estate, whether they take by descent or purchase. *Howell v. Knight*, 6 S. E. 721, 722, 100 N. C. 254.

The words "share and share alike," as used in a will bequeathing an estate to be settled on the ancestor, with remainder to his heirs, "share and share alike," indicate an intention on the part of the testator that the property is to be divided among the heirs as tenants in common per capita, between such persons as may bring themselves within the description when the life estate is terminated, and hence prevents the operation of the rule in *Shelley's Case*. *Mills v. Thorne*, 95 N. C. 362, 367.

A will providing that testator's brother should have and hold for his own special benefit all of the testator's property, real and personal, for and during his life, and at such brother's death the real estate should be divided among testator's legal heirs, "share and share alike," classifies the heirs; so that they take per stirpes, and not per capita. *Appeal of Alston (Pa.)* 11 Atl. 366, 367.

#### **As creating tenancy in common.**

The use of the words "share and share alike," in a will devising property to certain beneficiaries, share and share alike, operates to create a tenancy in common. *Bunch v. Hurst (S. C.)* 3 Desaus. 273-288, 5 Am. Dec. 551; *Stevenson v. Lesley*, 70 N. Y. 512, 516; *Emerson v. Cutler*, 31 Mass. (14 Pick.) 108, 114; *Watts v. Clardy*, 2 Fla. 369, 387 (quoting *Bunch v. Hurst (S. C.)* 3 Desaus. 288, 5 Am. Dec. 551; *Woodgate v. Unwin*, 4 Sim. 129; *Westcott v. Cady*, 5 Johns. Ch. 334); *Stetson v. Eastman*, 24 Atl. 868, 870, 84 Me. 366; *Gilpin v. Hollingsworth*, 3 Md. 190, 196, 56 Am. Dec. 737; *Shattuck v. Wall*, 54 N. E. 488, 489, 174 Mass. 167; *Martin v. Smith (Pa.)* 5 Bin. 12, 22, 6 Am. Dec. 395.

A gift to certain parties, the principal of which is to be paid to them, "share and share alike," means that they shall take equally in severalty. They take, not as joint tenants, but as tenants in common, without right of survivorship. *Bishop v. McClelland's Ex'rs*, 16 Atl. 1, 3, 44 N. J. Eq. 450, 1 L. R. A. 551 (citing *Heath v. Heath*, 2 Atk. 121; *Vreeland v. Van Ryper*, 17 N. J. Eq. [2 C. E. Green] 133; 2 *Williams' Ex'rs*, 1463; *Hawk. Wills*, 112).

#### **As creating tenancy in severalty.**

The use of the words "share and share alike," in a devise of property to certain beneficiaries, share and share alike, shows that the beneficiaries are to take several, and not joint, interests in the property. *Vreeland v. Van Ryper*, 17 N. J. Eq. (2 C. E. Green) 133, 134.

A testator provided in his will that two-fifths of his property should be left in trust, income from which, after paying certain debts, was to go to his son during his life,

and at his death the principal to be divided among his children, "share and share alike." Held, that this purports an intended severance of interest, and would create a tenancy in severalty, and not a joint tenancy. *Adams v. Woolman*, 26 Atl. 451, 453, 50 N. J. Eq. 516.

### SHARE IN NET PROFITS.

A "share in the net profits" is an interest in the profits as profits, and implies a participation in the profits and losses. *Parker v. Pullman & Co.*, 53 N. Y. Supp. 839, 840, 24 Misc. Rep. 505.

### SHARE OF STOCK.

See, also, "Stock."

A "share of stock" is "a right which the owner has in the management, profits, and ultimate assets of the corporation." *Jones v. Concord & M. R. R.*, 30 Atl. 614, 616, 67 N. H. 234; *Lamkin v. Palmer*, 48 N. Y. Supp. 427, 431, 24 App. Div. 255; *Commercial Fire Ins. Co. v. Board of Revenue*, 14 South. 490, 491, 99 Ala. 1, 42 Am. St. Rep. 17; *Thayer v. Wathen*, 44 S. W. 906, 909, 17 Tex. Civ. App. 382; *Rice v. Gilbert*, 72 Ill. App. 649, 650; *American Pig Iron Storage Co. v. State Board of Assessors*, 29 Atl. 160, 161, 56 N. J. Law, 389. But he has no legal title to the assets of the corporation until a dividend is declared and a division made on the dissolution of the corporation. *Storrow v. Texas Consol. Compress & Mfg. Ass'n (U. S.)* 87 Fed. 612, 615, 31 C. C. A. 139. The rights and obligations, as between the subscribers and the corporation, spring from the subscription per stock. Thus, in a popular sense, a corporation is said to issue stock when it obtains subscriptions for it, and in the construction of tax laws requiring the taxation of corporate stock the word is to be so construed. In order to constitute subscribers as stockholders, it is not necessary that certificates of stock be issued, nor payment of the par value of the stock be made in full. *American Pig Iron Storage Co. v. State Board of Assessors*, 29 Atl. 160, 161, 56 N. J. Law, 389.

A share in a national bank is the property or interest of a stockholder in the bank. *First Nat. Bank v. Commonwealth*, 76 U. S. (9 Wall.) 353, 359, 19 L. Ed. 701. A share in a bank is but a fractional part of its capital, owned by one who contributed an equivalent part of the capital, or his transferee. A bank does not own the shares of its capital. It owns the capital, but the shares are owned by its stockholders. *Miller v. First Nat. Bank*, 46 Ohio St. 424, 428, 21 N. E. 860.

A share of the stock of a corporation is the title of the shareholder to his propor-

tion of the corporate property. *Donnell v. Wyckoff*, 7 Atl. 672, 674, 49 N. J. Law, 48.

"A share of stock in a corporation," says Mr. Lowell, "consists of a set of rights and duties between the corporation and owner of the share." *Winslow v. Fletcher*, 4 Atl. 250, 253, 53 Conn. 390, 55 Am. Rep. 122.

A share or interest in the capital stock of a stock bank or other stock corporation may be defined as the right to a pro rata periodical dividend of all profits, and, if the corporation is not immortal, a right to a pro rata distribution of all its effects after payment of its debts on its death. *People v. Commissioners of Taxes and Assessments*, 40 Barb. (N. Y.) 334, 333.

A share of the capital stock of a corporation is the right to partake, according to the amount put into the single corporate fund which constitutes the capital stock, of the surplus profits of the corporation, and ultimately, on the dissolution of the corporation, of so much of the fund thus created as remains unimpaired and is not liable for the debts of the corporation. *Clow v. Redman*, 57 Pac. 437, 439, 6 Idaho, 568.

A share of stock represents the interest which the shareholder has in the capital and net earnings of the corporation. The interest is of an abstract nature; that is, the shareholder cannot, by any act of his, nor, ordinarily, by any act of the law, reduce it to possession. *Jermain v. Lake Shore & M. S. R. Co.*, 91 N. Y. 483, 492.

The shares in a corporation constitute a species of property entirely distinct from the corporate property. A shareholder has no distinct and individual title to the moneys or property of the corporation, nor any actual control over it. The shares represent a right to participate in profits only. *Monongahela Bridge Co. v. Pittsburgh & B. Traction Co.*, 46 Atl. 99, 101, 196 Pa. 25, 79 Am. St. Rep. 685.

Chief Justice Shaw, by way of a definition of "share of stock," says: "The right is, strictly speaking, a right to participate in a certain proportion in the immunities and benefits of the corporation, to vote in the choice of their officers, to share in the dividends of profits, and to receive an aliquot part of the capital on winding up and terminating the active existence and operation of the corporation." *Fisher v. Gray*, 373. Mr. Justice Sharswood, in *Neiler v. Kelley*, 69 Pa. (19 P. F. Smith) 403, says: "A share of stock is an incorporeal, intangible thing." Judge Holmes, in *Foster v. Potter*, 37 Mo. 524, says: "The property interest of the shareholder is an intangible and invisible thing, and cannot be actually seized by the officer." Such property is neither a specific chattel, nor a debt, but a mere chose in ac-

tion. But, be that right what it may, certificates of stock are not the stock itself. They are but evidence of the stock; and the stock itself cannot be attached by a levy of attachment on the certificate. Shares of stock in a corporation are personal property, whose location is in that state where the corporation is created. Considered as property separated from its owner, stock is in existence only in the state of the corporation. *Armour Bros. Banking Co. v. St. Louis Nat. Bank*, 113 Mo. 12, 20, 20 S. W. 690, 692, 35 Am. St. Rep. 691.

In a statute providing that it shall be the duty of any person, firm, corporation, or association owning any shares of stock in any banking company or corporation to render and return the same for taxation, the words "share" and "stock" are evidently used as of synonymous import, as is often done in common parlance. Each corporator is required to give in for taxation the part or portion of the capital stock of the corporation or association which he owns. This individual interest may be designated as either his "share" or his "stock," and, whether it is spoken of as one or the other, evidently it is the interest represented and conveyed by certificates of stock, or shares, into which the capital of the association is divided, to which reference is had. *Harrison v. Vines*, 46 Tex. 15, 21, 22.

Shares of stock are not money, nor are they security for money, nor a credit, while, on the other hand, a bond of a corporation is an instrument executed under the seal of the corporation, acknowledging the loan and agreeing to pay the same upon the terms set forth therein. So, where the bondholders of a corporation enter into a contract appointing trustees to purchase its property at a foreclosure sale, direct the reorganization of the corporation, and distribute the "securities" of the reorganized company pro rata among the bondholders, the contract calls for a distribution of bonds, and not of stock or shares of stock. *Thayer v. Wathen*, 44 S. W. 906, 909, 17 Tex. Civ. App. 382.

The terms "shares or stock" and "shares of capital stock," when used in the revenue act, shall be construed to include the shares into which the capital or stock of every incorporated company or association may be divided. *Hurd's Rev. St. Ill.* 1901, p. 1494, c. 120, § 292, subd. 13.

#### **Certificate thereof distinguished.**

"Shares in a corporation are not chattels personal, susceptible to possession, actual or constructive. *Arnold v. Ruggles*, 1 R. I. 165. A share in a bank is not a chose in action. It is in the nature of a chose in action. *Hutchins v. State Bank*, 53 Mass. (12 Met.) 421. A share in a corporation is a right to participate in the profits or in the final dis-

tribution of the corporate property pro rata." A share of corporation stock is separate and distinct from the certificate thereof, and the corporation cannot affect the rights of stockholders by refusing to deliver the certificates. *Field v. Pierce*, 102 Mass. 253, 261.

#### **Capital stock distinguished.**

See, also, "Capital Stock"; "Capital."

The shares of capital stock of a corporation are the integral parts of the capital stock, and are owned by the members in proportion to the respective amounts subscribed, and are very different from the capital stock, which is the amount subscribed. *Worth v. Petersburg R. Co.*, 89 N. C. 301, 306.

There is, under certain circumstances and for certain purposes, a distinction between "shares of stock" and "capital stock." "Capital stock" means the entire property owned by a corporation, while a share in the stock is the right to partake according to the amount put into the fund of the surplus profit obtained for the use and disposal of the capital stock of the company to those purposes for which the company is constituted. *People v. Chicago Gas Trust Co.*, 22 N. E. 798, 799, 130 Ill. 268, 8 L. R. A. 497, 17 Am. St. Rep. 319.

The "capital" of a corporation and the "shares" of its stockholders are different forms of the same thing. There is no value to the stock independent of the property which it represents. The property of the corporation is the property of the stockholders who compose it, and the shares held by each represent his interest in the corporate assets. *Richardson v. City of St. Albans*, 47 Atl. 100, 72 Vt. 1.

The "capital stock" and the "shares of the capital stock" of a corporation are distinct things. The capital stock is the money paid or authorized or required to be paid in as the basis of the business of the corporation and the means of conducting its operations. It represents whatever it may be invested in. The shares of the capital stock are usually represented by certificates. Every holder is a cestui que trust to the extent of his ownership. The shares are held and may be bought and sold and taxed like other property. Each share represents an aliquot part of the capital stock, but the holder cannot touch a dollar of the principal. The capital stock and the shares may both be taxed, and it is not double taxation. *Farrington v. Tennessee*, 95 U. S. 679, 686, 24 L. Ed. 558; *City of Memphis v. Farrington*, 67 Tenn. (8 Baxt.) 539, 541.

The capital stock of a corporation and the shares into which such stock may be divided and held by individual shareholders are two distinct pieces of property. The



capital stock and the shares of stock in the hands of the shareholders may both be taxed, and it is not double taxation. A charter of a bank, therefore, which fixed a tax on each share of its capital stock and declared that the same should be in lieu of all other taxes, did not prevent taxation of the capital stock. *Bank of Commerce v. Tennessee*, 16 Sup. Ct. 456, 460, 161 U. S. 134, 40 L. Ed. 645; *Shelby County v. Union & Planters' Bank*, 161 U. S. 149, 16 Sup. Ct. 558, 40 L. Ed. 650; *Union & Planters' Bank v. City of Memphis*, 46 S. W. 557, 101 Tenn. 154; *State v. Hernando Ins. Co.*, 97 Tenn. (13 Pickle) 85, 36 S. W. 721.

The right of a shareholder has been well defined by Shaw, C. J., to the effect that it is, strictly speaking, "the right to participate in a certain proportion in the immunities and benefits of the corporation." This is a right distinct from the capital stock of the company or property of the company, as a debt is distinct from the debtor, or the mortgage debt from the mortgaged premises; and hence the words "capital stock," in an act of 1872 taxing the capital stock of corporations, does not mean shares of stock, either separately or in the aggregate. *Porter v. Rockford, R. I. & St. L. R. Co.*, 76 Ill. 561, 567.

Shares of stock are not included in the term "capital" of a bank, within the meaning of the laws providing for the assessment of banking corporations. *Brown v. French* (U. S.) 80 Fed. 166, 168.

Shares of bank stock are not the same as the capital of a bank, and therefore the former may be taxed, though the capital of the bank is invested in United States bonds. *Wright v. Stilz*, 27 Ind. 338, 343.

Act April 30, 1855, § 14, incorporating a corporation, provided that 3,000 shares of such stock should be exempt from taxation. Held, that "shares of stock" did not mean capital stock, but this was an exemption of shares of stock in the hands of the stockholders. *Commonwealth v. Minersville Water Co.*, 13 Pa. Co. Ct. R. 17, 20.

"Capital stock" and "shares of stock" are different things and form different subjects of taxation. A tax upon the one is not a tax upon the other, nor is the examination of one an examination of the other. Thus an ad valorem tax may be levied upon the shares of stock of an insurance company, although its capital stock is exempt from taxation. *City of Memphis v. Home Ins. Co.*, 19 S. W. 1042, 1043, 91 Tenn. (7 Pickle) 558.

Under the statute which enumerates as objects of taxation all shares of stock in banks and other incorporated companies, the property of which alone shall be taxed, the property of a railroad company is represent-

ed by its shares of stock, and there cannot be any other property over and above the stock held by the stockholders. Therefore lands granted by the state to a railroad company are not taxable for state and county purposes under the general revenue law. *State v. Hannibal & St. J. R. Co.*, 37 Mo. 265.

In holding that the charter of a railroad company, providing that the road or roads, with all works, improvements, and profits, should be vested in such company, and that the shares of its capital stock should be exempt from the imposition of any tax or burden, exempted the property of a corporation from taxation, the court say: "It is contended that the shares of stock and the property and franchises of a railroad company are separate and distinct properties, with separate and distinct ownerships, and that the exemption of the one does not, therefore, exempt the other. The question, however, is not 'whether shares of stock, abstractly considered, embrace and represent the property and franchises of the appellee.' Strictly speaking, it may be true that the shareholder is not the legal owner of any portion of the property of the company, and his shares of stock are evidences only of his right to participate in the business and government of the corporation and to the proportional share of the profits carried by the company. We are not dealing, however, with abstract definitions, but with an act incorporating a railroad company, and endeavoring to ascertain how far and to what extent the Legislature meant to exempt the corporation from taxation. We are not bound, therefore, by the literal meaning of the words of the statute, but must look to the connection in which they are used, the subject-matter to which they are applied, and the motives and objects which actuated the Legislature in conferring this privilege." *State v. Baltimore & O. R. Co.*, 48 Md. 49, 72.

#### As credits or estate.

See "Credits"; "Estate."

#### As nonnegotiable security.

Shares of capital stock of corporations are nonnegotiable securities. *Maxwell v. Foster*, 45 S. E. 927, 930, 67 S. C. 377.

#### As share issued or subscribed for.

The by-law of a corporation, providing that "at all legal meetings of the company there must be present at least one-third of the stockholders, holding at least one-third of the shares of stock, to constitute a quorum to do business," construed to mean that the presence of one-third of the stockholders in number, holding at least one-third of the total number of shares issued or subscribed for, was sufficient to constitute a quorum, and not to have reference to the whole amount of stock authorized. *Castner v.*

Twitchell-Champlin Co., 40 Atl. 558, 560, 91 Me. 524.

**As moneyed capital.**

See "Moneyed Capital."

**As property.**

See "Personal Property."

See, also, "Property."

A share of stock is a species of incorporeal intangible property in the nature of a chose in action. *Vanstone v. Goodwin*, 42 Mo. App. 39, 47.

The shares of stock of a corporation are regarded by the common law, whether the property owned by the corporation is real or personal, as personal property, capable of alienation or succession in any of the modes by which that species of property may be transferred or transmitted. Strictly speaking, they are not chattels, but are rather choses in action, or, in other words, they are merely evidence of property. Statutes frequently do declare them property, and if a larger legislative intent is not intended such statutes are construed as merely declaratory of the known rule of the common law. *Nelson v. Owen*, 21 South. 75, 77, 113 Ala. 372.

A share of stock entitles its owner to a proportionate share in the net earnings of the corporation, and upon dissolution to a proportionate share in the assets of the corporation after the debts are paid. Its value in a corporation whose corporate life is not limited by its charter depends almost wholly on the net earnings of the corporation or on its prospective capacity for producing them. The share of stock is property. It is a chose in action, entitling its owner to yearly payments from a corporation, if there are net earnings. The corporation does not own its capital stock, divided into shares. It owns the property, which, when used in a business with skill and industry, will produce net earnings, out of which the dividends of the stock are to be paid. *Western Union Tel. Co. v. Poe* (U. S.) 61 Fed. 449, 456.

**SHAREHOLDER.**

See "Free Shareholders."

See, also, "Stockholder."

Mr. Thompson, in his *Commentaries on the Law of Corporations* (section 1071), says: "Shareholders are not joint tenants or in any other sense co-owners of the corporate property, either before or after its dissolution. The title to it rests exclusively in the legal entity called the corporation. A share of the capital stock merely gives the right to partake, according to the amount put into the fund, of the surplus profits of the cor-

poration, and ultimately, on the dissolution of it, to so much of the fund thus created as remains unimpaired and is not liable for the debts of the corporation." *State v. Mitchell*, 58 S. W. 365, 366, 104 Tenn. 336.

A shareholder in a corporation is one who has a proportionate interest in its assets and is entitled to take part in its control and receive its dividends. In all essential particulars he is distinguishable from a creditor of the shareholder who holds stock as collateral. By the very root of the word, he is entitled to a present share in the assets of the corporation, and receives presently and immediately the benefits of the share, which the creditor does not, even if he holds corporate stock as security, because the creditor's rights in this respect are only contingent and remote. Hence it is held that, under a statute making shareholders in corporations individually liable to assessment upon such shares, one who holds stock of an insolvent corporation as collateral security for a loan, which stock is registered upon the books of a bank in his name as collateral, is not liable upon such shares under the statutory liability of shareholders. *Beal v. Essex Sav. Bank* (U. S.) 67 Fed. 816, 817, 15 C. C. A. 128.

A "shareholder" in a building and loan association, for voting purposes, is the holder of a share, under the constitution, providing that each shareholder shall be entitled to one vote only, irrespective of the number of shares he or she may hold. In *re Provident Building & Loan Ass'n of Passaic County*, 41 Atl. 952, 62 N. J. Law, 590.

A shareholder of a bank occupies, as regards a creditor thereof, the position of surety, but is something more than a surety. He is one of the associates of the bank, and by the very terms of the association he is deemed to undertake for the debts which the bank contracts. *Grand Rapids Sav. Bank v. Warren*, 52 Mich. 557, 561, 18 N. W. 356, 358.

**SHARP.**

The term "sharp" is commonly applied in reference to the cutting edge of a knife or razor, to the tooth of a man, or to the prow of a ship, and cannot fairly be construed to mean a mathematical angle or particular degree of sharpness, when used in a patent in which the language of the claim is "that the jaws are provided with sharp angles." *F. C. Austin Mfg. Co. v. American Well Works* (U. S.) 121 Fed. 76, 79, 57 C. C. A. 330.

**SHARP DANGEROUS WEAPON.**

Other sharp weapon, see "Other."

A blow given with the handle of a pitchfork, without pushing or thrusting with the

times, is not an assault with a "sharp, dangerous weapon," within the meaning of Laws 1864, c. 74, providing for the punishment of assaults with dangerous weapons. *Filkins v. People*, 69 N. Y. 101, 102, 25 Am. Rep. 143.

## SHAVE.

"Shaved," as used in the statement of a purchaser of goods, after knowledge of their arrival, to the seller, "They say you have shaved me," is to be understood in its offensive sense, and is equivalent to saying, "You have deceived me; you have defrauded me; you have overreached me by fraud." *Bronson v. Wiman* (N. Y.) 10 Barb. 406, 428.

"Shaving," as used in a publication representing a person as anxious to get money speedily for the purpose of using it for shaving purposes in Wall street, means he wished to put money into the hands of some one in Wall street, to be employed in legitimate and profitable business of buying up securities at a discount. The word "shaving" certainly is sometimes used to denote the act of obtaining the property of another by oppression and extortion; that is, by taking an inequitable and unconscientious advantage of his situation to fleece or strip him of his property. Such, however, is not the natural sense in which those who read the publication would be likely to understand the word "shaving"; for the word "shave" is also used to denote the buying of existing notes and other securities for money at a discount beyond the nominal amount of the debt and interest due or to become due on such notes or securities. It is this kind of shaving operations, in which money placed in the great money mart of the United States for the purpose of being used in shaving, is generally understood to be implied, and is not actionable per se. *Stone v. Cooper* (N. Y.) 2 Denio, 293, 301.

"Persons shaving notes," within the meaning of Acts 1893, c. 89, imposing a license tax on persons shaving notes, does not include the purchaser of a judgment on a note for less than the face thereof. *Mace v. Buchanan* (Tenn.) 52 S. W. 505.

The word "shave," as used in Acts 1901, p. 219, c. 128, § 4, providing for a privilege tax for shaving notes, accounts, judgments, or other evidences of indebtedness, means simply the buying of the paper referred to at a discount, although such paper was not made expressly for the purpose of being discounted. *Trentham v. Moore* (Tenn.) 76 S. W. 904, 905.

## SHAWNEE AND DELAWARE INDIANS.

The term "Shawnee and Delaware Indians," as used in the statute referring to

claims of the Shawnee and Delaware Indians, means the tribes, and not individual members of those tribes of Indians. *Blackfeather v. United States*, 23 Sup. Ct. 772, 774, 190 U. S. 368, 47 L. Ed. 1099.

## SHED.

As building, see "Building."

## SHEEP.

"Sheep," as used in an indictment charging a stealing of a sheep, includes a lamb; and hence the fact that the evidence shows the stealing of a lamb does not constitute a variance. *State v. Tootle* (Del.) 2 Har. 541; *Reg. v. Spicer*, 1 Car. & K. 699, 700.

In an indictment for stealing sheep, the term is only proper where the animal is a wether and is not under one year old. If a ewe or a lamb is stolen, it must be so designated in the indictment. *Rex v. Birket*, 4 Car. & P. 216.

In *Reg. v. McCalley*, 2 Moody, Cr. Cas. 34, it was held that "ram, ewe, sheep, and lamb," were all covered by the word "sheep"; but, if the words had been "ram, ewe, or sheep," it would have been a plain violation of the rule that every word of a statute should be given effect, and that, when words of different significance are employed, the scope of the statute must not be compressed within the limits of a narrower word, to reject the comprehensive word "sheep," and say that lambs or wethers were not included. *United States v. Debs* (U. S.) 64 Fed. 724, 748.

A chattel mortgage on "sheep and the increase thereof," executed in California, where such mortgage is expressly authorized by statute (Civ. Code Nev. § 2955; St. Nev. 1893, p. 84), covers the wool thereafter shorn from the sheep as a part of the increase. *Alferitz v. Ingalls* (U. S.) 83 Fed. 964, 972.

The term "sheep," as used in the chapter relating to weighing live stock, shall not be construed to include lambs. Code Va. 1887, § 1937.

### Law sheep.

Wherever, in the chapter relating to public printing and binding, the word "sheep" is used, it shall be construed to mean "law sheep." Code Iowa 1897, § 142.

## SHEEPSKINS.

In construing Tariff Act July 24, 1897, c. 11, § 2, Free List, par. 604, 30 Stat. 201 [U. S. Comp. St. 1901, p. 1688], which provides for the exemption from duty of certain skins, except "sheepskins with the wool on," held, that skins with the wool on of the cabretta,

a hybrid resulting from a cross between a sheep and a goat, are "sheepskins," within the meaning of said paragraph, and should be classified as such for duty purposes. *Lawrence, Johnson & Co. v. United States* (U. S.) 124 Fed. 1000.

## SHEET.

"A sheet, an article of bed furniture, may be composed of various substances, as linen, cotton, or wool, singly or in combination. The word has reference to the form and not the material of which the article is made." *Alkenback v. People* (N. Y.) 1 Denio, 80, 81.

"Sheet," as used in Rev. St. § 4905 [U. S. Comp. St. 1901, p. 3414], providing that any one who shall violate the copyright of a photograph by making copies thereof without the owner's consent shall forfeit "one dollar for every sheet of the same found in his possession," means a broad piece of paper on which the impression may be printed; and the forfeiture is exacted according to the number of sheets, without regard to the number of copies of the photograph that may be printed thereon. In the printer's art it is what is used for one impression, and is distinguished by a signature for the binder. *Falk v. Heffron* (U. S.) 56 Fed. 299.

## SHEET STEEL.

"What is commercially known as 'sheet steel' is rolled hot in mills, called 'sheet mills,' especially adapted for the purpose, between rolls running so slowly that the sheets cannot be run over 12 feet in length, and that the sheets are not less than 8 inches wide. Steel in strips, varying from ½ inch to 6 inches in width, and from No. 10 wire gauge to No. 36 in thickness, mostly in coils exceeding 100 feet in length, produced by rolling a billet or bar cold, and not by shearing from commercial sheet steel of greater width, and known commercially as "steel strips," or "cold-rolled steel," is dutiable under Tariff Act Aug. 27, 1894, c. 349, § 1, schedule C, par. 122, 28 Stat. 516, which provides for "steel in all forms and shapes not specially provided for in this act," and not under section 1, schedule C, par. 124, 28 Stat. 517, as "sheet steel in strips," regardless of its value. *Boker v. United States* (U. S.) 124 Fed. 50, 60, 59 C. C. A. 425.

## SHELL.

Shells, which have been treated with chloride of lime and washed with water to cleanse them, are entitled to free entry under Tariff Act July 24, 1897, c. 11, § 2, Free List, par. 536, 30 Stat. 197 [U. S. Comp. St. 1901, p. 1683], which includes shells not sawed, polished, or otherwise manufactured or ad-

vanced in value from their natural state. *Schoenemann v. United States* (U. S.) 119 Fed. 584, 56 C. C. A. 104.

## SHELLFISH.

"Shellfish" is "fish covered with a shell"; so that the designation of an oyster as a shellfish does not exclude it from the class of fishes. Hence a bond not to sell fish is broken by the sale of oysters. *Caswell v. Johnson*, 58 Me. 164, 166.

A shellfish is any aquatic animal whose external covering consists of a shell, either testaceous, as in oysters, clams, and other mollusks, or crustaceous, as in lobsters or crabs. The term is chiefly applied in commerce to crabs, lobsters, and crawfish, oysters, mussels, periwinkles, and whelks. Thus an act relating to oysters alone is not repealed by one relating to shellfish in general. *White v. Hill*, 34 S. E. 432, 433, 125 N. C. 194.

## SHELLEY'S CASE.

See "Rule in Shelley's Case."

## SHERIFF.

See "Deputy Sheriff."

Before sheriff and suitors, see "Before."

"The office of 'sheriff' is one of the oldest known to the common law. It is inseparably associated with the county. The name itself signifies the keeper of the shire or county. The office is said to have been created by Alfred when he divided England in shires, though Coke claims for it an earlier origin, and says that it existed during the Roman occupation of England, and that Alfred's division into shires or counties was but a more exact description. Co. Litt. c. 16, 186b. The sheriff was the immediate officer of the King within the shire, received his commission from the King, and directly represented the sovereign power of the state. He was the conservator of the peace within the county, had the safe-keeping of the county jail, and commanded the posse comitatus or powers of the county. He served the processes of the state and enforced its execution, which, Coke says, is the life and fruit of the law. In this country, allowing for the difference of our system, his functions have been similar, and his relation to the sovereign power the same. He is the chief executive officer of the state in his county." *State ex rel. Beach v. Finn*, 4 Mo. App. 347, 352.

The office of "sheriff" is recognized in the earliest annals of English law. It is much older than Magna Charta, and the exact time of its creation is involved in much obscurity; but the place and function of the sheriff is easily determined. He has been in

all times a chief peace officer of his bailiwick. Under all systems of government which have recognized the law as the supreme rule of action, it has been found absolutely necessary to vest in some one person the ultimate power to preserve the peace and quell disorder and suppress riots, and this person is the sheriff. His power is largely a discretionary one. In all times of great emergency, or in a crisis of unusual danger, the limits under which his discretion may be exercised have been held by the courts not to be fixed. *Commonwealth v. Martin* (Pa.) 9 Kulp, 69, 73, 74.

The title "sheriff" is said to be derived from the Saxon word "seyre," a shire or county, and "reeve," bailiff or keeper; the "seyre-reeve," sheriff or bailiff of a county. *Commonwealth v. Cluley*, 56 Pa. (6 P. F. Smith) 270, 275, 94 Am. Dec. 75.

The sheriff was, in Saxon times, the reeve or bailiff of the shire, and during the Anglo-Norman period acted as the deputy of the count, who had the government of the county. In England, as in the United States, he executes civil as well as criminal process throughout the county. He keeps the peace. In re Executive Communication, 13 Fla. 687, 689 (quoting Webst. Dict.).

The sheriff is the conservator of the peace within his county, and he may appoint deputies necessary to encompass that end. He is bound to suppress an affray and arrest a breaker of the peace, if the offense happen within his view. His duties are in a large measure in kind the same as are imposed on police officers, and he necessarily exercises police powers. *Pearce v. Stephens*, 45 N. Y. Supp. 422, 424, 18 App. Div. 101.

The word "sheriff" technically means an officer who acts within a county under a commission for a limited time. A sheriff may go on to sell land levied on by him after his commission is out, and make a good deed for it under his hand and seal. Though the word used by the statute is "sheriff," in such a case he is no longer technically such; yet the law understands it to mean the person who levied the execution, and it has made, therefore, a fixed rule, for the sake of completing unfinished business, that the person who began any business as sheriff should complete it. *Tichenor v. Hewsom*, 14 N. J. Law (2 J. S. Green) 26, 32.

A "sheriff" is the officer constituted by law to execute the process of the court. It is his duty to execute with due diligence and reasonable promptitude. *Denson v. Sledge*, 13 N. C. 136, 140.

The term "sheriff," used in Rev. Laws, 797, being the act constituting courts for the trial of small causes, means the proper returning officer; and, where there is a legal

objection to the sheriff, the court is competent to order the coroners to return a jury. *De Wit v. Decker*, 9 N. J. Law (4 Halst.) 148, 149.

A sheriff is nothing but the agent of the government, to do the acts which the laws authorize him to perform; and his acts, without proof of his lawful authority to perform them, are as ineffectual in judicial proceedings as the acts of a private agent without proof of authority from his principal. A sheriff's certificate of sale and conveyance of land, unwarranted by any law, or order or process of any court, is not evidence of any title or any right of possession in its grantee in the property which it describes. *Hockett v. Alston* (U. S.) 110 Fed. 910, 912, 49 C. C. A. 180.

A provision in How. St. c. 310, § 1, for a bond entitling the obligor to the liberty of the jail limits, provided that such bond shall be held for the indemnity of the "sheriff taking the same," means the sheriff of the county in which the bond is given, and necessarily includes the succeeding sheriffs of the county. *Kruse v. Kingsbury*, 60 N. W. 443, 444, 102 Mich. 100.

#### As a generic term.

The word "sheriff," as used in Code Civ. Proc. § 110, providing that a certified copy of the undertaking of bail shall be delivered to the sheriff, must be held to be a generic term. In *Winchell v. Pond*, 19 Vt. 198, the court, in passing on the statute which provided that no sheriff or deputy sheriff shall be allowed to make any writ, declaration, etc., it was held that the word "sheriff" was a generic term, and comprehended the entire class of executive officers, including constables, whose duties were of a like nature; and such is the meaning of the word "sheriff" in the section under consideration. *Hume v. Norris*, 5 Or. 478, 480.

"Sheriff," as used in Code, § 92, subd. 1, limiting the actions against a sheriff for liabilities incurred by doing an act in his official capacity, includes a deputy sheriff. *Cumming v. Brown*, 43 N. Y. 514, 515.

The word "sheriff," as used in the General Statutes, does not include deputies. *George v. Fellows*, 58 N. H. 494.

"Sheriff," as used in R. S. 1847, c. 11, § 26, providing that no sheriff or deputy sheriff shall be allowed to make any declaration, etc., should be construed as including constables. The term "sheriff" should be regarded as a generic, not a specific, term, and as comprehending the whole class of executive officers whose duties are of a like nature. *Winchell v. Pond*, 19 Vt. 198.

"Sheriff," as used in a statute making it penal to bribe or offer to bribe any sheriff,

etc., includes a sheriff and his deputies. *O'Brien v. State*, 6 Tex. App. 665, 667.

A constable, though a peace officer, and as such having authority to arrest offenders against the law, is not authorized to execute a warrant of arrest or other process directed to the sheriff, unless deputized in the manner provided by law. *Winkler v. State*, 32 Ark. 539, 546.

The term "sheriff," when used in statutes, may be extended to any person performing the duties of a sheriff, either generally or in special cases. Code Iowa 1897, § 48, subd. 19; Shannon's Code Tenn. 1896; § 66; Gen. St. Kan. 1901, § 7342, subd. 19; Hurd's Rev. St. Ill. 1901, p. 1719, c. 131, § 1, subd. 8. The provision of the Iowa Code does not authorize any person other than the sheriff to serve notices or levy executions and sell property. *Conway v. McGregor & M. R. Co.*, 43 Iowa, 32, 33.

The words "sheriff," "county attorney," "clerk," or other words used to denote an executive or ministerial officer, may include any deputy or other person performing the duties of such officer, either generally or in special cases. Rev. St. Utah 1898, § 2498.

The word "sheriff," when used in the civil procedure act, means the sheriff of the county, or any other person authorized to perform his duties in any case. *Horner's Rev. St. Ind.* 1901, § 1285.

The word "sheriff," as used in the chapter relating to attachments, is meant to apply to constables, when the proceedings are in a justice's court.—Ballinger's Ann. Codes & St. Wash. 1897, § 5382. Or the like officer of any other court. Code Iowa 1897, § 3934.

The word "sheriff" means the sheriff of the county in which action is brought or is pending, and in which the proceeding is had, or to whom the process is directed, and where it is used in connection with any process or order, or the execution thereof, or of any ministerial act, shall be taken to signify also any other officer to whom the process or order may be directed, and who may be acting under it, or by whom the ministerial act may be performed. Sand. & H. Dig. Ark. 1893, § 7211.

By the word "sheriff," in the title relating to proceedings in criminal cases, shall be intended any sheriff or deputy sheriff, mayor or city marshal, constable, police officer or watchman, or other person authorized to make arrests in a criminal case. Pub. St. N. H. 1901, p. 773, c. 250, § 1.

#### **As a ministerial officer.**

See "Ministerial Office—Officer."

#### **As trustee.**

See "Trustee."

### **SHERIFF'S CERTIFICATE.**

The phrase "sheriff's certificate," as used in Gen. Laws 1883, c. 112, relating to a sheriff's certificate of sale made under a power of sale in a mortgage, includes those certificates executed by deputy sheriffs. *Burke v. Lacock*, 42 N. W. 1016, 1017, 41 Minn. 250.

### **SHERIFF'S DEED.**

As color of title, see "Color of Title."

### **SHERIFF'S SALE.**

As judicial sale, see "Judicial Sale."

Three things are essential to the title of the purchaser under a sheriff's sale in execution: A judgment, an execution, and an official act of the sheriff in conformity with the execution. Under the judgment the property of the judgment debtor is bound for its satisfaction. Under the execution the sheriff derives authority to levy, sell, and convey; and a levy, sale, and conveyance in due form completes the title of the purchaser. *Ward v. Cohen*, 3 S. C. (3 Rich.) 338, 343.

A sheriff's sale supposes a judgment establishing the debt due; an execution upon that judgment; that delivered to an officer under oath; a levy upon property by such officer; advertising the same for sale at least 14 days, naming some public place for the sale; an exposure of the property at public auction by such officer at the time and place thus advertised, so that not only the debtor himself and that particular creditor, but all the creditors of the same debtor, may attend and bid upon the property, and prevent a waste for want of bidders; and, in the end, an official return of the sale by such officer upon such execution to the office whence it issued, where it may be seen by any person who may desire to see it. An auction sale by a sheriff, made by agreement of the parties interested and without any previous advertisement, and not under any legal precept warranting the sale, is not, therefore, a sheriff's sale. *Batchelder v. Carter*, 2 Vt. 168, 172, 19 Am. Dec. 707.

A "sheriff's sale" operates to transfer the mortgagor's title such as it is, not merely such as it is described to be. *Richmond v. Bennett*, 55 Atl. 17, 18, 205 Pa. 470.

### **SHEVIA.**

The word "shevia" in the Roman law seems to have represented what we term "float," while "ratis" answers properly to our word "raft." *Raft of Cypress Logs* (U. S.) 20 Fed. Cas. 169, 170.

**SHIFT.**

The word "shift," in its ordinary use, means to change. *Cunningham v. Hoff*, 118 Ind. 263, 265, 20 N. E. 756.

**SHIFTER.**

In connection with machinery, a "shifter" is a lever used to move belts from fixed to loose pulleys, or vice versa. *Young v. Burlington Wire Mattress Co.*, 44 N. W. 693, 694, 79 Iowa, 415.

**SHIFTING OF BURDEN OF PROOF.**

See "Burden of Proof."

**SHIFTING RISK.**

Is a term in the law of fire insurance used to designate the risk created by a contract of insurance on stocks of merchandise and other similar property which are kept for sale or are subject to change by purchase and sale; the policy being conditioned to cover the goods in the stock at any and all times, and not to be affected by changes in the stock. *Farmers' Mut. Fire Ins. Ass'n v. Kryder*, 31 N. E. 851, 5 Ind. App. 430, 51 Am. St. Rep. 284.

**SHIFTING TRUST.**

An express trust may operate in favor of additional or other beneficiaries upon specified contingencies and is then a shifting trust. *Civ. Code Ga.* 1895, § 3154.

**SHIFTING USE.**

A "shifting use" is a use which arises in derogation of a preceding estate. It is distinguished from a "springing use," which is one which arises from the seisin of the grantor and where there is no estate going before it. *Smith v. Brisson*, 90 N. C. 284, 288.

The common purpose of a "shifting use" is to have an estate take effect in derogation of some other estate, and such uses are common in marriage settlements in England and in this country. *Ricker v. Brown*, 67 N. E. 353, 354, 183 Mass. 424.

**SHINGLE SAWDUST.**

"Shingle sawdust," or "long sawdust," consists of long fibers of the wood cut out by the saw, of the length, or nearly of the length, of the shingle bolt, and is included in the term "refuse wood or timber" in a statute prohibiting its deposit in a river. *State v. Howard*, 72 Me. 459, 463.

**SHINGLE SHAVINGS.**

"Shingle shavings," or "jointer shavings," consist of the portions of the shingles taken off by the machine in edging and trimming the shingle, and are of the length, or nearly of the length, of the shingle, and are included in the term "refuse wood or timber" in a statute prohibiting its deposit in a river. *State v. Howard*, 72 Me. 459, 463.

**SHIP.**

See "American Ship"; "Consort Ship"; "Coppered Ship"; "General Ship."

Mortimer's Commercial Dictionary states "that the term 'ship' is a general name for all large vessels." *United States v. Open Boat* (U. S.) 27 Fed. Cas. 346, 347.

A "ship" is a locomotive machine, adapted to transportation over rivers, seas, and shores. *Pollock v. Cleveland Shipbuilding Co.*, 47 N. E. 582, 584, 56 Ohio St. 655.

By the Roman law the word "ship" apparently included everything which floated upon the water and was accessory to commerce. Under the French law the definition is almost equally broad. Says Emerig. *Assur. c. 4, § 7, par. 1*: "The word 'ship' (navire) includes every vessel of timber work able to float and to be carried upon the water. Boats and the smallest barks are comprehended in the same definition. Even rafts are included." "But," says Dufour (1 *Droit Mar.* 811), "these definitions must be accepted with caution. They are in fact true only in a certain sense and in certain given situations. Thus, they would be correct in a point of view of the law of 1791 (1 *Stat.* 199) which forbids, save in case of statutory force, the lading or unlading of ships outside the limits of harbors where custom houses are established." The author then proceeds to show from opinions of the court of cassation that those only are ships, within the meaning of article 190 of the Code of Commerce, which have an equipment, a crew and special service, and a particular industry. Such only are subject to legal process and are affected by the liens of commerce. So *De Fresquet* (*Des Aboriges Maritimes*) defines ships as "every construction designed for the carriage of passengers or freight in navigation," and, in enumerating those collisions which are not considered as maritime in the Commercial Code, mentions such as occur "with cribs of timber floating upon a river." *Raft of Cypress Logs* (U. S.) 20 Fed. Cas. 169, 170.

The materials which constitute a ship become one as soon as she leaves the ways and her keel strikes the element for which she was originally designed. *The Manhattan* (U. S.) 46 Fed. 800. She then becomes a ship, within the definition of *Ben. Adm. § 215*, as

"a locomotive machine adapted to transportation over rivers, seas, and oceans." Thereafter all contracts to equip, furnish, or repair such machine have direct reference to the vessel in esse, with capacity for locomotion and transportation on navigable waters, and are, therefore, maritime. *The Eliza Ladd* (U. S.) 8 Fed. Cas. 491, 492.

"Ship or vessel," as used in the statement of the rule that salvage applies only to ships and vessels and their cargoes, is employed in a broad sense to include all navigable structures intended for transportation. *Cope v. Vallette Dry-Dock Co.*, 7 Sup. Ct. 336, 338, 119 U. S. 625, 30 L. Ed. 501.

"A ship or vessel is a locomotive machine for transportation over rivers, seas, and oceans. It is the purpose and business of the craft, and not its form or its means of propulsion, that determines whether it is a vessel." *Warn v. Easton & M. Transit Co.*, 2 N. Y. Supp. 620, 622.

A ship is born when she is launched, and lives so long as her identity is preserved. Prior to her launching she is a mere congeries of wood and iron, an ordinary piece of personal property, as distinctly a land structure as a house, and subject only to mechanics' liens created by state law. In her baptism of launching she receives her name, and from the moment her keel touches the water she is transformed, and becomes a subject of admiralty jurisdiction. Hence, where a sailor deserted a vessel after she had been launched and was lying in the stream, she was a ship of war, though she had not received her armament and was not equipped for sea service. *Tucker v. Alexandroff*, 22 Sup. Ct. 195, 201, 183 U. S. 424, 46 L. Ed. 264.

The word "ship," in 2 Hill's Code, p. 662, § 46, which defines burglary as an unlawful entry, with intent to commit a felony, of an office, shop, store, warehouse, malthouse, stillhouse, mill, factory, bank, church, schoolhouse, railroad car, barn, stable, ship, steamboat, and water craft, or any building in which goods, merchandise, or valuable things are kept for use, sale, or deposit, means any ship, without regard as to whether any valuable things are kept therein or not, as the latter clause of the statute only refers to buildings not specifically designated. *State v. Sufferin*, 32 Pac. 1021, 6 Wash. 107.

As used in the Civil Code, "ship" is construed to mean any boat, vessel, or structure fitted for navigation. *Rev. Codes N. D. 1899*, § 4139.

The term "ship" or "shipping," when used in the Civil Code, includes steamboats, sailing vessels, canal boats, barges, and every structure adapted to be navigated from place to place for the transportation of merchandise or persons. *Civ. Code Cal. 1903*, § 960;

*Rev. Codes N. D. 1899*, § 3468; *Civ. Code S. D. 1903*, § 385; *Rev. St. Okl. 1903*, § 4164.

#### **Barge.**

A barge is a vessel in a certain sense, and, as the word "ship" is not used in a strictly nautical meaning in a policy insuring a hopper barge, it is a ship. It is used in carrying men and mud, and is used in navigation; for to dredge and carry away mud and gravel is an act done for the purposes of navigation. *The Mac*, 7 Prob. Div. 126, as cited in *Cope v. Vallette Dry-Dock Co.*, 7 Sup. Ct. 336, 338, 119 U. S. 629, 30 L. Ed. 501.

That species of water craft known on the western rivers of Pennsylvania as "barges" are neither ships, boats, nor vessels, within an act giving lien for work furnished in the construction or repair of such vessels. *Appeal of Nease (Pa.)* 3 Grant, Cas. 110, 113.

"Ship" does not include coal barges, which are used merely for transporting coal down the Mississippi river and its tributaries, and which are broken up for old lumber and firewood, when the coal is unloaded, and have no propelling power or master, nor crew, and none of the usual paraphernalia of a ship. *Wood v. Two Barges* (U. S.) 46 Fed. 204, 206.

Coal barges, arks, or flatboats used on many rivers to transport merchandise down stream, and usually broken up and sold for lumber at the end of their voyage, are not "ships or vessels," subject to admiralty jurisdiction on such waters. *Jones v. Coal Barges* (U. S.) 13 Fed. Cas. 950.

#### **Canal boat.**

The term "ship" would include both canal boats and scows. *The Hezekiah Baldwin* (U. S.) 12 Fed. Cas. 93. See, also, *King v. Greenway*, 71 N. Y. 413, 417.

A canal boat, not built to navigate tide waters, but to navigate the Erie Canal, is not a "ship," within the definition in *Ben. Adm.* 215; not being a locomotive machine. *The Ann Arbor* (U. S.) 1 Fed. Cas. 945.

#### **Dry dock.**

A dry dock is not a ship, since it is not used for navigation, so as to entitle the crew of a tug salving it to compensation. *Cope v. Vallette Dry Dock Co.*, 7 Sup. Ct. 336, 338, 119 U. S. 625, 30 L. Ed. 501.

#### **Equipment and supplies.**

"Ship or vessel," as used in Act March 3, 1851, § 3 (9 Stat. 635), limiting the liability of shipowners in cases of collision to the value of their interest in the ship or vessel and her freight then pending, does not include the whaling equipment, provisions, and supplies of a whaling ship. *Swift v. Brownell* (U. S.) 23 Fed. Cas. 554, 555.



**Ferryboat.**

"Ships or vessels," as used in 2 Rev. St. p. 493, authorizing the arrest of ships or vessels for debts contracted by the master, owner, or consignee, etc., extends only to ships or vessels navigating the ocean, or, at most, to such as sail coastwise from port to port, so that a ferryboat, plying across a river, is not liable to attachment under such statute. *Birkbeck v. Ferryboats* (N. Y.) 17 Johns. 54, 56.

**Floating elevator.**

A floating elevator, constructed from a canal boat, upon which had been built an elevating apparatus for hoisting grain, though not enrolled or licensed, and without motive power of its own, or capacity for cargo, except the permanent cargo of its elevator, is a vessel or ship, and as such subject to maritime lien. *The Hezekiah Baldwin* (U. S.) 12 Fed. Cas. 93.

**Raft of logs.**

A raft of logs is not a ship. *Raft of Cypress Logs* (U. S.) 20 Fed. Cas. 169, 170.

**Rigging and furniture.**

A "ship" engaged in navigation is an entirety, and usually described as consisting of the ship, her tackle, apparel, and furniture; and this includes the hull and spars, which constitute the ship, the rigging, which constitutes the tackle, the sails, which are her apparel, and the anchors and numerous utensils for the ship's use, which are the ship's furniture. *Grothgar v. Lewis* (U. S.) 100 Fed. 326, 330, 40 C. C. A. 382.

The word "ship," in admiralty, embraces her tackle, apparel, and appurtenances, because part of the ship as a going concern. *United States v. Dewey*, 23 Sup. Ct. 415, 421, 188 U. S. 254, 47 L. Ed. 463.

**Small, undecked boats.**

The words "ships or vessels," as used in the statute authorizing the arrest of ships and vessels, etc., are to be understood as used in common parlance, and apply only to vessels of a larger class, so that proceedings are not authorized against small, open, undecked boats, employed within a port, and not performing voyages coastwise from state to state, or from one port to another. *The Farmer's Delight v. Lawrence* (N. Y.) 5 Wend. 564.

**Torpedo steam launch.**

"Ship," as used in Prize Act 1864, relating to the rules of distribution in case of a capture by a single ship, has no restricted sense, implying three square-rigged masts, or any mast at all, but is synonymous with the words "vessel of the navy," or simply "vessel," which includes all armed vessels offered and manned by the United States and

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under the control of the Department of the Navy. A torpedo steam launch, attached to a division of a naval squadron, though not proved to have had any books, is a ship. *United States v. Steever*, 5 Sup. Ct. 765, 768, 113 U. S. 747, 28 L. Ed. 1133.

**Vessel synonymous.**

In its generic sense "ship" means any seagoing craft larger than an undecked boat. Benedict says that the word in the law is equivalent to "vessel," and that it is not the form, the construction, the rig, the equipment, or the means of propulsion that makes a "ship," but the purpose and business of the craft as an instrument of naval transportation. In its specific sense the term "ship" applies to sailing vessels having three masts, with crossyards on each mast fitted to carry square sails on each, in addition to a number of fore and aft sails. In the specific sense no bark, brig, brigantine, schooner, or sloop is a ship. As used in Prize Act 1864 (13 Stat. p. 306, c. 174) § 10, entitling the commander of a single ship to one-tenth of the prize money, and specifying the rate of distribution to the others, the word "ship" is synonymous with "vessel." *Swan v. United States* (U. S.) 19 Ct. Cl. 51, 62.

**SHIP (Verb).**

Under a lease of a stone quarry, by which the lessees agreed to pay a specified rate for stones shipped by them, the lessors cannot recover for stones quarried by the lessees and ready for shipment, but not actually shipped. *Crawford v. Oman & Stewart Stone Co.*, 12 S. E. 929, 930, 34 S. C. 90, 12 L. R. A. 375.

"Shipped," as used in Rev. St. art. 4535, requiring that the freight received by a connecting carrier shall be shipped in the order in which it is received, indicates carriage of the freight to or in the direction of its destination, and not a transfer from one railroad to another at the same station by a railroad which does not constitute a part of the road. *Gulf & I. Ry. Co. v. Texas & N. O. Ry. Co.*, 56 S. W. 328, 329, 93 Tex. 482.

"Ship," as used in a complaint against a railroad company, declaring that the company agreed to receive and ship said cattle, and that the cattle were delivered according to the terms of the understanding, and that the company, after the cattle had been placed in its yards, "refused to ship said cattle," is not appropriately used, but in connection with the context is equivalent of "to receive and carry." *Louisville, N. A. & C. Ry. Co. v. Godman*, 4 N. E. 163, 165, 104 Ind. 490.

**As to put on board.**

A contract "to ship" by a certain vessel for a particular voyage ordinarily means simply to put on board, and the terms of such a contract are satisfied when that act is per-

formed, and not broken because from stress of weather or other unavoidable cause part of the goods are transferred while at sea to another vessel. *Harrison v. Fortlage*, 16 Sup. Ct. 488, 490, 161 U. S. 57, 40 L. Ed. 616.

In common maritime and mercantile usage, "shipped" means placed on board of a vessel for the purchaser or consignee, to be transported at his risk. *Fisher v. Minot*, 76 Mass. (10 Gray) 260, 262.

The words "shipped" and "shipment" are now used, indifferently, to express the idea of goods delivered to carriers for the purpose of being transported from one place to another over land as well as water, and imply, with respect to carriage by land, a completed act, irrespective of the time or mode of transportation. *Caulkins v. Hellman*, 47 N. Y. 449, 452, 7 Am. Rep. 461; *Fisher v. Minot*, 76 Mass. (10 Gray) 260; *Schmertz v. Dwyer*, 53 Pa. (3 P. F. Smith) 335.

The same signification has been given to them by lexicographers. Thus Webster defines shipment to mean "the act of putting anything on board of a ship or other vessel"; Worcester, "the act of shipping or putting on board a ship." *Abbott's*, *Bouvier's*, and *Rapalje & Lawrence's Law Dictionaries* each give substantially the same definitions. In a leading case in England, that of *Bowes v. Shand*, L. R. 2 App. Cas. 455, the court were unanimously of the opinion that the word "shipped," according to its natural and ordinary signification, as well as its meaning in the mercantile community, was the putting of the goods on board the vessel and taking a bill of lading therefor; and it was there held that rice put on board in February was not "shipped" in March or April, although the vessel did not in fact sail until March. A contract for the sale of goods calling for a "shipment" within 30 days by steam or sail does not require a clearance of the vessel within that time, but there was a compliance if within that time the goods were put on board a vessel which the sellers had good reason to believe would sail for the intended port within a reasonable time after "shipment." *Ledon v. Havemeyer*, 24 N. E. 297, 299, 121 N. Y. 179, 8 L. R. A. 245.

Act Dec. 22, 1839 (Cobb's Dig. 38), fixed rates for the wharfage of vessels, for the landing of produce and goods, and for the shipping of the same, giving to the owners or occupiers of such wharves the right to charge certain fixed rates. Under the port regulations of Savannah, two vessels were allowed to lie abreast at a wharf, and, for the sake of convenience in transshipment, the cargo was not actually landed upon the wharf and then reshipped to the second vessel, but was carried directly from one to the other, it being the unvarying interpretation that such transshipment included both landing and shipping; and it was held that the

wharf owners would have the right to charge the rates allowed for landing and shipping. In the absence of any contract to the contrary. The word "landing," as used among the shippers and wharfingers of the port, means taking the cargo out of a vessel, and the word "shipping," putting the cargo into a vessel, either with or without the intervention of the wharf; and where a cargo is transferred from one vessel to another, both lying abreast at the same wharf, there is both a landing and a shipping. *Robertson v. Wilder*, 69 Ga. 340, 345.

Act 1807 fixes the rates of wharfage in the city of Charleston: "For landing every bale or case of cotton, 4 cents per bale or case; for shipping every bale or case of cotton, 4 cents per bale or case." Held, that the words "landing" and "shipping," as used in the statute, should be construed to mean that the wharf owner is entitled to 4 cents per bale only for receiving the cotton from drays, railroad cars, and other vehicles and loading it on vessels. "Landing" means taking the cotton from the ship and putting it on the land, and "shipping" means putting the cotton on board of a ship to be transported; the two operations being the exact opposite of each other. "Landing" should not be construed to be a part of "shipping," so as to entitle a wharf owner to 4 cents per bale for receiving cotton from vehicles, etc., and 4 cents additional for loading it on the ship, since such construction would make the charge for shipping 8 cents per bale, instead of 4, as the act declares. The "landing" and "shipping" meant by the statute are two separate and distinct things, and not different parts of the same transaction of shipping, and the act was intended to fix the charge in case of possible importation, as well as in case of exportation. *Lesesne v. Young*, 12 S. E. 414, 417, 33 S. C. 543.

#### SHIP BROKERS.

Ship brokers are brokers who negotiate the purchase and sale of ships and the business of freighting ships. *City of Little Rock v. Barton*, 33 Ark. 436, 444.

#### SHIP CARPENTER OR BUILDER.

The term "ship carpenter" or "ship builder" properly designates builders and repairers of vessels, rather than the term "manufacturers," and therefore they are not within the meaning of Laws 1880, c. 542, § 3, exempting manufacturing corporations from certain taxes. *People v. New York Floating Dry Dock Co. (N. Y.)* 63 How. Prac. 451, 453.

#### SHIP CHANNEL.

A ship channel is the channel in which the water is deep enough for vessels of

large size, usually designated in harbors by buoys. *The Oliver* (U. S.) 22 Fed. 848, 849.

### SHIP OF THE UNITED STATES.

These words now have a technical meaning, for the ship registry act (Acts 1792, c. 45; 1 Stat. 287, c. 1) declares that no ships except those which are registered according to that act shall be denominated and deeded "ships or vessels of the United States," entitled to the benefits and privileges appertaining to such ships; and the act further prescribes that no ships or vessels, except those wholly belonging to citizens, shall be registered. *United States v. Howard* (U. S.) 26 Fed. Cas. 388, 389.

### SHIP OF WAR.

"Ship of war," as used in Act March 2, 1879, § 31, providing that it shall not be necessary "for the master or person having command of any ship or vessel of war" to make certain reports and entries, is a generic term, including both national ships and private armed ships. *Wilson v. United States* (U. S.) 30 Fed. Cas. 239, 242.

The term "ship or vessel of war" includes her armament, search lights, stores, and in fact everything attached to or on board of the ship in aid of her operations. *United States v. Dewey*, 23 Sup. Ct. 415, 421, 188 U. S. 254, 47 L. Ed. 463.

The phrase "ship or vessel of war belonging to an enemy," as employed in U. S. Comp. St. 1901, p. 3134, relating to bounty, covers armament, outfit, and appurtenances, including provisions, money to pay the crew or for necessary expenditures, and everything necessary to be used for the purposes of the vessel and as a vessel of war. *United States v. Taylor*, 23 Sup. Ct. 412, 414, 188 U. S. 283, 47 L. Ed. 477.

### SHIP RECEIPT.

"A ship receipt is the written acknowledgment of the mate, receiving a cargo, acknowledging the receipt of the goods on board, describing them by the marks on them or the boxes." *People v. Bradley* (N. Y.) 4 Parker, Cr. R. 245, 247, 1 Buff. Super. Ct. 576, 579.

### SHIP TIMBER.

Among those who deal in the article, the phrase "ship timber" has undoubtedly a somewhat definite meaning, as much so as "merchantable boards," or "cordwood," and the like, and the declarations of the purchaser, at the time of discussing the bargain, as to the uses to which he intends to put the articles, cannot be competent to change or vary the signification of the terms finally

used in the contract. The meaning of words and terms used in making a contract or agreement must, in the absence of fraud, be determined by their known or proved signification, and not by the statements of the parties or conversations they may have at the time the contract is made. *Pillsbury v. Locke*, 33 N. H. 96, 102, 66 Am. Dec. 711.

### SHIPMENT.

See "Spring Shipment."

"Shipment," in reference to goods, means a delivery on board a vessel. *Fisher v. Minot*, 76 Mass. (10 Gray) 260, 262.

Shipment is the act of dispatching or shipping, especially the putting of goods or passengers on board for transportation by land or water, and hence, as used in a contract providing that shipments are to be made on a certain day, means merely the delivery of the goods to the transportation company, and not that the goods were to be transported at such date. *Clark v. Lindsay*, 47 Pac. 102, 103; 19 Mont. 1, 61 Am. St. Rep. 479; *Ledon v. Havemeyer*, 24 N. E. 297, 121 N. Y. 179; *Caulkins v. Hellman*, 47 N. Y. 449, 452, 7 Am. Rep. 461; *Fisher v. Minot*, 76 Mass. (10 Gray) 260; *Schmertz v. Dwyer*, 53 Pa. 335.

The term "shipment," in a municipal ordinance providing for the inspection of flour manufactured within the town or brought to the same for sale, shipment, or exportation, imports a shipment of flour in some form which has become identified with the interests of the city. It does not apply to flour which is merely in transit through the city. *Corporation of Georgetown v. Davidson* (U. S.) 1 Mackey, 278, 284.

### SHIPMENT FROM GLASGOW.

In the contract of sale of certain iron, "shipment from Glasgow as soon as possible, delivery and sale subject to ocean risks," the condition that the shipment was to be from Glasgow was a material part of the contract, which was not complied with by shipment from Leith, and the purchaser was not bound to accept the iron when shipped from the latter place. In commenting on this contract the court said: "The court has neither the means nor the right to determine why the parties in their contract specified shipment from Glasgow, instead of using the more general phrase 'shipment from Scotland,' or merely 'shipment,' without meaning any place, but is bound to give effect to the terms which the parties have chosen for themselves. The term 'shipment from Glasgow' defines an act to be done by the sellers at the outset, and a condition precedent to any liability of the buyer. The sellers do not undertake to obtain a shipment, nor does the buyer agree to accept shipment from any

other port. The buyer takes the risk of delay in shipment from Glasgow, or a delay or disability in procuring the voyage from Glasgow to New Orleans; but he does not take the risk of delay or of sea perils which may be obtained from the course of the different voyage from Leith to the same destination." *Filley v. Pope*, 6 Sup. Ct. 19, 21, 115 U. S. 213, 29 L. Ed. 372.

### SHIPPING BUSINESS.

The term "shipping business" in its broadest extent may mean any and every kind of business relating to ships, and may include shipbuilding. *DeWolf v. Crandall* (N. Y.) 1 Sweeny, 556, 566.

### SHIPPING ORDER.

"Shipping order," within the meaning of a mining lease requiring the lessee to pay a royalty of one-tenth the product of the mine at the mine or shaft in shipping order, was held to mean that the ore should be reasonably free from earth, stones, or gravel, and such other impurities as could be readily found and removed. *Nunnally v. Warner Iron Co.*, 29 S. W. 124, 127, 94 Tenn. 282.

### SHIPPING PRICE.

"Shipping price," as used in an agreement for the purchase of nuts at the then "shipping price" at a certain port, is not equivalent to "reasonable price." "A contract to furnish a cargo at a reasonable price means such a price as the jury, upon trial of the case, shall under all the circumstances decide to be reasonable. This price may or may not agree with the current price of the commodity at the port of shipment at the precise time when such shipment is made. The current price of the day may be highly unreasonable from accidental circumstances, as on account of the commodity having been purposely kept back by the vendor himself, or with reference to the price at other ports in the vicinity, or from various other causes." *Acebal v. Levy*, 10 Bing. 376, 383.

### SHIP'S BILL.

A "ship's bill" is a bill of lading retained by a ship, designed only for information and convenience, and not for evidence as between the parties of what constituted their agreement. *The Thames*, 81 U. S. (14 Wall.) 98, 105, 20 L. Ed. 804.

### SHIP'S COMPANY.

See, also, "Crew."

The term "ship's company" embraces all the officers, as well as the common seamen. *United States v. Winn* (U. S.) 28 Fed. Cas. 733, 735.

"A mere passenger, from the time of the Laws of Oleron down to the present day, has not been considered one of the crew or ship's company; the latter being the mariners, and having a voice in times of peril in consultation, and being under obligation for services and exposure, and obedience." Therefore the terms in a statute making criminal certain acts on the part of a member of the crew, or ship's company, does not apply to a passenger. *United States v. Libby* (U. S.) 26 Fed. Cas. 928, 931.

### SHIP'S HUSBAND.

A "ship's husband" is an agent of the owner of the ship, and in almost every port visited by a ship may be found some agent to attend to her affairs. *Webster v. The Andes*, 18 Ohio, 187, 213, 214.

"Ship's husbands are defined to be a class of agents whose chief employment it is, among other things, to purchase ship's stores for her voyage, and to make disbursements for the ship's use, and to make out an account of these transactions for their employers, the owners of the ship, to whom they are, as it were, stewards at land, as the officer bearing that name is on board the ship when at sea." *Muldon v. Whitlock* (N. Y.) 1 Cow. 290, 307, 13 Am. Dec. 533 (quoting *Livermore*, Ag. 72).

"This expressive maritime phrase, as Story calls it, of 'ship's husband,' is used only to designate the person who in the home port, where the vessel belongs, does what the owner would otherwise do—obtains a cargo for her and attends to everything essential to the due prosecution of the voyage for which the cargo has been obtained. According to *Beawes* he collects the freight, both at home and abroad, pays all the ship's disbursements, and makes out an account of all these transactions for his employers, the owners of the ship." *Gillespie v. Winberg* (N. Y.) 4 Daly, 318, 322 (quoting *Beawes' Lex Merc.* p. 47).

"The ship's husband," says Chancellor Kent, "may either be one of the part owners, or a stranger, and he is sometimes merely an agent for conducting the necessary measures on the return of the ship to port. But he may have a more general agency for conducting the affairs of the vessel in place of the owners, and his contracts in the proper line of a ship's husband's duty will bind the joint owners. His duty is generally to see to the proper outfit of the vessel as to equipment, provisions, and crew, and the regular documental papers, and, though he has the powers incidental and necessary to the trust, it is held that he has no authority to insure or borrow money for the owners, or to bind them to the expenses of lawsuits." In distributing the authority generally pos-

essed by ship's husbands, Judge Story says: "He is understood to be the general agent of the owner in regard to all the affairs of the ship in the home port, and as such is intrusted to direct all proper repairs and equipments and outfits for the ship, to hire the officers and crew, to enter into contracts for the freight or charter of the ship, if that is her usual employment, and to do all other acts necessary and proper, and dispatch her for and on her intended voyage." *Mitchell v. Chambers*, 5 N. W. 57, 65, 43 Mich. 150, 38 Am. Rep. 167 (quoting 3 Kent, Comm. 157; Story, Ag. § 35).

A ship's husband may be appointed by a written instrument or orally, or his appointment may be inferred from his exercising the duties of his office with the knowledge and consent of the owners. His duties are determined by usage, and are, in general, to provide for the complete seaworthiness of the ship and see that she has on board all necessary and proper papers, to make contracts for freight and to collect the freight, to enter up the proper charter party, direct all repairs, appoint the officers and mariners, and see that the vessel is furnished with provisions and stores, and generally to conduct all affairs and arrangements for the due employment of the ship in commerce and navigation; and for all these purposes he is the agent of the owners and can bind them by his contracts. *McCready v. Thorn*, 51 N. Y. 454, 457 (citing Story, Partn. § 418).

#### SHIP'S OFFICER.

The federal statute, declaring that every master and commander of any vessel belonging in whole or in part to any citizen of the United States, who, without justifiable cause, forces an officer or mariner of such vessel on shore in order to leave him behind in any foreign port, or refuses to bring home again all such officers and mariners of such vessel whom he carried with him, shall be punished, etc., applies to all persons, other than the captain, employed under shipping articles on the vessel in any capacity. *In re Ah Tie* (U. S.) 13 Fed. 291, 293.

Rev. St. § 5347, providing that every master or other officer of any American vessel, who beats, wounds, etc., shall be punished, should be construed to include a captain of the watch, who is a kind of foreman or overseer, who, under the supervision of the mate, has charge of one of the two watches into which the crew is divided for the convenience of work. The primary signification of the word "officer" will include the captain of the watch. One of the earliest definitions of the word "officium" is "that function by virtue whereof a man hath some employment in the affairs of another, as of the king or another person." Again, it is

said that "the word 'officium' principally implies a duty, and in the next place the charge of such duty, and that it is a rule that, where a man hath to do with another's affairs against his will and without his leave, that this is an office, and he who is in it is an officer." Any one who by authority exercises the function of control over the actions of the crew or any part of it, by giving direction to their work, is an officer. *United States v. Trice* (U. S.) 30 Fed. 490, 491.

#### SHIP'S STORES.

See "Stores."

#### SHIP'S SUPPLIES.

See "Supplies."

#### SHIP'S TACKLE, APPAREL, AND FURNITURE.

"Ship's tackle, apparel, and furniture," as contained in an insurance policy on the ship's tackle, apparel, and furniture of a ship employed in the Greenland trade, does not include fishing tackle used on such trip. *Hoskins v. Pickersgill*, 3 Doug. 222.

Within the rule that, in suits in rem against a ship, her "tackle, sails, apparel, furniture, and boats," if in the possession of a third person, may be ordered to be turned over to the marshal, the enumeration quoted includes everything belonging to the vessel as a "navigating ship." *The Witch Queen* (U. S.) 30 Fed. Cas. 396, 397.

Special apparatus or appliances on board of a vessel engaged in a particular business, which are indispensable to the proper prosecution thereof, and not constituting in any sense a portion of the cargo, are a part of the ship's "tackle, apparel, and furniture," and liable as such for seamen's wages and supplies. *The Edwin Post* (U. S.) 11 Fed. 602, 606.

As used in the custom of the port of New Orleans, that before a ship is called upon to take cotton on board it must be brought within the reach of a ship's tackle, it was held that the expression "ship's tackle" means where the ship ropes can get onto it, so that the ship's winches can pull the cotton in. *Texas & P. R. Co. v. Callender*, 22 Sup. Ct. 257, 260, 183 U. S. 632, 46 L. Ed. 362.

#### SHIPWRECK.

"Shipwreck" is a matter of revenue. In a legal wreck, the goods must come on shore. *Republica v. LeCaze* (Pa.) 1 Yeates, 55, 68 (citing 1 Bl. Comm. 290).

**SHIPWRECKED GOODS.**

The words "shipwrecked goods," in their ordinary legal meaning, are confined to goods cast on shore, and cannot be extended to boats or other property afloat, not appearing to have ever been cast ashore, or thrown overboard, or lost from a vessel in distress. *Chase v. Corcoran*, 106 Mass. 286, 288.

**SHIPYARD.**

"Shipyard," as used in a fire insurance policy on the stock in a shipyard, embraces the ground adjoining the inclosure, so far as it is used for keeping the stock of ship timber there provided for use. It is not limited to a yard bounded by lines exactly defined and limited by streets or other lineal landmarks. *Webb v. National Fire Ins. Co.*, 4 N. Y. Super. Ct. (2 Sandf.) 497, 505.

**SHIRRED.**

"I looked through all the French and English dictionaries for the word 'shirred.' I could not find it. The nearest word in the dictionary of the Scotch language which resembles it is 'shirp,' which means to shrivel or shrink up. Probably, when the word crossed the Tweed and came south, they dropped the 'p' and called it 'shir.'" *Day v. Stellman* (U. S.) 7 Fed. Cas. 262, 265.

**SHOCK.**

A "shock" is a sudden agitation of body or mind. It may affect the body or mind. *Haile's Curator v. Texas & P. R. Co.* (U. S.) 60 Fed. 537, 559, 9 C. C. A. 134, 23 L. R. A. 774.

"Shock" is defined by Charles L. Dana, M. D., as a sudden depression of the vital functions, especially to the circulation, due to the nervous exhaustion following an injury or a sudden violent emotion, resulting either in immediate death or in prolonged prostration, and is spoken of as being either corporeal or psychical, relating, respectively, to the vital powers and the emotions of the mind. *Maynard v. Oregon R. Co.*, 72 Pac. 590, 593 43 Or. 63.

**SHOCK OF WHEAT.**

In common parlance the terms "shock of wheat" and "stack of wheat" have a totally distinct and different signification. "Shock" is the term applied to the small collection and arrangement of a few sheaves together in the field, in such manner as to protect them against the weather for a few days, until the farmer has time to gather them into his barn or place them in the large, conical pile called a "stack." *Denbow v. State*, 18 Ohio, 11, 12.

**SHODDY.**

"Shoddy" is the refuse thrown off in the shearing or finishing of woolen cloths. *Lenning v. Maxwell* (U. S.) 15 Fed. Cas. 312, 313.

**SHOES.**

Pair of shoes, see "Pair."

Const. art. 207, exempting from taxation capital employed in the manufacture of leather and "shoes," does not include capital employed in the manufacture of shoe uppers from purchased leather. "A shoe is ordinarily composed of uppers, soles, and heels, sewed or otherwise joined together in such manner as to constitute an article or apparel for the feet. A shoe upper is no more a shoe than is a shoe sole or shoe heel." *Ricks v. Board of Assessors*, 10 South. 202, 43 La. Ann. 1075.

The word "shoes," in an indictment charging the embezzlement of so many pairs of shoes, must be taken to mean shoes for the feet of human beings, and the description of the embezzled property is sufficient. *Commonwealth v. Shaw*, 14 N. E. 159, 161, 145 Mass. 349.

**SHOOK.**

A "shook" is defined in Webster's Dictionary as: "(a) A set of staves sufficient in number for one hoghead, cask, barrel, and the like, trimmed and ready to be put together; (b) a set of boards for a sugar box." As used in Tariff Act 1890, par. 493, it covers a set of boards for a box for lemons or oranges. *United States v. Dominici* (U. S.) 78 Fed. 334, 335, 24 C. C. A. 116.

Shooks are boxes knocked down. They are pieces of wood which are cut and sawed into sizes and shapes by machinery to take in bundles either for shipment or manufacture into boxes. They are "articles of wood," within the meaning of Const. art. 207, exempting from taxation capital, machinery, and other property employed in the manufacture of articles of wood. *Washburn v. City of New Orleans*, 9 South. 37, 39, 43 La. Ann. 226.

**SHOOT.**

Shooting as accidental means of death, see "Accident—Accidental."

The words "shooting a person" mean that the person was hit by the substance with which the gun or pistol was loaded. *Voght v. State*, 43 N. E. 1049, 1051, 145 Ind. 12 (citing *Jarrell v. State*, 58 Ind. 293).

The word "shoot" is frequently—perhaps usually—employed in the sense of "kill."

Winn v. State, 52 N. W. 775, 778, 82 Wis. 571.

An indictment charging that the defendant "feloniously, willfully, and with malice aforethought did shoot said H." is sufficient, under Rev. Code 1855, p. 565, the words of which statute are "shoot at," inasmuch as the averment that defendant did shoot necessarily implied that he shot at. State v. Vaughn, 26 Mo. 29, 30.

To shoot with a loaded firearm is necessarily to wound, so that an indictment alleging that defendant did shoot a loaded firearm, etc., is sufficient under a statute making it an offense to wound another. State v. Hammerli, 58 Pac. 559, 560, 60 Kan. 860.

## SHOP.

See "Bucket Shop"; "Butcher Shop"; "Drinking Shop"; "Junk Shop"; "Liquor Shop"; "Machine Shop"; "Railroad Shop"; "Union Shop"; "Workshop."

Webster defines the word "shop" as follows: "(1) A building in which goods, wares, drugs, etc., are sold at retail; (2) a building in which mechanics work, and where they keep their manufactures for sale." State v. O'Connell, 28 Ind. 266, 267; Salomon v. Pioneer Co-operative Co., 21 Fla. 374, 384, 58 Am. Rep. 667.

Worcester defines a shop as a place, building, or room in which things are sold; a store. Salomon v. Pioneer Co-operative Co., 21 Fla. 374, 384, 58 Am. Rep. 667.

A shop is a building or a room or suite of rooms appropriated to the sale of wares at retail. State v. Sprague, 50 S. W. 901, 903, 149 Mo. 409.

A shop is a place where goods are sold by retail, and, in this country, shops for the sale of goods are frequently called "stores." Commonwealth v. Annis, 81 Mass. (15 Gray) 197, 199.

Commonly the word "shop" means a building inside of which a mechanic carries on his work. Chicago, R. I. & P. R. Co. v. Denver & G. R. Co. (U. S.) 45 Fed. 304, 314.

"Shop," as used in Code, § 985, par. 6, providing that whoever shall set fire to any church, office, shop, etc., shall be guilty of arson, means a house or building in which small quantities of goods, wares, or drugs, and the like, are sold, or in which mechanics labor, and sometimes keep their manufactures for sale. A charge that defendant set fire to a certain house used as a shop sufficiently charges that he set fire to a shop, since a house used for the purpose of a shop is a shop while so used. State v. Morgan, 3 S. E. 927, 928, 98 N. C. 641.

The word "shop," in 2 Hill's Code, p. 662, § 46, which defines burglary as an unlawful entry with intent to commit a felony of an office, shop, store, warehouse, malt-house, stillhouse, mill, factory, bank, church, schoolhouse, railroad car, barn, stable, ship, steamboat, and watercraft, or any building in which goods, merchandise, or valuable things are kept for use, sale, or deposit, means any shop, without regard whether any valuable things are kept therein or not, as the latter clause of the statute only refers to buildings not specifically designated. State v. Sufferin, 32 Pac. 1021, 6 Wash. 107.

### Banking house.

A banking house is a "shop," within the meaning of the statute which makes it a crime to break and enter in the nighttime the store, shop, or warehouse of another, where in goods, wares, or merchandise are deposited, with intent to commit theft or any crime. Wilson v. State, 24 Conn. 57, 70.

### Cabin of vessel.

The cabin of a vessel is not a "shop," within the meaning of the statute relative to burglary. Rex v. Humphrey (Conn.) 1 Root, 63.

The cabin of a vessel is a "shop," within the meaning of the statute punishing the burglary of a shop. State v. Carrier (Conn.) 5 Day, 131, 132.

### Inclosed park.

"Shop," as used in Gen. St. tit. 52, § 4, making it criminal to keep open on Sunday any shop, house, etc., in which liquor is reputed to be sold, does not include an inclosed park where such liquors are sold. State v. Barr, 39 Conn. 40, 44.

### As house.

See "House."

### Loan office.

"Shop," as used in Gen. St. c. 11, § 12, providing that all goods, wares, merchandise, and other stock in trade shall be taxed in those places where the owners hire or occupy manufactories, stores, shops, or wharves in its popular as well as legal meaning, is not confined to a workshop. It is a word of various significance, and "store" and "workshop" are both included in it, and do not exhaust its meaning. It includes any building or room used for carrying on any trade or business adapted to be carried on in a building or room and employing a stock in trade. The place of business of a foreign corporation, where it has personal property consisting of office furniture and fixtures, and where it keeps personal property pledged to it as collateral security for money lent it, which it sells when not redeemed, is a shop. Boston

Loan Co. v. City of Boston, 137 Mass. 332, 333.

### Millhouse.

Act Feb. 12, 1894, making it a crime to break and enter any office, shop, storehouse, warehouse, or banking house with intent to commit larceny, does not include a millhouse, and an indictment charging the breaking and entering of a millhouse with intent to commit larceny was insufficient. *Cool v. Commonwealth*, 26 S. E. 411, 412, 94 Va. 799.

### As public house or place.

See "Public House"; "Public Place."

### Stall distinguished.

"Shop" is an English word meaning the building itself, as distinguished from a place of sale which is open like a stall. *Richards v. Washington Fire & Marine Ins. Co.*, 27 N. W. 586, 588, 60 Mich. 420.

### Store synonymous.

"Shop" ordinarily means a place in which a mechanic pursues his trade, as a carpenter shop, blacksmith shop, or shoemaker's shop. It is not the legal equivalent of "store," as used in a statute making it an offense to keep a store open on Sunday. *Sparrenberger v. State*, 53 Ala. 481, 483, 25 Am. Rep. 643.

The words "store" and "shop" may be used interchangeably, so that a butcher shop is a "store," within the meaning of a statute prohibiting the keeping open of a store on Sunday. *Petty v. State*, 22 S. W. 654, 655, 58 Ark. 1.

Webster defines a shop to be a building in which goods, wares, drugs, etc., are sold by retail, and states that in the United States shops for the sale of goods of any kind, by wholesale or retail, are often called "stores." Indeed, in common parlance, in speaking of going to places known by no other name than "stores" to purchase goods, we speak of "going a shopping." So, an indictment for breaking and entering a store is good under a statute against breaking and entering a shop. *State v. Smith*, 5 La. Ann. 340, 341.

The building in which goods are kept and used for sale is a "shop," according to the definition of that word by lexicographers generally; and proof that the goods were stolen from a store is sufficient. *Commonwealth v. Riggs*, 80 Mass. (14 Gray) 376, 378, 77 Am. Dec. 333.

Though in conversation we speak of a "store" as a place where goods are exposed for sale, thus giving it the same meaning as "shop," still we recognize a difference between the meanings of these two words. Thus, we do not call a place where any mechanic art is carried on a "store," but give it the name of "shop." Nor do we always mean

a "store" when we use the word "shop." The two words not being synonymous in ordinary use, there is no reason to believe that they are used synonymously in a statute providing a punishment for breaking and entering any shop, store, etc.; and hence an indictment charging the breaking and entering of a "store," and stealing from the "shop" aforesaid, does not charge a theft from the place entered. *State v. Canney*, 19 N. H. 135, 137.

### Storehouse synonymous.

A "shop" is a building in which goods are offered openly for sale, and "storehouse" is often used synonymously with it. *State v. Sandy*, 25 N. C. 570, 573.

### Workshop.

"Shop" has been defined as a building in which goods, wares, or merchandise are sold at retail, or in which mechanics labor, and sometimes keep their manufactures for sale. In England the word "shop" is understood to be a structure or room in which goods are kept and sold at retail. In this country, however, such a building is usually called a "store," and universally so in the Western and Pacific coast states, where a shop is understood to be a building in which an artisan carries on his business, or laborers, workmen, or mechanics, by the use of tools or machinery, manufacture, alter, or repair articles of trade. The sale of goods so manufactured is not necessarily an ingredient in determining what constitutes a shop. In Massachusetts the words "store" and "shop" are held to be synonymous. *Commonwealth v. Riggs*, 80 Mass. (14 Gray) 376, 77 Am. Dec. 333. But in New Hampshire a different conclusion has been reached. *State v. Canney*, 19 N. H. 135. And hence, as used in Hill's Ann. Laws Or. § 1764, providing that if any person shall commit the crime of larceny in any dwelling house, store, "shop" or warehouse, such person shall be punished, etc., will be held to include a shop where a workman pursues his business, and keeps his tools or the products of his labor therein, notwithstanding such articles of trade may not be offered for sale or sold on the premises. *State v. Hanlon*, 48 Pac. 353, 354, 32 Or. 95.

"Shop," as used in 7 & 8 Geo. IV, c. 29, § 15, and 1 Vict. 90, providing a penalty for the breaking into of any "dwelling, shop, warehouse, or counting house," applies to a place for the sale of goods, and not a mere workshop. *Regina v. Sanders*, 9 Car. & P. 79.

### SHOP STEWARD.

A "shop steward" is an officer of a labor union, whose duty is to keep a record of all nonunion men on works where he is employed, and present their names at the branch meeting. It is also his duty to notify every



nonunion man to report at such meeting and take the obligation of the organization. *State v. Dyer*, 32 Atl. 814, 819, 67 Vt. 690.

### SHOPKEEPER.

A "shop keeper" differs from a merchant in that he is a small dealer. *Sparrenberger v. State*, 53 Ala. 481, 484, 25 Am. Rep. 643.

### SHOPS AND FACTORIES.

As used in certain sections of the Revised Statutes, providing for inspectors of shops and factories, the term "shops and factories" includes the following: Manufacturing, mechanical, electrical mercantile, art, laundering establishments, printing, telegraph and telephone offices, railroad depots, hotels, memorial buildings, tenement and apartment houses. *Bates' Ann. St. Ohio 1904*, § 4238-k.

### SHORE.

See "On Shore"; "Seashore."

The shore of the sea is the part of it covered by water, whether in winter or summer. *Sullivan v. Richardson*, 14 South. 692, 708, 33 Fla. 1.

#### As bank of nontidal river.

The term "shore" is inapplicable to a nontidal river. The word strictly means that space which is alternately covered and exposed by the flow and ebb of the tide, the space between ordinary high and low water mark. The shore is the ground between the ordinary high and low water marks—the flats—and a well-defined monument. *Montgomery v. Reed*, 69 Me. 510. A fresh-water river has banks instead of shores, but the word is sometimes used with reference to a nontidal river synonymously with "bank." *Morrison v. First Nat. Bank of Skowhegan*, 33 Atl. 782, 783, 88 Me. 155.

In *Starr v. Child* (N. Y.) 20 Wend. 149, it was held that "shore" and "bank," as applied to fresh-water rivers, were equivalent terms, though the term "shore" in its strict sense belongs to the ocean. *Bradford v. Cressey*, 45 Me. 9, 12.

#### Beach synonymous.

The word "shore" must be deemed to designate land washed by the sea and its waves, and to be synonymous with "beach." *Littlefield v. Littlefield*, 28 Me. (15 Shep.) 180.

The word "beach" is deemed the equivalent of the word "shore." *Storer v. Freeman*, 6 Mass. 435, 4 Am. Dec. 155. In the case of *Niles v. Patch*, 79 Mass. (13 Gray) 254, it is said that the word "'beach' is a term not more significant of a sea margin than 'shore,' and 'bounding on the shore' does not

include the 'shore.'" *Coburn v. San Mateo County* (U. S.) 75 Fed. 520, 531.

"Shore" is defined to be land on the margin of the sea or a lake or river; that space of land which is alternately covered and left dry by the rising and falling of the tide; the space between high and low water marks. It is synonymous with "beach." *Elliott v. Stewart*, 14 Pac. 416, 417, 15 Or. 259.

#### As high-water mark.

"By the common law a 'shore' of the sea, and, of course, all arms of the sea, is the land between the ordinary high and low water marks, the land over which the ordinary tide ebbs and flows. When, therefore, the sea or a bay is named as a boundary, the line of ordinary high-water mark is always intended where the common law prevails." *United States v. Pacheco*, 69 U. S. (2 Wall.) 587, 590, 17 L. Ed. 865.

When the terms "the sea" or "shore" are used in a deed to designate one boundary of a parcel conveyed, they describe that part of the beach on which the sea coincides with it, and include the beach to high-water mark. *Snow v. Mt. Desert Island Real Estate Co.*, 24 Atl. 429, 430, 84 Me. 14, 17 L. R. A. 280, 30 Am. St. Rep. 331.

The term "shore" in the civil law, which was controlling in Mexico at the time California belonged to the latter nation, was used to designate the extraordinary high-tide line; but where the decree of the circuit court confirming a claim of lands in California under a Mexican grant describes the land as bounded by the shore of the bay, and the description by courses and distances includes the land to ordinary high tide, the ordinary high-tide line will be the boundary, as words used in a common-law court decree must be given the common-law interpretation. *Valentine v. Sloss*, 37 Pac. 326, 327, 103 Cal. 215.

#### As land not an easement.

"Shores," as used in a deed purporting to pass "all those sea grounds, oyster layings, 'shores,' and fisheries," denotes that specific portion of the soil by which the sea is confined to certain limits. The term is wholly inapplicable to the grant of a privilege or easement. It of necessity comprehends the soil itself. *Scrutton v. Brown*, 4 Barn. & C. 485, 493.

#### As land adjoining water line.

A "shore" is the coast of the sea or the bank of a river; that part of the bed lying between the top of the bank and that part of the bed where the water actually flows. This word is applied primarily to the land contiguous to water, but it extends also to the ground near to the border of the sea or the lake, which is covered with water. The word

is also used to express the land near the border of the sea or of a great lake to an indefinite extent, as when we say a town stands on the shore. We do not apply the word to the land contiguous to a small stream. *Harlan & Hollingsworth Co. v. Paschall*, 5 Del. Ch. 435, 463.

In the commonly accepted use of the word, the shore of a river is the land adjacent to the water line, and is applied in the same general sense in which the same term is popularly applied to the land adjacent to the water of an inland sea or to one of the Great American Lakes. *Lacy v. Green*, 84 Pa. 514, 519.

As used in the certificate of a tunnel company providing that the westerly terminus of the tunnel should be on the western "shore" of the Hudson river, and within or near Jersey City or Hoboken, "shore" is not to be construed in its strictest sense as meaning the land between the limits of ordinary high and low water, but in its more extended and popular sense. In the latter signification of the word a city is built on the "shore" of a river, etc. *Morris & E. R. Co. v. Hudson Tunnel R. Co.*, 38 N. J. Law (9 Vroom) 548, 563.

"Shore," as used with relation to conveyances of land bordering on tidal waters, means that portion of the land at the water's edge which is daily covered and daily left bare by the rising and falling of the tides. As applied to inland waters, the term cannot be so exactly defined, but with relation to lakes and rivers means the land adjacent thereto. Where a deed describes one boundary as the "shore" of the lake, the term does not create a boundary upon the lake itself, or the waters thereof, but such a boundary is land, and not water, and does not confer riparian rights. *Axline v. Shaw*, 17 South. 411, 413, 35 Fla. 805, 28 L. R. A. 391.

#### **As land between bank and low-water mark.**

The "shore" of a stream is the pebbly, sandy, or rocky space between the bank and low-water mark. *McCullough v. Wainright*, 14 Pa. (2 Harris) 171, 174.

#### **As land between high and low water.**

The "shore" is that ground that is between the ordinary high-water and low-water mark. *Shively v. Bowliby*, 14 Sup. Ct. 548, 552, 152 U. S. 1, 38 L. Ed. 331; *Andrus v. Knot*, 8 Pac. 763, 12 Or. 501; *Dana v. Jackson St. Wharf Co.*, 31 Cal. 118, 122, 89 Am. Dec. 164; *Mather v. Chapman*, 40 Conn. 382, 400, 16 Am. Rep. 46; *Littlefield v. Littlefield*, 28 Me. (15 Shep.) 180, 184; *Montgomery v. Reed*, 69 Me. 510, 514; *Abbott v. Treat*, 3 Atl. 44, 45, 78 Me. 121; *Gerrish v. Proprietors of Union Wharf*, 26 Me. (13 Shep.) 384, 396, 46 Am. Dec. 568; *Pike v. Munroe*, 36 Me. 309, 313, 58 Am. Dec. 751; *Dunton v. Parker*, 54 Atl. 1115, 1118, 97 Me. 461; *Sullivan Timber Co.*

*v. City of Mobile*, 110 Fed. 186, 196; *Morris Canal & Banking Co. v. Brown*, 27 N. J. Law (3 Dutch.) 13, 17; *Doane v. Willcutt*, 71 Mass. (5 Gray) 328, 335, 66 Am. Dec. 369; *The Mayor of Mobile v. Eslava* (Ala.) 9 Port. 577, 598, 603, 33 Am. Dec. 325; *Gen. St. N. J.* 1895, p. 3756, § 11; *French v. Bankhead* (Va.) 11 Grat. 136, 160; *Elliott v. Stewart*, 14 Pac. 416, 417, 15 Or. 259; *Bell v. Gough*, 23 N. J. Law (3 Zab.) 624, 683; *Oakes v. De Lancey*, 24 N. Y. Supp. 539, 540, 71 Hun, 49; *McBurney v. Young*, 32 Atl. 492, 67 Vt. 574, 29 L. R. A. 539; *Lorman v. Benson*, 8 Mich. 18, 27, 77 Am. Dec. 435.

The shore is the space between the margin of the water at a low stage and the banks which contain it at its greatest flow. *Thomas v. Hatch* (U. S.) 23 Fed. Cas. 946; *Howard v. Ingersoll*, 54 U. S. (13 How.) 381, 391, 14 L. Ed. 189; *State of Alabama v. State of Georgia*, 64 U. S. (23 How.) 505, 513, 16 L. Ed. 556.

The "shore" of navigable rivers and arms of the sea where the tide ebbs and flows includes all between high and low water mark, and is a part of the sovereignty, and belongs to the state, and not to the riparian owner; and therefore a riparian owner, by filling up in front of his premises, does not acquire title to the land so filled up. *Gough v. Bell*, 21 N. J. Law (1 Zab.) 156, 157.

Shore is the territory lying between high and low water mark. When the term "shore" is used to designate a line in a conveyance, unexplained by circumstances, it may be ambiguous, leaving in doubt whether the sea side or the land side of the territory lying between high and low water mark is intended. *Doane v. Willcutt*, 71 Mass. (5 Gray) 328, 335, 66 Am. Dec. 369.

Shore is that part of the land covered by water in its greatest ordinary flux—the ports, bays, roadsteads, and salt marshes. *United Land Ass'n v. Knight* (Cal.) 23 Pac. 267, 270.

Where the word "shore" is used to designate the boundary of land described as bounded by the shore of the ocean, it will be understood to designate the point to which the tide usually flows. As the tide ebbs and flows, at short and regular recurring periods, to the same points, a portion of the shore is regularly and alternatively sea and dry land, and this, being unfit for cultivation or other private use, is held not to be the subject of private ownership, but belongs to the public. When an adjacent owner's land is bounded by the sea or one of its bays, the line to which the water may be driven by storms or unusually high tides, is not adopted as the boundary. *Seaman v. Smith*, 24 Ill. 521, 524.

"The rule of the civil law made the shore of the ocean extend to the line of the highest tide in winter." *City of Galveston v. Menard*, 23 Tex. 349-399.

**As land washed by the sea.**

In the case of *Storer v. Freeman*, 6 Mass. 435, 4 Am. Dec. 155, it was said that the "shore" cannot be construed as including any ground always covered by the sea, for then it would have no definite limit on the seaboard; neither could it include any part of the land for the same reason. The word denotes lands washed by the sea. *Trustees of Town of East Hampton v. Kirk*, 68 N. Y. 459, 463 (citing *Littlefield v. Littlefield*, 28 Me. [15 Shep.] 180; *Phillips v. Rhodes*, 48 Mass. [7 Metc.] 322; *Cutts v. Hussey*, 15 Me. [3 Shep.] 237).

**As low-water mark.**

The term includes a strip of land lying between the high and low water mark, and, when the words of the grant are limited by the shore conveyed, any qualifying words to indicate whether the inner or outer line of the shore was intended within the rule of construction would limit the grant by the one shore line, but where there are words in the grant indicating the different intention, such words, together with corroborating circumstances, will be construed as extending the grant to the outer shore line or low-water mark. *Maynard v. Puget Sound Nat. Bank of Seattle*, 64 Pac. 754, 755, 24 Wash. 455.

In its ordinary sense "shore" signifies the land that is periodically covered and uncovered by the tide, but it is sometimes applied to a river or pond as synonymous with "bank." In the absence of any qualification, a grant bounded by the "shore" of a river, when the grantor is the owner of the river, conveys the land up to the lowest point of the shore at any time, in order that the grantee may have at all times access to the stream by which the land is bounded. *Freeman v. Bellegarde*, 41 Pac. 289, 291, 108 Cal. 179, 49 Am. St. Rep. 76.

**As inapplicable to river.**

A river in which the tide does not ebb and flow has no "shores," in the legal sense of the term. *Child v. Starr* (N. Y.) 4 Hill, 369, 375.

The word "shore," in the legal sense, means the margin between high and low tide. The Ohio river is a great navigable boundary between states, and the public have all the rights that by law appertain to public rivers as against the riparian owner; but there is no shore, in the legal sense of that term, the title to which is good. The banks belong to the riparian owner, and he owns an absolute fee down to low-water mark. *Bainbridge v. Sherlock*, 29 Ind. 364, 367, 95 Am. Dec. 644.

**SHORE LINE.**

The term "shore line" in the act authorizing the owners of lands upon tide waters

to build wharfs in front of the same shall be construed to mean the edge of the water at ordinary high water. Gen. St. N. J. 1895, p. 3756, § 11; *Morris Canal & Banking Co. v. Brown*, 27 N. J. Law (3 Dutch.) 13, 17.

**SHORE OWNER.**

The term "shore owner" in the act authorizing owners of land upon tide waters to build wharfs in front of same shall be construed to mean the owner of the lands above and adjoining the shore line. Gen. St. N. J. 1895, p. 3756, § 11; *Morris Canal & Banking Co. v. Brown*, 27 N. J. Law (3 Dutch.) 13, 17.

**SHORT.**

Every merchant who sells you something not yet in his stock, but which he undertakes to get for you, is selling "short" in the language of the stock market. In re *Taylor & Co.'s Estate*, 43 Atl. 973, 974, 192 Pa. 304, 73 Am. St. Rep. 812.

The term "sold short," in the language of the board of trade, indicates the sale of grain that the seller is not possessed of and has no contract by which he is entitled to such grain. *Watte v. Costello*, 40 Ill. App. 307, 311.

A contract by a banker and broker to sell a certain number of dollars worth of gold "short" at a certain price, means that the seller did not have the gold, but expected to buy it at a lower price than that for which he sold. *Appleman v. Fisher*, 34 Md. 540, 548.

A short transaction in relation to stocks is a sale of stock before purchase, usually with a view of purchasing at a future time, at a lower price, for delivery. *Baldwin v. Flagg*, 36 N. J. Eq. (9 Stew.) 48, 57.

A sale of stock short means a sale of stock which the seller does not at the time possess, but which, by the future date or time agreed upon for its delivery to the purchaser under the terms of the contract, the seller must in some way acquire for the purpose of such delivery. *Boyle v. Henning* (U. S.) 121 Fed. 376, 380.

**SHORT BLAST.**

The words "short blast," as used in article 28 of the international rules for preventing collisions at sea, shall mean a blast of about one second's duration. U. S. Comp. St. 1901, p. 2871.

**SHORT DISTANCE.**

It cannot be presumed that the term "short distance," in an allegation that defendant was carrying on a certain trade

within a short distance of the place where plaintiff's business was located, necessarily meant a distance of less than 20 miles. *Brooker v. Cooper*, 3 Exch. 112, 114.

### SHORT ENTRY.

"The custom of bankers in London, on receiving bills for collection, was to enter them immediately in their customer's accounts, but never to carry out the proceeds in the column to their credit until actually collected (*Giles v. Perkins*, 9 East, 12; *Ex parte Thompson*, 1 Mont. & M. 102, 110); and this was called a 'short entry,' or 'entering short.' Such bills continued the property of the customer, unless the contrary was to be inferred from special facts. Country bankers throughout England generally credited to their customers at once all bills considered to be good." *Blaine v. Bourne*, 11 R. L. 119, 121, 23 Am. Rep. 429.

### SHORT RATES.

A fire policy authorizing the assured to cancel the policy, but providing that the company should retain "short rates," and all expenses incurred in taking the risk on the cancellation thereof, should be construed to mean premium or premiums at short time rates. *Burlington Ins. Co. v. McLeod*, 8 Pac. 124, 126, 34 Kan. 189.

### SHORT SHIPPED.

A bill of lading providing for a delivery of iron in the following form, "4,264 bars of iron, 131 bars short shipped," meant that this was a deduction to be made from the number 4,264, previously stated. *Abbott v. National S. S. Co.* (U. S.) 33 Fed. 895, 896.

### SHORT STATEMENT.

By "short statement," as used in a provision punishing the failure to enter in a record book a short statement of each acknowledgment or proof taken by any officer authorized to take acknowledgments or proofs of instruments, is meant that such statement shall recite the true date on which such acknowledgment or proofs were taken, the name of the grantor and grantee of such instrument, its date, if proved by a subscribing witness, the name of the witness, the known or alleged residence of the witness, and whether personally known or unknown to the officer; if personally unknown, this fact shall be stated, and by whom such person was introduced to the officer, if by any one, and the known or alleged residence of such person. Such statement shall also recite, if the instrument is acknowledged by the grantor, his then place of residence, if known to the officer; if unknown, his alleged residence, and whether such grantor is personally known to the officer; if person-

ally unknown, by whom such grantor was introduced, if by any one, and his place of residence. If land is conveyed or charged by the instrument, the name of the original grantee shall be mentioned, and the county where the same is situated. Pen. Code Tex. 1895, art. 235.

### SHORT SWINGS.

The term "short swings" is used in the postal service to designate intervals of short duration between the close of one mail delivery by carrier and the commencement of the next subsequent delivery, such interval being the carrier's own time, for which he is entitled to receive no compensation. *King v. United States*, 32 Ct. Cl. 234, 238.

### SHORT TIME.

Where a real estate owner authorized his brokers to place certain lots on the market for a price named only for "a short time," such provision did not limit their authority to sell to any definite period, and, they having sold to a purchaser, at the price fixed by the owner, within two weeks, no notice of change having been given by the owner, he was liable for their commission on refusing to complete the sale on the ground that the lots had increased in value and had been withdrawn from the market. *Smith v. Fairchild*, 4 Pac. 757, 7 Colo. 510.

Failure to sue within ten months is not suing in a "short time," within the meaning of the contract by which a party agreed to sue a person in a short time, for it was more than a reasonable time for that purpose. *Murry v. Smith*, 8 N. C. 41, 44.

### SHORT YEARLING.

In stockmen's parlance, cattle about proximately near one year old are called "short yearlings." *Sparks v. Deposit Bank* (Ky.) 74 S. W. 185.

### SHORTAGE.

Shortage is any deficiency in a quantity warranted. *Parker v. Barlow*, 21 S. E. 213, 215, 93 Ga. 700.

The term "shortage," used in charter parties, may be used and is intended to apply to either short loading or short delivery. *Otis Mfg. Co. v. The Ira B. Ellems* (U. S.) 50 Fed. 934, 940, 2 C. C. A. 85.

### SHORTEST TERM.

See "Patent Having Shortest Term."

### SHORTLY.

The statement that memoranda are inadmissible to refresh the memory of a wit-

ness unless reduced to writing "shortly after the time of the transaction" about which witness is testifying, has apparently a very unsettled meaning. In *Wood v. Cooper*, 1 Car. & K. 645, 646, a witness was allowed to look at his examination before commissioners in bankruptcy, signed by him, given within a fortnight of the time of the happening of certain occurrences, and when the facts were fresh in his memory. So, in *State v. Colwell*, 3 R. I. 132, a witness was allowed to refer to a memorandum made a day or two after a previous trial, when an interval of about eight days had elapsed from the time when the occurrences transpired concerning which the witness gave testimony. In *Billingslea v. State*, 85 Ala. 323, 5 South. 137, it was held proper to allow a witness to refresh his recollection by resort to the minutes of statements made to a grand jury within a week after the occurrence about which he was being interrogated. In *Spring Garden Mut. Ins. Co. v. Evans*, 15 Md. 54, 74 Am. Dec. 535, it was held that a witness who, five months after the occurrence of certain facts, and at the request of a party interested, made a statement in writing and swore to it, could not be allowed to testify to his belief in its correctness. *Putnam v. United States*, 16 Sup. Ct. 923, 927, 162 U. S. 687, 40 L. Ed. 1118.

## SHOTGUN BARRELS.

Gun barrels made under the Whitworth patent process, and shown to have been subjected to a hammering process in the forging, are admissible free of duty under paragraph 614, Tariff Act, Aug. 28, 1894, c. 349, § 2, Free List, 28 Stat. 542, as shotgun barrels, forged, rough bored, and are not dutiable under section 1 of said act, Schedule C, par. 177, 28 Stat. 520, as manufactured articles or wares not specially provided for, composed of metal. *United States v. Baldwin* (U. S.) 125 Fed. 158.

## SHOULD.

### Command implied.

The use of the word "should" instead of the word "may" in the part of the charge which tells the jury that they "should" consider the interest the witness has, etc., is objectionable as in some measure an invasion of the province of the jury; the word "should" there meaning more than the word "may" in its permissive sense. *Lynch v. Bates*, 38 N. E. 806, 807, 139 Ind. 206.

"Should," as used in an instruction that if the jury believed that any witness had made statements out of court materially different from those made by him on the stand, then the jury should consider these facts in estimating the weight which ought to be

given the testimony, should not be construed as a word of too imperative a character, so as to invade the province of the jury as to the weight to be given to evidence; though the presumable form, such as "it is the duty of," or "it is the province of the jury," or "the jury ought to," or "the jury may," consider it, etc., is preferable in such connection. *Smith v. State*, 41 N. E. 595, 596, 142 Ind. 288.

### Duty implied.

"Should," as used in a requested instruction in an action against a railroad company for injuries to an employé that, even if the switch target was insufficient, ~~and~~ from the deceased's running so many years past it while in this condition, he knew, or "should" have known, of its defective condition, he is held in law to have assumed the risk of its insufficiency, and the defendant in that case is relieved from responsibility for it, implies the performance of some obligation or duty owing by the deceased to his employer; yet the degree of care with which that obligation or duty is by law required to be performed is not a necessary implication therefrom. *Durand v. New York & L. E. R. Co.*, 48 Atl. 1013, 1015, 65 N. J. Law, 658.

### As entitled.

"Should," as used in an affidavit of attachment stating that the plaintiff "should recover" may be merely the expression of the affiant's opinion, and hence is not of the same force that the plaintiff is "entitled" to recover, and the affidavit is insufficient, the word "entitled" expressing a legal ground for such recovery. *Sommers v. Allen*, 28 S. E. 787, 788, 44 W. Va. 120.

### As relating to future.

A statement by one that another to whom he felt himself indebted and under obligations "should be secured," and which was made subsequent to his execution of a writing in which he acknowledged an indebtedness of a certain amount to the person to whom he felt under obligations, should not be construed as having reference to a future act, but to the writing. *Toner v. Taggart* (Pa.) 5 Bin. 490, 496.

### As might.

It is not error to use the word "should" instead of the word "might" in an instruction that the jury "should" take into consideration the fact, as effecting the credibility of the defendant as a witness, that he is the accused party on trial. *State v. Renfrow*, 20 S. W. 299, 301, 111 Mo. 589.

### As ought.

A statement in a petition that in the opinion of the petitioners an improvement "should be made" is not the same as a state-

ment that in the opinion of the petitioner the public interests "require the improvement to be made." *Godchaux v. Carpenter*, 14 Pac. 140, 142, 19 Nev. 415.

#### **Promise implied.**

An obligation reciting that one of the obligors had conveyed to the obligee a house and land in payment for the debt due from the obligor, and that, it being uncertain whether the premises conveyed were equal in value to the debt which was canceled when the deed was executed, it was agreed that the house and land "should," as soon as convenient, "be appraised" by three disinterested men, is equal to a covenant that the appraisement should take place, or at least that it should not be prevented by the refusal on the part of the obligors to appoint an appraiser, which appraisement should take place within a reasonable time. *Eaton v. Strong*, 7 Mass. 312.

#### **As would.**

The word "should," as used in defining the degree of care required in certain circumstances to be such as men of ordinary prudence and caution "should" have exercised under similar circumstances, imports the same meaning as the word "would," the best authorities using them interchangeably. The measure of care exacted is in accordance with what prudent and cautious men usually do in like circumstances, and upon failure to do which they are no longer entitled to be called prudent and cautious. Hence it may be said that they would or would not do something which the particular exigency required. *Blyth v. Birmingham Waterworks Co.*, 11 Exch. 781, 784 (cited in *Shear. & R. Neg.* § 1).

## **SHOW.**

#### **As prove.**

"Show" means to make clear or apparent, as by evidence, testimony, or reasoning; to prove (*Coyle v. Commonwealth*, 104 Pa. 133), and is so used in *St. Okl.* 1893, § 5138, providing that, if it be "shown" to the court by the affidavit of the accused that he cannot have a fair and impartial trial, etc., a change of judge shall be ordered. *Cox v. United States*, 50 Pac. 175, 178, 5 Okl. 701.

"Showing" a case to be within the purview of a statute consists of a disclosure of the facts which prove it within such statute. *Spalding v. Spalding* (N. Y.) 3 How. Prac. 297, 301.

"Showing," as used in *Rev. St.* § 2870, authorizing an attachment on the filing of the affidavit of plaintiff showing certain facts, is not synonymous with to "state" or "allege," but requires that the plaintiff shall exhibit a good reason for his belief, or shall make ap-

parent or clear by affidavit that he has good reason to believe the alleged facts. *First Nat. Bank v. Swan*, 23 Pac. 743, 746, 3 Wyo. 356.

#### **As represent.**

As used in statutes, § 5138, as amended by *Laws* 1895, p. 198, authorizing a change of venue if it be shown to the court by the affidavit of the accused that it cannot have a fair and impartial trial, etc., "show" is synonymous with "represent," so that to show to the court means to represent to the court the facts as therein stated. *Lincoln v. Territory*, 58 Pac. 730, 731, 8 Okl. 546.

#### **State distinguished.**

"Show," as used in *Code*, § 182, requiring an affidavit to "show" that the property seized under execution was exempt from such seizure, means to prove or to manifest, and hence requires the affidavit to set out the facts which show that the property is exempt; and the word is not synonymous with "state," since stating is simply alleging, while showing consists in the disclosure of the facts that the property is exempt. *Spalding v. Spalding* (N. Y.) 3 How. Prac. 297, 301.

An information referred to the supporting affidavit, and alleged that an affidavit "showed to the court" that the defendant committed the offense. Held, that the term "shows to the court" was not synonymous with a direct allegation that the defendant had committed the offense, and was therefore insufficient. *Thomas v. State*, 12 Tex. App. 227, 228.

There is a material distinction between "showing" a fact and "stating" it. In the former case satisfactory proof may be required; in the latter the mere recital of the fact is sufficient. *Meadow Valley Min. Co. v. Dodds*, 7 Nev. 143, 148, 8 Am. Rep. 700.

#### **SHOW FORTH.**

*St.* 5 Eliz. c. 14, making it criminal to pronounce, publish, or "show forth in evidence" any false or forged deed as true, knowing the same to be forged, means a giving of the deed in evidence in a court of justice, and is altogether a different thing from the mere exhibition of it in pais. *State v. Britt*, 14 N. C. 122, 124.

#### **SHOWN.**

A good cause "shown," within *Rev. St.* p. 50, § 62, providing that a court may, on good cause shown, change the place of trial, when there is reason to believe that an impartial trial cannot be had in the county designated in the complaint, must be a statement of facts upon which the court is to determine whether a sufficient case is made.

**Kennon v. Gilmer**, 5 Pac. 847, 848, 5 Mont. 257, 51 Am. Rep. 45.

Code Pub. Gen. Laws, art. 75, § 64, Rev. Code, art. 64, § 45, providing that the court of the county in which lands lie, or, if situated in the city of Buffalo, the judge of the circuit or superior court, shall, on application in writing, to be verified by the affidavit of the purchaser or his attorney, unless good cause be shown to the contrary by the debtor or other person concerned, issue a writ in the nature of a writ of habere facias, etc., means not only an objection in writing, but an answer in solemn form, according to the usages and practices of the court in which the proceedings are pending, under the sanction of an oath, and allegations of the petition so that the court may have some warrant for withholding the relief it has commenced to give. It implies also not only averments, but evidence to sustain them, constituting good cause to the contrary. **Schaefer v. Amicable Permanent Land & Loan Co. of Baltimore City**, 53 Md. 83, 88.

Gen. St. 1878, c. 66, § 125, authorizing the district court to set aside the determination of a court commissioner in certain matters on good cause "shown," does not mean that on reading the certified statement of the testimony, and without having seen the witness contending for the custody and care of an infant of tender years, the judge may be of the opinion that a reversal of the decision of the officer who heard the testimony and saw the parties would better serve the interests of the infant, and be more just. **State v. Bechdel**, 37 N. W. 338, 339, 38 Minn. 278.

2 Sayles' Civ. St. art. 4258a, § 3, provides that any railroad company, its officers, agents, or employes, that shall refuse to deliver to the owner, agent, or consignee any freight, goods, wares, and merchandise of any kind or character whatever on payment or tender of the freight charges due as "shown by the bill of lading," shall render the railroad company liable to damages to an amount equal to the freight for every day the goods are held after payment or tender of the charges due "as shown by the bill of lading." A shipper shipped goods at a certain through rate, stated in the bill of lading, in care of himself. Thereafter the carrier agreed to deliver to the shipper at an intermediate point, provided he would pay the local rate. The local rate was contained in the carrier's published tariff, and the bill of lading expressly stated it was made subject to such tariff. Held, that the freight demanded was "shown by the bill of lading" within the meaning of the statute, and that the carrier was, therefore, liable in damages for each day's retention of the goods after payment of the amount or tender of payment. **Atchison, T. & S. F. Ry. Co. v. Roberts**, 22 S. W. 183, 186, 3 Tex. Civ. App. 370.

## SHOWS.

A corporation which maintains a driving track with stands and other conveniences for horse racing, and annually devotes such track to horse racing, and keeps its grounds open for pay to the public, is not liable to a tax on its gross receipts, under section 108 of the act of Congress of June 20, 1864 (13 Stat. 276), as conducting a show which is open to the public for pay. In the statute the line is quite clearly defined between exhibitions which are intended by their projectors for profit, and usually managed as business enterprises, and those which are not followed as business avocations. Fairs, industrial exhibitions, and entertainments for charitable purposes are all of them shows which are open to the public for pay, but they are not named and are not within the description of the exhibitions taxed. They are as much so, however, as our horse races, baseball matches, or various other shows which might have been subjected to tax. **United States v. Buffalo Park** (U. S.) 24 Fed. Cas. 1299, 1300.

"Shows and amusements," as used in Rev. St. 1893, c. 24, art. 5, § 1, subd. 41, authorizing city councils to license and tax theatricals and other exhibitions, "shows and amusements," includes horse races held in an inclosure. **Webber v. City of Chicago**, 36 N. E. 70, 72, 148 Ill. 313.

## SHRUB.

"A shrub is a low, small plant, whose branches grow directly from the earth without any supporting trunk or stem," and does not include a young tree, for a tree is a woody plant, whose branches spring from and are supported upon a trunk or body. **Clay v. Postal Tel. Co.**, 11 South. 658, 659, 70 Miss. 406.

## SHUNPIKE.

A shunpike is a road intended to furnish a way of evading a tollgate, and constructed for that special purpose. (Elliott, Roads & S. p. 74.) The county road which would be of great convenience to people living between two existing roads, one of which is a turnpike, by shortening their line of travel to the town in which the roads terminated, and which would in time be of great utility, is not a shunpike, though the effect would be to decrease the business of the turnpike so as to entitle such company to enjoin its location. **Clarksville & R. Turnpike Co. v. City of Clarksville** (Tenn.) 36 S. W. 979, 982.

## SHUT DOWN.

A sawmill which has stopped running for the winter is "shut down" within the mean-

ing of such term in a provision of an insurance policy, though men are employed upon the premises, shipping lumber therefrom, and the machinery has not been dismantled and put in shape for the winter. To say that a sawmill is shut down when it is not running and is idle is to use an expression which is perfectly plain and easily understood by the average layman. It calls for no expert opinion. To assert the contrary is idle. It would be little more unreasonable to say that the train stopping at a station had not stopped because freight was being delivered from the cars. *McKenzie v. Scottish Union Nat. Ins. Co.*, 44 Pac. 922, 926, 112 Cal. 548.

## SHUT OFF.

The phrase "shut off," as used in the regulations prescribed by a gas company to the effect that every person employed by the company is directed to give to the office the earliest information possible of any gas leak, whether in the streets, buildings, or public lamps, and providing that such person shall be authorized to shut off the gas, if, in his judgment, it is necessary, and he must always give such instructions to the occupant of the premises as will, if followed by him, preserve the property from injury and protect the person and household from accident, if not construed as applying only to shutting off the gas from the separate houses, there was a latent ambiguity, which it was competent to remove by parol evidence. *Bartlett v. Boston Gas Light Co.*, 117 Mass. 533, 539, 19 Am. Rep. 421.

## SHYSTER.

See, also, "Pettifogging Shyster."

A shyster is defined as a trickish knave; one who carries on any business, especially a legal business, in a dishonest way (Webst.), and is capable of having reference to the professional character and standing of lawyer; and hence in an action for libeling a lawyer by calling him a shyster the issue whether plaintiff is a lawyer is a material one. *Gribble v. Pioneer Press Co.*, 25 N. W. 710, 34 Minn. 342.

## SICK.

"Sick," as used in an application to revive a life policy which states that the applicant has not been sick since his policy lapsed, is not to be construed "as importing an absolute freedom from any bodily ailment, but rather the freedom from such ailments as would ordinarily be called sickness." The fact that the applicant had a cold during such time did not render his statement false. *Metropolitan Life Ins. Co. v. McIlague*, 9

Atl. 706, 768, 49 N. J. Law (20 Vroom) 587, 60 Am. Rep. 661.

## SICKNESS.

Sickness or otherwise, see "Otherwise."

"Sickness" is defined to be the state of being sick or diseased; second, a disease or malady. *Kelly v. Ancient Order of Hibernians* (N. Y.) 9 Daly, 289, 291.

"Sickness" is an act of God, and one of the mutual hazards assumed by parties when they enter into the partnership relation, and which qualify the strict term of copartnership agreements. *Hart v. Myers*, 12 N. Y. Supp. 140, 141, 25 Abb. N. C. 478.

In denying specific performance of an agreement to take care and provide for complainant in case of her general debility or sickness it is said that the court could not "from time to time, determine what is meant by general debility and sickness." *Mowers v. Fogg*, 17 Atl. 296, 297, 45 N. J. Eq. (18 Stew.) 120.

"Sickness," as used in an application for a life policy stating that insured had no sickness, does not include any slight ill in no way seriously affecting the applicant's health or interfering with his usual avocations, but a temporary ailment in the nature of a headache or a cold may be of such a serious nature that it is a sickness within the meaning of such a representation. *Manhattan Life Ins. Co. v. Francisco*, 84 U. S. (17 Wall.) 672, 680, 21 L. Ed. 698.

## Blindness.

"Sickness," as used in 9 & 10 Vict. c. 66, § 4, requiring that justices in making an order for the removal of a pauper for "sickness" should state whether they were satisfied that the sickness would produce permanent disability, would include incurable blindness. *Regina v. Inhabitants of Bucknell*, 3 El. & Bl. 587, 595, 28 Eng. Law & Eq. 176, 182.

## Insanity.

As used in the constitution and by-laws of a mutual benefit association, providing that every member who from "sickness" or other disability is unable to follow his usual business or some other occupation whereby he may earn a livelihood for himself and family, shall be entitled to a certain sum as weekly benefits, should be construed to include insanity, for insanity is a sickness in some senses of the word. In *Kelly v. Ancient Order* (N. Y.) 9 Daly 292, Van Brunt says, "Insanity has always been considered a disease, and comes strictly within the meaning of the term 'sickness.'" *McCullough v. Expressman's Mut. Benefit Ass'n*, 19 Atl. 355, 366, 133 Pa. 142, 7 L. R. A. 210; *Robil-*



lard v. Société St. Jean Baptiste, 43 Atl. 635, 636, 21 R. I. 348, 45 L. R. A. 559, 79 Am. St. Rep. 806.

#### Pregnancy.

"Sickness," as used in 9 & 10 Vict. c. 66, § 4, providing that no warrant should be granted for the removal of any person becoming chargeable in respect of relief made necessary by "sickness" or accident, unless the justices granting the warrant shall state therein that they are satisfied that the sickness or accident would produce permanent disability, the word "sickness" meant "disease." An able-bodied woman who was pregnant was not sick within the meaning of the statute. *Regina v. Huddersfield*, 7 El. & Bl. 794, 798.

### SIDE.

See "North Side."

Webster defines "side" as the margin, edge, verge, or border of a surface; the bounding line of a geometrical figure, as the side of a field. *People v. Ohio & M. R. Co.*, 21 Ill. App. 23, 27.

The word "side" is often used to express the idea of a line, edge, or surface, but it is also sometimes used to express the half or part lying on one side or the other of a central line, either actual or imaginary, drawn through a body, and it depends entirely upon the context whether the one meaning or the other be intended. Thus, the right side of the body, used in contradistinction to the left side, clearly means right half. Webster, in his *Unabridged Dictionary*, gives as the fourth definition of the noun "side," one half of the body (human or otherwise), considered as opposite to the other half, especially one of the halves of the body lying on either side of the mesial plane; that is, of a plane passing from front to back through the spine. Hence a description of land as the north "side" of a lot is a sufficient description of the north half. *Winslow v. Cooper*, 104 Ill. 235, 243.

The word "side," as used in a description of land as "ten acres off of the west side of the northeast quarter," etc., means the west half of such quarter. *Hill v. Blackwelder*, 113 Ill. 283, 294.

#### Of building.

The line of a parcel of land to run parallel with and at a specified distance from the south "side" of a building should be measured from the corner board of that side, not from the outer edge of the eaves. The side of a building is defined as the doors or windows and as certain a point of departure. The space from the extreme end of the eaves to the earth presents no material sur-

face. *Center St. Church v. Machias Hotel Co.*, 51 Me. 413, 414.

A deed describing the northerly boundary of the premises conveyed as four feet north from the northerly "side" of the building now standing on the premises, means four feet from the extremest part of the building, and therefore from the eaves. *Millett v. Fowle*, 62 Mass. (8 Cush.) 150, 151.

#### Of lane.

A grant of land, one boundary of which is the "side of the lane," will not be construed to include a portion of the land, when the deed also grants an easement to the grantee in the lane. *Mott v. Mott*, 68 N. Y. 246, 255.

#### Of lode or vein.

Cod. St. p. 522, providing that the claims of certain ores shall consist of not more than 200 feet along the lead, lode, or ledge, as also "50 feet on each side" of said lead, lode, or ledge, for working purposes, means 50 feet from each wall or side of the lead, and not from the center thereof. *Foote v. National Min. Co.*, 2 Mont. 402, 404.

#### Of pond.

The term "side of the pond," when used to describe the boundary of land with reference to a pond caused by a dam across a fresh-water river, resulting in the river overflowing its banks in the spring, is to be construed as extending the boundary to the center of the pond. *Lowell v. Robinson*, 18 Me. 357, 361, 33 Am. Dec. 671.

#### Of railroad.

"Side," as used in Gen. St. 1878, c. 34, § 54 (Gen. St. 1894, § 2692), requiring railroad companies to build good and substantial fences on each side of such road, the word "side" is not used in a technical sense, and means that the fence must be built at the margin or border of the entire right of way, and therefore on the division line between such right of way and that of the adjoining proprietor. *Gould v. Great Northern Ry. Co.*, 65 N. W. 125, 127, 63 Minn. 37, 30 L. R. A. 590, 58 Am. St. Rep. 453 (citing *People v. Ohio & M. R. Co.*, 21 Ill. App. 23; *Wabash, St. L. & P. R. Co. v. Zeigler*, 108 Ill. 306; *Ohio & M. R. Co. v. People*, 121 Ill. 483, 13 N. E. 236).

Under a statute requiring railroads to erect fences on the sides of their roads, a fence erected on the exterior line of the right of way complied with the statute, though it was a crooked, or Virginia fence, and every alternate corner projected on to the adjoining owner. *Ferris v. Van Buskirk* (N. Y.) 18 Barb. 397, 399.

"Sides of the road," as used in Wag. St. p. 310, § 43, providing that it should be the

**duty of railroad companies to erect and maintain good and substantial fences on the "sides of the road"** where the same passes through, along, or adjoining inclosed or cultivated fields or uninclosed fields, means the vacant spaces on either side of the tracks, and not the dividing lines between the roads and the adjacent lands. The width of the road, with the length, constitutes the entire road, but the road itself consists of several parts—the roadbeds or tracks for the cars, and the unoccupied sides or spaces on either side of the track. The roadbed or tracks may be looked upon as the central part, and the vacant spaces as the sides, of the road. *Marshall v. St. Louis & I. M. R. Co.*, 51 Mo. 138, 139.

#### **Of road or street.**

Where a conveyance of land recites that the tract conveyed is bounded by the "side" of a certain street, it means that the grantee takes title to the center of the street if the grantor have title to such extent. *Cox v. Freedley*, 33 Pa. (9 Casey) 124, 127, 75 Am. Dec. 584.

The words "side of the road," as used in a deed conveying land described as situated in a certain village beginning on the "northeastern side of the new road," etc., together with the words "and running by said road to a stake," are not sufficient to overcome the presumption that a grant of land bounded on a highway carries the fee in the highway to the center. *Low v. Tibbetts*, 72 Me. 92, 93, 39 Am. Rep. 303.

A description of real estate fixing the starting point at the corner of a lot on the "east side" of a certain street means the margin or edge of the street. *Dale v. Travelers' Ins. Co.*, 89 Ind. 473, 475.

A grant of land described as bounded "by the side of" or "by the margin of" or "by the line" of a highway, excludes the soil of the highway. *Baltimore & O. R. Co. v. Gould*, 8 Atl. 754, 756, 67 Md. 60.

A description in a conveyance of a lot, describing one boundary as being the "side of a street," does not operate to convey to the center of the street.—*Graham v. Stern*, 64 N. Y. Supp. 728, 729, 51 App. Div. 406.

"Side," as used in a deed describing the land conveyed as bounded by the northeasterly "side" of a certain street, the whole of which street was on the grantor's land, together with the free and common use, right, liberty, and privilege of such street, passes the fee only to the side line of the street, with a right of way over the whole street. *Hobson v. City of Philadelphia*, 24 Atl. 1048, 1049, 150 Pa. 595.

The use of the words "side of road" in describing a boundary of land as running to the side of a certain road, thence along the side of the road, is to be construed as fixing

the boundary of the road at the side line and not the center line of the road. *Augustine v. Britt*, 15 Hun, 395, 398.

Where the words "side of a highway" are used to designate the boundary of land conveyed, they operate as fixing the boundary at the side of the road.—*De Peyster v. Mall*, 27 Hun, 439, 444.

The phrase "beginning at side of road" in a conveyance of real estate describing one boundary as beginning at the southerly side of a certain road, thence running easterly on said road, does not operate to make the boundary the side of the road, instead of the middle thereof. *O'Connell v. Bryant*, 121 Mass. 557.

Where one boundary of a tract of land conveyed is on a certain road, and the description gives the first call as beginning on the east side of a road, which road is in fact west of the land, but it also states that such point is at the northwest corner of the land of another directly opposite the point of beginning, and the land of the latter includes the fee to the center of the road, the conveyance operates to pass title to the center of the road, and not merely to the side thereof; and especially is this true when the road had been discontinued for a long time, and the premises conveyed have been treated by the respective holders as extending to the center of the road. *Pell v. Pell*, 65 App. Div. 388, 73 N. Y. Supp. 81, 83 (affirming *Pell v. Pell*, 71 N. Y. S. 1092, 1094, 35 Misc. Rep. 472).

Where, in a deed, the description of the land conveyed commenced "at a point on the east side of" a certain road, and, after describing the three lines, gives the last line as "along the east side of said road" a certain number of feet and in a specified direction to the place of beginning, the deed fails to convey any portion of the land forming the bed of the road. But where the legal road as laid out was four rods wide, but the road actually used and worked was only two rods wide, the description included the land to the side of the road as actually worked and used. *Blackman v. Riley*, 34 N. E. 214, 215, 138 N. Y. 318.

"Sides of road," as used in Gen. Turnpike Act, 9 Geo. IV, c. 77, § 5, authorizing turnpike trustees to build tollhouses and inclose gardens for them on the "sides of the turnpike road," limits such power to the inclosure of land on the side of the road over which the public has an easement for passage, and does not extend to land adjacent to the road over which the public has no easement, though the land be uninclosed. *Beckett v. Upton*, 5 El. & Bl. 629, 638.

#### **Of stream.**

A description in a deed reciting that the line runs down the middle of a stream in

which the tide ebbs and flows, thence across the stream to the upland on the southerly side, and thence on the southerly "side" of such stream, means the low-water mark. *Erskine v. Moulton*, 24 Atl. 841, 842, 84 Me. 243.

### SIDE LINES.

The "side lines" of a mining claim are those which measure the extent of the claim on each side of the middle of the vein at the surface. *Argentine Min. Co. v. Terrible Min. Co.*, 7 Sup. Ct. 1356, 1359, 122 U. S. 478, 30 L. Ed. 1140.

The side lines of a mining claim are not those which are designated as side lines upon the original plat of the claim, but when a mining claim crosses the course of the lode or vein, instead of being along the vein or lode, the side lines are those which measure the extent of the claim on each side of the middle of the vein at the surface. *Del Monte Min. & Mill. Co. v. Last Chance Min. & Mill. Co.*, 18 Sup. Ct. 895, 907, 171 U. S. 55, 43 L. Ed. 72.

The statute of 1872 gives to locators of mining claims the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and of all veins, lodes, and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically, although such veins, lodes, or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of such surface locations. These are their extralateral rights, which should neither be extended nor restricted by the courts. The only limit placed by the statute is that "their right of possession to such outside parts of such veins or ledges shall be confined to such portions thereof as lie between vertical planes drawn downward, as above described, through the end lines of their locations, so continued in their own direction that such planes will intersect such exterior parts of such veins or ledges." One general principle should pervade and control the various conditions found to exist in different locations, and its guiding star should be to preserve in all cases the essential right given by the statute to follow the lode upon its dip as well as upon the strike to so much thereof as its apex is found within the surface lines of the location. If the lode runs more nearly parallel with the end lines than with the side lines as marked on the ground as such, then the end lines of the location must be considered by the courts as the side lines meant by the statute. If the lode runs more nearly parallel with the side lines than the end lines, then the end lines as marked on the ground are considered by the court as the end lines of the location. Con-

solidated *Wyoming Gold Min. Co. v. Champion Min. Co.* (U. S.) 63 Fed. 540, 549.

The side lines of a road or railroad are the lines which include the territory covered by the road. Public roads and highways and railroads are regarded as having three lines, the side lines and the center line equidistant between the side lines. *Maynard v. Weeks*, 41 Vt. 617, 619.

### SIDE TRACK.

See, also, "Siding"; "Switch."

A "side track" of a railroad is a connection with the main road affording communication with market. *Southern Pine Fibre Co. v. North Augusta Land Co.* (U. S.) 50 Fed. 26, 27.

### SIDEWALK.

Sidewalk has a definite meaning. It is a way for foot passengers. *Salisbury v. Andrews*, 36 Mass. (19 Pick.) 250, 258.

A sidewalk is that part of a street which the municipal authorities have prepared for the use of pedestrians. *Kohlhof v. City of Chicago*, 61 N. E. 446, 192 Ill. 249, 85 Am. St. Rep. 335.

The term "sidewalk" denotes that portion of the highway which is set apart by dedication, ordinance, or otherwise for the use of pedestrians; but its use could not mislead a jury where the injury complained of was caused by a trench dug within a path or footway in common use by the public. *City of Ord v. Nash*, 69 N. W. 964, 965, 50 Neb. 335.

"Sidewalk," as used in Act March 21, 1885, conferring upon certain cities the power to build and maintain suitable pavement or "sidewalk" improvements, means the same as "pavement," which is defined as not being limited to uniformly arranged masses of solid material, as blocks of wood, brick, or stone, but may be as well formed of pebbles or gravel or other hard substances which will make a compact, even, hard way or floor. The word "sidewalk," when used to designate a part of the highway, means that part of the street intended only for pedestrians, and is thus distinguished from that part of the street set apart especially for vehicles and horsemen. *City of Little Rock v. Fitzgerald*, 28 S. W. 32, 33, 59 Ark. 494, 28 L. R. A. 496.

The word "sidewalk" of itself has no strict legal interpretation, and its meaning and import must be governed by facts showing the limits and extent of the same in the street where it is located. *Porter v. Waring*, 69 N. Y. 250, 253, 2 Abb. N. C. 230, 234.

The walk in front of a man's house, so far as the lot extends, but no farther, is deemed his sidewalk, and is required to be made and repaired by him; and if the lot be a corner lot he builds and keeps in repair the walk on the side so far as the lot extends, and no farther. *O'Neil v. City of Detroit*, 15 N. W. 48, 49, 50 Mich. 133.

A sidewalk does not necessarily consist of a walk made of boards, or a place paved or otherwise improved, for the use of foot passengers, but it may be a place set apart at the side of the street for the use of that portion of the public that travel on foot. *Oklahoma City v. Meyers*, 48 Pac. 552, 557, 4 Okl. 686.

The word "sidewalk," as used in this country, does not mean a walk or way constructed of any particular kind of material, or in any special manner, but ordinarily is used for the purpose of designating that part of the street of a municipality which has been set apart and used for pedestrians, as distinguished from that portion set apart and used for animals and vehicles. *Graham v. City of Albert Lea*, 50 N. W. 1108, 1109, 48 Minn. 201.

The term "sidewalk," as used in the section relating to the regulation of bicycle riding, shall mean any sidewalk laid out as such by a city, town, or borough, and any walk which is reserved by custom for the use of pedestrians, or which has been specially prepared for their use. It shall not include crosswalks, nor shall it include footpaths on portions of public highways outside of the thickly settled parts of cities, towns, and boroughs which are worn only by travel, and are not improved by such cities, towns, or boroughs, or by abutters. *Gen. St. Conn. 1902*, § 2061; *Rev. Laws Mass. 1902*, p. 531, c. 52, § 12.

The term "sidewalk," as used in the act regulating the use of highways, etc., shall mean all sidewalks laid out as such by the city, town, or fire district, or reserved by custom for the use of pedestrians, that are within the compact part of a city, village, or fire district. It shall not include cross walks or footpaths outside the compact part of towns and cities that are worn only by travel, and not included by towns or cities, nor shall it include any paths or walks that are now or may hereafter be built for the exclusive use of bicyclists. *Pub. St. N. H. 1901*, p. 256, c. 93, § 2.

#### Approach to bridge.

"Sidewalk," in a statute rendering municipal authorities liable for defective "sidewalk," includes an approach to a bridge of dirt, with a stone wall on each side, stringers laid on the dirt, and a plank walk laid on the stringers for foot passengers. *Saunders v. Gun Plains Tp.*, 42 N. W. 1088, 76 Mich. 182.

#### As a building.

As building, see "Building (In Lien Laws)."

#### Elevated walk.

A sidewalk is defined to be a raised way for foot passengers at the side of a street or road; a foot pavement. *Porter v. Waring* (N. Y.) 51 How. Prac. 295, 296.

A sidewalk is defined by Webster as a raised way for foot passengers at the side of a street or road; a foot pavement. And the fact that a board walk was elevated on trestlework did not make it any the less a sidewalk. Nor does the fact that it crosses a small stream of running water change its character. *Challiss v. Parker*, 11 Kan. 384, 391.

The word "sidewalk" has a well-understood meaning. We understand that a part of the street is meant thereby. It is the public way, generally raised, especially intended for pedestrians, and adapted to their use; usually constructed in this country as a part of a street at or along the side of the part thereof especially designed and constructed for the passage of vehicles and animals. And when a sidewalk is spoken of as being on a specific side of a designated street it is understood to be a part so reserved of that street at or along the specific side of the roadway. *Wabash R. Co. v. De Hart* (Ind.) 65 N. E. 192, 193 (citing *Town of Rose-dale v. Ferguson*, 3 Ind. App. 596, 30 N. E. 156; *City of Frankfort v. Coleman*, 19 Ind. App. 368, 49 N. E. 474, 65 Am. St. Rep. 412).

#### As a part of the street.

The sidewalk of a public street of a city is a part of the street. *Marini v. Graham*, 7 Pac. 442, 443, 67 Cal. 130.

The sidewalk is a part of a common highway, and no duty rests on the property owner to keep a sidewalk in repair. *Martino-vich v. Wooley*, 60 Pac. 760, 128 Cal. 141 (citing *Bonnet v. City and County of San Francisco*, 65 Cal. 231, 3 Pac. 815; *Ex parte Taylor*, 87 Cal. 94, 25 Pac. 258).

A sidewalk is simply a pavement, or something in the nature of a pavement, laid or constructed on the portion set apart for travelers on foot, and the portion occupied by the sidewalk is included in the word "street." *Board of Public Works v. Hayden*, 56 Pac. 201, 204, 13 Colo. App. 36 (citing *Challiss v. Parker*, 11 Kan. 384).

A sidewalk is a part of a street, and a city's authority over a street extends over the sidewalk as a part of the street. *City of Frankfort v. Coleman*, 49 N. E. 474, 475, 19 Ind. App. 368, 65 Am. St. Rep. 412; *People v. Meyer*, 56 N. Y. Supp. 1097, 1099, 26 Misc. Rep. 117.

The establishment of sidewalks is the act of the authorities; they, by ordinance, requiring along certain streets, on both sides, a certain width to be left, to be used as sidewalks for pedestrians. Vehicles drawn by four-footed animals are prohibited from the use of this space, but it is no less a part of the street as originally established; and therefore, in a grant by the Legislature of control over the streets of a city to the city authorities, control over the sidewalks passes to them, they being a part of the street. The charter of the city of Bloomington, giving control over the streets to the authorities of that city, also imposed upon them the duty of keeping them in repair, and, as sidewalks are a part of the streets, a like duty is imposed to keep them in repair. *City of Bloomington v. Bay*, 42 Ill. 503, 506, 507.

A public street is a public highway, and a sidewalk is a part of the street. Such highways belong from side to side and from end to end to the public, and there is no such thing as a rightful private, permanent use of a public highway. If one person can permanently use the highway for his private business purposes, so may all. Once the right is granted, there can be no distinction made, no line drawn. All persons may build their shops, exhibit and sell their wares, within the boundaries of a public highway. There is no right in any person to permanently appropriate to private use any part of a public street or alley. The court held that, where the defendant was occupying and maintaining on a sidewalk a building of a permanent nature, of the length of 23 feet, and of the width of 3 feet 11 inches and of the height of 7 feet, the sidewalk being 15 feet wide except where said building was situated, and there reduced by such building to the width of 11 feet, he was maintaining a public nuisance. *State v. Berdett*, 73 Ind. 185, 188, 194, 38 Am. Rep. 117.

A sidewalk is as much a part of the highway as the traveled wagonway is, and the word, as used in New York Penal Code, § 652, prohibiting any person from driving a bicycle on the sidewalk, means a sidewalk along a highway, and to convict it must be proved that the sidewalk is not on private property. *People v. Meyer*, 56 N. Y. Supp. 1097, 1099, 26 Misc. Rep. 117.

The word "sidewalk" has a well-understood meaning. It is the public way, generally somewhat raised, especially intended for pedestrians, and adapted to their use; usually constructed in this country as a part of a street, at or along the side of the part thereof especially designed and constructed for the vehicles and animals; there being often, if not generally, a gutter, also constituting a portion of the street, between such parts. And when a sidewalk is spoken

of as being on a specific side of a designated street it is to be understood to be a part so reserved on that side, at or along the specific side of the roadway. *Wabash R. Co. v. De Hart* (Ind.) 65 N. E. 192, 193.

Acts 1870, No. 244, creating a liability in favor of persons "sustaining bodily injury upon any of the public highways or streets in this state by reason of neglect to keep such public highways or streets and all bridges, crosswalks and culverts in good repair," does not apply to sidewalks. This statute was intended to distinguish between those portions of the streets which the city itself constructs and keeps in repair and that other portion, namely, sidewalks, which it compels property owners to build and keep in repair, rendering the city liable in one case and not in the other. Every crosswalk is in one sense a sidewalk, because it is an extension of the sidewalk proper across an intervening space; but it makes no difference whether it crosses a street or an alley—in each case it crosses a highway for the passage of teams, and is a part of the street, which the city itself builds and keeps in repair. *Pequignot v. City of Detroit* (U. S.) 16 Fed. 211, 212.

## SIDING.

See, also, "Side Track"; "Switch."

The words "sidings," "switches," and "turnouts," in relation to railroads, are of modern growth, and not only in popular use, but in the dictionaries, are treated as to some extent interchangeable. The only definition that Webster gives of "siding" is the turnout of a railroad, and "turnout" is defined as "a short side track on a railroad, which may be occupied by one train while another is passing on a main track; a siding." *City of Philadelphia v. River Front R. R. Co.*, 19 Atl. 356, 357, 133 Pa. 134.

By "blind siding" is meant a side track to a railroad where there is no telegraphic station. *Galveston, H. & S. A. R. Co. v. Brown* (Tex.) 59 S. W. 930, 932.

## SIGHT.

See "After Sight"; "In Sight."

A bill payable at so many days "sight" is to be counted so many days next after the bill shall be accepted, or else protested for nonacceptance, and not from the date of the bill, nor from the day that the same came to hand, or was privately exhibited to the party on whom it is drawn to be accepted, if he did not accept thereof, for the sight must appear in a legal way, which is approved either by the parties underwriting the bill, accepting thereof, or by protest

made for nonacceptance. *Campbell v. French*, 6 Term R. 200, 212.

## SIGN—SIGNATURE.

See "Countersign"; "Material Signature."

Webster defines "to sign" as to affix a signature to; to ratify by hand or seal; to subscribe in one's own handwriting; and "signature" as a sign, stamp, or mark impressed, especially the name of any person written with his own hand, employed to signify that the writing which precedes accords with his wishes or intentions; a signed manual. *Appeal of Knox's Estate*, 18 Atl. 1021, 1023, 131 Pa. 220, 6 L. R. A. 353, 17 Am. St. Rep. 798.

As defined by Bouvler, "signature" is understood as the art of putting down a man's name at the end of an instrument to attest its validity. *Wade v. State*, 2 S. W. 594, 22 Tex. App. 256.

Signature means a person's name as set down by himself. *Mills v. Howland*, 49 N. W. 413, 2 N. D. 30 (citing *And. Law Dict.*).

To "sign" a paper is to subscribe one's own name to it. The requirement that the passenger purchasing a return ticket should sign it contemplates that the purchaser will use his real name, not the name of another, nor only his given name. *Sinnott v. Louisville & N. R. Co.*, 56 S. W. 836, 838, 104 Tenn. 233.

Exactly what constitutes a "signing" has never been reduced to a judicial formula, but it has usually been regarded that whatever is intended as a signature is valid signing, no matter how imperfect or unfinished or fantastic or illegible or even false the separate characters or symbols used may be. *Sheehan v. Kearney* (Miss.) 21 South. 41, 42, 57 Am. St. Rep. 30 (citing *In re Plate's Estate*, 148 Pa. 55, 23 Atl. 1038, 33 Am. St. Rep. 805).

The word "sign" in the English statute of frauds means the making of some mark upon the paper so as to identify and give efficacy to it by some act, and not by words merely. *In re McElwaine's Will*, 18 N. J. Eq. (3 C. E. Green) 499, 503.

An Illinois statute requiring a collector's warrant to be "signed" by certain officers is complied with when the signatures of the officers appear upon the instrument, and the same is not vitiated where the word "countersign" appears before one of the signatures. *Gurnee v. City of Chicago*, 40 Ill. 165, 167.

A deed or other instrument may be said to be "signed" whenever the name of its maker is so written upon it as to evidence

his intention to give authenticity to it. At common law the seal was the sign, and a sealing was regarded as a signing, as the act evidencing the intention of a maker to give vitality to the instrument; and where a deed is wholly written by another at the grantor's request, and not subscribed by the grantor, his name only appearing in the granting clause, but it is acknowledged by him before the proper officer, it is signed so as to be valid and operative. *Newton v. Emerson*, 18 S. W. 348, 349, 66 Tex. 142.

St. 1897, c. 417, § 78, providing that any voter signing a nomination paper "shall sign the same in person," means that the voter shall sign with his own hand, or be present at the signing by another for him, and request that it be done. *Commonwealth v. Connelly*, 40 N. E. 862, 163 Mass. 539.

The phrase "did not sign," as used in a plea to an action on a note alleging that the party sued "did not sign" the note, is used in place of the more usual and more comprehensive phrase "did not make," and is a plea in bar, for it is a plea intended to deny the note sued on. *Holman v. Carhart*, 25 Ga. 608, 609.

The "signature" of a person on a paper is that person's own name written by him or by another with his authority. A railroad ticket requiring the signature of the original purchaser on the back thereof contemplates that the purchaser will use his real name, not the name of another, nor only his given name. *Sinnott v. Louisville & N. R. Co.*, 56 S. W. 836, 838, 104 Tenn. 233.

### As actual signing.

The word "signed," as used in the statute of wills (Act March 17, 1713-14), providing that all wills shall be made in writing, signed and published by the testator in the presence of three subscribing witnesses, means an actual signing by the testator in the presence of the witnesses; and a mere acknowledgment, in their presence, of his signing a will is insufficient. *Mickle v. Matlack*, 17 N. J. Law (2 Har.) 86, 87.

Where the statute to prevent frauds requires the contract to be put in writing and "signed by the party" to be charged, a resolution, ordinance, or vote of a corporation accepting or adopting a lease or contract tendered does not constitute a "signing" within the words or intent of the statute. *Wade v. City of Newbern*, 77 N. C. 460, 465.

### Autograph synonymous.

A signature is the sign on an instrument or document by any mark in token of knowledge, approval, acceptance, or obligation, and by long custom and usage has come generally to mean the name of a person written by himself, and thus to be nearly an exact

synonym of autograph; but such signification is not inherent in the word itself. In *re Walker's Estate*, 42 Puc. 815, 816, 110 Cal. 387, 30 L. R. A. 460, 52 Am. St. Rep. 104.

#### **Execute synonymous.**

See "Execute."

#### **Indorsement to note.**

An indorsement to a negotiable promissory note is a signature to a written instrument within an act making it criminal to obtain the signature of any person to a written instrument by false token or pretense. *People v. Chapman* (N. Y.) 4 Parker, Cr. R. 56, 58.

#### **As requiring intent.**

The actual signing of a written instrument in a legal sense may imply more than the clerical act of writing the name. The element of intent may enter into the act, not the intent merely to place the name on the paper, but to affix it to the instrument in token of an intention to be bound by its conditions; for a signing consists of both the act of writing a person's name and the intention in doing this to execute, authenticate, or to sign as a witness. In an action to recover from an alleged surety on an indemnity bond, defendant, as between the original parties, is not estopped from claiming that he did not execute the instrument as a surety, but that he inadvertently placed his signature thereto under the name of the obligor instead of the proper place for a witness to sign, which he intended merely to be. *United States Fidelity & Guaranty Co. v. Siegmann*, 91 N. W. 473, 474, 87 Minn. 175.

A signature, according to Greenleaf, consists both of the act of writing the party's name and of the intention of thereby finally authenticating the instrument. *Vines v. Clingfost*, 21 Ark. 309, 312; *Watson v. Pipes*, 32 Miss. 451, 466; *Board of Trustees Seventh St. Colored M. E. Church v. Campbell*, 21 South. 184, 187, 48 La. Ann. 1543; *Davis v. Sanders*, 19 S. E. 138, 139, 40 S. C. 507.

#### **Mark.**

The term "signature" includes the mark of a person who is unable to write his name. *Zacharie v. Franklin*, 37 U. S. (12 Pet.) 151, 160, 9 L. Ed. 1035; *Vanover v. Murphy's Adm'r* (Ky.) 15 S. W. 61, 62; *Terry v. Johnson*, 60 S. W. 300, 301, 109 Ky. 589; *Gillis v. Gillis*, 23 S. E. 107, 108, 96 Ga. 1, 30 L. R. A. 143, 51 Am. St. Rep. 121.

To constitute a "signature" it is not necessary that the party should write his entire name, his mark being held sufficient; and if the signature be made by another guiding his hand with his consent it is held sufficient. *Board of Trustees Seventh St. Colored M. E. Church v. Campbell*, 21 South.

184, 187, 48 La. Ann. 1543; *Watson v. Pipes*, 32 Miss. 451, 466. Even though he was able to write. *Vines v. Clingfost*, 21 Ark. 309, 312.

A person is said to "sign" a document when he writes or marks something on it in token of his intention to be bound by its contents. In the case of an ordinary person, "signature" is commonly used as equivalent to "subscription," but any mark is sufficient if it shows an intention to be bound by the document. Illiterate persons commonly sign by making a cross. *Board of Trustees Seventh St. Colored M. E. Church v. Campbell*, 21 South. 184, 187, 48 La. Ann. 1543 (citing Sweet, Law Dict.).

The word "signed," as used in the statute of frauds, is satisfied by the making of a mark, and it was not necessary to prove that the party could not write his name at the time. *Baker v. Dening*, 8 Adol. & El. 94.

A statutory requirement that a "signature" shall always be in the proper handwriting of the person required by law to sign does not require the actual writing of the signer's full name by himself, but one person may sign for another person, and, if the party required to sign cannot write, a signature by mark is sufficient. *Sheehan v. Kearney* (Miss.) 21 South. 41, 42, 57 Am. St. Rep. 39.

If a testator has his hand guided in making his mark, it is a sufficient signature within the statute of frauds. *Wilson v. Beddard*, 12 Sim. 28, 83.

Under Code, § 1, defining a "signature or subscription" to "include a mark, when a person cannot write his name, his name being written near it, and witnessed by a person who writes his own name as a witness," and section 1731, requiring a chattel mortgage to be in writing, and subscribed by the mortgagor, a mortgage of personal property by one who is unable to write his name is subscribed by the mortgagor only when he has made his mark near his name, subscribed for him, and this making of his mark has been witnessed by a person who can and does write "his own name as a witness." *Houston v. State*, 21 South. 813, 814, 114 Ala. 17.

Under Pol. Code 1895, § 5, a "signature" includes a mark, even though the mark is not between the given name and the surname. *Horton v. Murden*, 43 S. E. 786, 787, 117 Ga. 72.

Signatures by marks are treated as original signatures, and are a signing or subscription within the terms of statutes regulating the making of deeds, wills, or written instruments. *Robins v. Coryell* (N. Y.) 27 Barb. 556, 560.

Where a witness to a will is unable to write, the mark of that witness is his signature. *Gillis v. Gillis*, 23 S. E. 107, 108, 96 Ga. 1, 30 L. R. A. 143, 51 Am. St. Rep. 121.

By Code, § 50, the word "signature" includes a mark. *Brown v. McClanahan*, 68 Tenn. (9 Baxt.) 347.

To "sign," in the primary sense of the word, is to make any mark. To "sign" any instrument or docket is to make any mark upon it in token of knowledge, approval, acceptance, or obligation. A signature is a sign thus made. In *re Walker's Estate*, 42 Pac. 815, 816, 110 Cal. 387, 30 L. R. A. 460, 52 Am. St. Rep. 104.

A signature is not limited to a written name, and includes a mark. There can be no doubt that historically and down to very modern times the ordinary "signature" was the mark of a cross, and there is, perhaps, as little question that in the general diffusion of education at the present day the ordinary use of the word implies the written name. Even in the now usual acceptance of a written name, "signature" still does not imply the whole name. Appeal of *Knox's Estate*, 18 Atl. 1021, 1023, 131 Pa. 220, 25 Wkly. Notes Cas. 133, 135, 6 L. R. A. 353, 17 Am. St. Rep. 798.

A note is "signed" by the maker if he writes his own name thereto, or if his name is written in his presence and by his direction, either with or without the maker's mark. *Crumrine v. Crumrine's Estate*, 43 N. E. 322, 324, 14 Ind. App. 641.

The word "signature" includes mark when the person cannot write, his name being written near it, and witnessed by a person who writes his own name as witness. Code Civ. Proc. Mont. 1895, § 3463; Pol. Code Mont. 1895, § 16; Civ. Code Mont. 1895, § 4662; Pen. Code Mont. 1895, § 7; Civ. Code Ala. 1896, § 1; Rev. St. Okl. 1903, § 2808; Pen. Code Cal. 1903, § 7; Rev. Codes N. D. 1899, § 5135; Civ. Code S. D. 1903, § 2469; *Maupin v. Berkley*, 3 Ky. Law Rep. 617; *Iowa Loan & Trust Co. v. Greenman*, 88 N. W. 518, 63 Neb. 268. Except to an affidavit or deposition, or a paper executed before a judicial officer; in which case the attestation of the officer is sufficient. Cr. Code N. Y. 1903, § 958; Rev. Codes N. D. 1899, § 8508; Code Cr. Proc. S. D. 1903, § 641; Rev. St. Okl. 1903, § 5149. Provided that when a signature is by mark it must, in order that the same may be acknowledged, or may serve as the signature to any sworn statement, be witnessed by two persons, who must subscribe their own names as witnesses thereto. Code Civ. Proc. Cal. 1903, § 17; Civ. Code Cal. 1903, § 14. Under statutes of this kind it has been held that the attestation of a witness to a will by his mark is valid,

although the person writing the name of the witness fails to sign his name in witness of that fact. *Davis v. Semmes*, 9 S. W. 434, 51 Ark. 48. That a signature written by another than the signer, who was unable to write, is not a signature by mark, unless there is a sign or mark to indicate that the signer did not sign his own name. *Simmons v. Leonard*, 18 S. W. 280, 281, 91 Tenn. 183, 30 Am. St. Rep. 875. That a mark by or for a surety who cannot write is a signature in law, although not witnessed as required by the Civil Code. *Maupin v. Berkley*, 3 Ky. Law Rep. 617. And it was said in *Watson v. Billings*, 38 Ark. 278, 283, 42 Am. Rep. 1, that this (referring to the statute) was not necessary in common law to constitute a signature by mark. We can see obvious reasons for the provision, however, in the thousands of uneducated persons without any experience or habits of preserving property, who have recently been clothed with all the rights of citizenship. While the act of the grantor before the proper official and the filing for record taken in evidence may perhaps be considered as an adoption of the written name as a signature regardless of the mark, yet in the case of an instrument which has not been both acknowledged and filed the mark should not be considered a signature without the name of the person writing the grantor's name being so subscribed. *Watson v. Billings*, 38 Ark. 278, 283, 42 Am. Rep. 1.

The term "signature" includes any name, mark, or sign written with intent to authenticate any instrument or writing. Rev. Codes N. D. 1899, § 7722; Pen. Code S. D. 1903, § 817; Rev. St. Okl. 1903, § 2695; Laws N. Y. 1892, c. 677, § 12; Rev. St. Utah 1898, § 2498; Ann. Codes & St. Or. 1901, § 2183; Gen. St. Minn. 1894, § 6842, subd. 7; Pen. Code N. Y. 1903, § 718.

The word "signature" includes the mark of a person unable to write. Rev. St. Tex. 1895, art. 3270.

A mark shall have the same effect as a signature when the name is written by some other person, and the mark made near thereby by the person unable to write his name. Pen. Code Tex. 1895, art. 31; *Cobbey's Ann.* St. Neb. 1903, § 2383.

In the construction of statutes the word "signature" includes the mark of an illiterate or infirm person. Pen. Code Ga. 1895, § 2.

The word "signature" includes a mark, the name being written near the mark and witnessed. *Shannon's Code* Tenn. 1896, § 62.

#### Signature of part of name.

The wills act of 1833 provided that every will must be signed at the end thereof. Held, that a signature by the first name, or by initials only, may be a valid execution



of a will if the intent to execute is apparent. *Appeal of Knox* (Pa.) 25 Wkly. Notes Cas. 133, 135.

#### **Signature written by another.**

"Signed," as used in Pub. St. c. 100, § 25, forbidding the sale of liquor to a husband after notice by the wife "In writing signed by her," includes a notice bearing the wife's name, but actually signed by another at her request and in her presence, she knowing the contents and objects of such notice. *Finnegan v. Lucy*, 32 N. E. 656, 157 Mass. 439.

The writing of the name of the vendor in a memorandum of a sale by a broker authorized to make the sale is a sufficient signing within the statute of frauds, and it is immaterial whether the name is written at the top, or in the body, or at the bottom of the memorandum. *Merritt v. Clason* (N. Y.) 12 Johns. 102, 105, 7 Am. Dec. 286.

Where a memorandum was drawn up between three parties, each agreeing to contribute a certain sum to a purse to be run for by their colts, and to forfeit such sum to the others if his colt did not run, and after the written name of each party was given a description of the colt he would enter for the race, the agreement was sufficiently signed, though the signatures were all written by one person. *Fulshear v. Randon*, 18 Tex. 275, 277, 70 Am. Dec. 281.

#### **Place of signing.**

The etymology of the word "sign" does not necessarily require that the signature be placed at the bottom of an instrument, but it is much a matter of taste as to the place of signing. *Adams v. Field*, 21 Vt. 254, 264.

"Signing," in common parlance, means the writing of the name at the bottom of the paper or instrument, thereby formally authenticating it; and not a mere recital of the name in any part of the instrument. *Evans v. Ashley*, 8 Mo. 177, 181.

As used in St. 32 Hen. VIII, allowing any person having land held by military tenure to devise two-thirds thereof, and any person having land held by socage tenure to devise the whole, provided the devise be made in writing, "signed" by the testator, means the writing of his name by the testator in any part of the instrument. *Smith-deal v. Smith*, 64 N. C. 52, 53.

Where a statute requires an instrument to be "signed" it is held that, if the party writes his name either in the body or at the foot or end with the intent to execute the instrument, it is signed within the meaning of the statute. In this respect a difference is made between the terms "signed" and "subscribed," it being held that to constitute

an execution where the instrument is to be subscribed it is necessary that the signature be at the end or foot of the instrument. *Lawson v. Dawson's Estate*, 53 S. W. 64, 65, 21 Tex. Civ. App. 361.

"Signed," as used in Wag. St. p. 1364, § 3, declaring that every will shall be signed by the testator, means that the testator's name shall be affixed at the bottom of the will, either in his own handwriting or that of some one else by his authority. *Catlett v. Catlett*, 55 Mo. 330, 331.

The doctrine of the French law as to the signature to an olographic will is expressed as follows by an annotator of the Code: "Although the natural place of the signature be at the end of the act, because it expresses the final approval by the testator to the dispositions of the last will which he has made, it is, however, admitted that the writing by the testator of his name towards the end of the act may be considered as a signature if it is placed after all the dispositions concerning the testament. It does not matter that after the name there may follow some words connected with it, if the words thus following are superfluous and useless." In re *Armant*, 9 South. 50, 51, 43 La. Ann. 310, 26 Am. St. Rep. 183.

Where one of the vendees wrote their firm name on a piece of paper, below which the vendor wrote the date, and "I sold to the above gentlemen 39 bales upland cotton at 40 cents," followed by his signature, the paper was sufficiently signed within the statute of frauds; it being immaterial that the vendee signed above, instead of below, the memorandum. *Penniman v. Hartshorn*, 13 Mass. 87, 90.

As used in the statute of frauds, requiring certain contracts to be in writing and signed by the party to be charged, it is not necessary to the validity of the contract that the note or memorandum should be signed underneath or at the end; but it is a compliance with the statute if the name of the party to be charged appear in any part of the instrument either in the top, in the middle, or at the bottom, provided it is placed there either by the party himself or by his authority and is applicable to the whole substance of the writing. While the popular meaning of the word "signed," when applied to a contract or other instrument, is generally the writing of one's name at the bottom, the primary meaning is to write one's name on paper, or to show or declare, assign or attest, by some sign or mark. *James v. Patten*, 6 N. Y. (2 Seld.) 9, 12, 13, 55 Am. Dec. 376.

"Signed," as used in the statute of frauds, requiring memorandums of sales to be signed, did not require subscription of the signature at the end of the contract. The

place of the signature in the memorandum is immaterial, and the name may as well be printed as written, if the printed name is adopted by the party to be charged. *Drury v. Young*, 58 Md. 546, 553, 42 Am. Rep. 343.

The ordinary legal meaning of the word "signature" as applied to a pleading is that the proper name has been written and signed at the end of it. It is not sufficient if the name of the party pleading or his attorney appears in the body of the writing, as in the case of a will at common law. *Ashbrook v. Roberts*, 82 Ky. 298, 301.

As to what amounts to a signing by a testator under the statute of 29 Car. II, it is said in *Jarm. Wills*, p. 201: "It has been decided that a mark is sufficient, and that notwithstanding the testator is able to write, and though his name does not appear on the face of the will." To the same effect is section 303 of *Schouler on Wills*, citing American cases. Section 14 of the Civil Code provides that "signature" or "subscription" includes "mark" when the person cannot write; his name being written near it, and written by a person who writes his own name as a witness. Testator made her mark at the end of a will which was only six lines in print, which commenced with her name; the whole paper being written by a person who signed as a witness. It was held that the mark was sufficiently near the written name to constitute a signature under such statute. *In re Guilfoyle*, 31 Pac. 553, 96 Cal. 598, 22 L. R. A. 370.

The requirement that a memorandum of sale be signed by the party to be bound means that the signature must be somewhere on the instrument, and placed there for the purpose of giving it authenticity. *Anderson v. Harold*, 10 Ohio, 399, 402.

The indorsement of the name of the attorney on the back of the bill of exceptions was such a "signing" as is contemplated and required by Civ. Code, § 5527. *O'Connell Bros. v. Friedman, Keller & Co.*, 43 S. E. 1001, 117 Ga. 948.

#### Printed or stamped signature.

"To sign" means to attach a name, or cause it to be attached, to a writing, by any of the known methods of impressing the name on paper with the intention of signing it; and where the name of the prosecuting attorney appeared in print on an indictment it is a sufficient compliance with Rev. St. 1881, § 1669, requiring the indictment to be "signed by the prosecuting attorney." *Hamilton v. State*, 2 N. E. 299, 300, 103 Ind. 96, 53 Am. Rep. 491.

Under a statute requiring the summons to be subscribed by the plaintiff or his attorney, it is not necessary that the name be written, but it may be printed on the summons. Any signature, whether written

or lithographed, which the party issuing the summons may adopt as his own, will be sufficient. *Herrick v. Morrill*, 33 N. W. 849, 850, 37 Minn. 250, 5 Am. St. Rep. 841.

Gen. St., § 1094, providing that in actions against the representatives of deceased persons no acknowledgment or promise shall be sufficient evidence of a new or continuing contract to take the case out of the statute of limitations unless the same be contained in some writing "signed" by the party to be charged thereby, does not mean writings subscribed by the deceased with his own hand, for one may properly sign his name by means of a rubber stamp, used by himself, or by another at his direction. *In re Deep River Nat. Bank (Conn.)* 47 Atl. 675, 677, 73 Conn. 341.

#### Subscribed synonymous.

Although of a different derivation than "subscribed," and although its literal meaning may have a shade or two of difference, the two words are substantially the same, except where, in a statute, or connection with a context, some peculiar or additional meaning to the words is indicated. *California Canneries Co. v. Scatena*, 49 Pac. 462, 463, 117 Cal. 447.

"Sign," as used in Rev. St. art. 1378, providing that, where the parties do not agree to a statement of facts, the judge shall "make out and sign and file with the clerk a correct statement of the facts proved on the trial," which shall constitute a part of the record, is synonymous with the word "subscribe," which means to place a signature at the bottom of a written instrument. *Wade v. State*, 2 S. W. 594, 22 Tex. App. 256.

"Sign" means to affix a signature to, and is not synonymous with "subscribe," as used in 4 Rev. St. (8th Ed.) p. 25, § 40, subd. 4, which provides that to every will "there shall be at least two attesting witnesses, each of whom shall sign his name as a witness at the end of the will"; and it includes the signing by one witness of the name of the other witness at the request of such other, who is at the time incapacitated from writing. *In re Strong*, 16 N. Y. Supp. 104, 2 Con. Sur. 574.

#### SIGN (Noun).

"Signs," as used in a chattel mortgage on the furniture and signs of a boot and shoe store, includes a wooden elephant kept in the store at night, but standing in front thereof in daytime, decorated with shoes, as the principal object of such elephant is that of a sign. *Curtis v. Martz*, 14 Mich. 506, 507, 512.

#### SIGN OF FRAUD.

Anything out of the usual course of business is a "sign of fraud." Taking an abso-

lute deed as a security for money is a mark of fraud, for it is calculated to deceive creditors, and to make them believe that no part of the property is subject to their demands, when in fact it is otherwise. A deed not at first fraudulent may become so by being concealed, because by its concealment persons may be induced to give credit to the grantor. The omission to place a deed on record is an instance of concealment within the rule. *Lyon v. Plankinton Bank*, 89 N. W. 1017, 1018, 15 S. D. 400.

### **SIGN OVER.**

The words "sign over" in a written instrument which was claimed to be a conveyance of land were held not to be operative words of present conveyance. *McKinney v. Settles*, 31 Mo. 540-545.

### **SIGNAL.**

"Signal," as used in a contract allowing one railroad to cross the tracks of another railroad, imposing upon it the expense of all watchhouses, signal stations, signals, and other similar appliances that may be required, implies merely a notification to the trainmen, by reason of which they are to govern their conduct. An interlocking system is not a signal. *Chicago, St. P., M. & O. R. Co. v. Chicago, M. & St. P. R. Co.*, 89 N. W. 180, 181, 113 Wis. 161.

### **SIGNATURE DECLARED ON.**

The phrase "any signature to a written instrument declared on or set forth as a cause of action in St. 1877, c. 163, providing that any signature to a written instrument declared on or set forth as a cause of action shall be taken as admitted unless its genuineness is specially denied, does not apply to the signature of a witness to an attested promissory note, required by Gen. St. c. 155, § 4, to take the note out of the statute of limitations, as the signature of an attesting witness to a promissory note does not, properly speaking, form part of the cause of action against the maker. *Holden v. Jenkins*, 125 Mass. 446, 448.

### **SIGNED AND SEALED.**

The words "signed and sealed" affixed at the end of a note, and following the signature of the maker, and a scroll for his seal, with the letters "L. S." written across it, is equivalent to the words "witness my hand and seal." *Humphries v. Nix*, 77 Ga. 98.

"Signed and sealed," as used in the certification of a deed, must be construed agreeably to the common understanding and acceptance of its meaning as an equivalent expression for "signed, sealed, and delivered" or

"executed." *Tubbs v. Gatewood*, 26 Ark. 128, 131.

### **SIGNED BY THE PARTIES TO BE CHARGED.**

As used in Pub. St. 1849-53, c. 50, § 3, requiring that contracts for the sale of goods for the amount of \$50 or more shall be in writing, "signed by the parties to be charged therewith" does not mean that all the parties to the writing shall sign the same, but only those to be charged. *Morin v. Martz*, 13 Minn. 191, 193 (Gil. 180, 182).

### **SIGNED, SEALED, AND DELIVERED.**

The words "signed, sealed, and delivered," as used in a deed declaring that the deed was signed, sealed, and delivered by the grantor, constitute some evidence of a delivery of the deed; but when it is shown conclusively by other evidence that there was no delivery, these words can have no force. *Stone v. French*, 14 Pac. 530, 532, 37 Kan. 145, 1 Am. St. Rep. 237.

### **SIGNING JUDGMENT.**

The words "signing judgment" and other familiar words, as used at common law, meant a very different thing from signing the completed judgment entry. Such words simply meant the allowance or permission by the master or other proper officer to the plaintiff or defendant to have the judgment entered in his favor when the cause had reached such a stage that he was entitled to have a judgment rendered in his favor. And the common-law authorities nearly always speak of one of the parties—generally the plaintiff—signing judgment, and seldom speak of an officer signing judgment. And the judgment here spoken of as thus signed is in fact no judgment at all. It is really only a right and a permission to take judgment, and, though an execution may in some cases be issued on it, yet it cannot be used as evidence in any court of justice. *French v. Pease*, 10 Kan. 51, 54.

Code, § 420, relating to the stay of execution, and fixing the time for the commencement of the stay from the time of "signing the judgment," relates to the signature of the judge in the proceedings of the court on the day on which the judgment was rendered, as provided by section 22 of the circuit court act. *Galbraith v. Sldener*, 28 Ind. 142, 150.

### **SIGNAL OF DISTRESS.**

A "signal of distress" is a request for assistance, and if competent persons, on such request, subject themselves to labor, danger, and expense to get on board of the vessel, and there offer their services for such reward as

the law will give them, if such offer be rejected it would seem that some compensation should be made for the labor, expense, and danger so incurred, especially where the vessel subsequently comes to a place of safety. *The Susan* (U. S.) 23 Fed. Cas. 440, 442.

## SIGNS.

Act Feb. 10, 1818, requiring a physician to deliver his account or bill of particulars in plain "English words," or as nearly so as the articles will admit, cannot be construed to include contractions, initials, and symbols. They are not words, or, at any rate, are not English words. *Hedges' Ex'rs v. Boyle*, 7 N. J. Law (2 Halst.) 68, 71.

### Caret.

If an indictment have an interlineation and have a caret (^) at the proper place where the interlined words are to come in, the court will take notice of the caret, and read in the interlined words. *Rex v. Davis*, 7 Car. & P. 319.

### Degree sign.

A call for courses in a boundary was "thence with the arc of a circle with the radius of eleven miles from the town of L. 12° 93 miles." Two other calls were "thence south with the McNairy and Hardin line 1° 52 miles; thence west 1° 39 miles." Plaintiffs contended that the degree sign between the figures should be construed as the normal sign for degrees, while defendants contended signs were intended for periods. Held, that defendants' contention should be sustained, since, if the figures were construed literally, the description would amount to the arc of a circle of 93 miles with a radius of 11 miles, which, as the circumference of a circle is three times its diameter, would not only complete the circle, but would run partially around it, while by construing the sign to be nothing more than a decimal point it describes by actual measurement the boundaries of the county; and it may therefore be properly presumed that the sign was used by the printer as a decimal point. *Brown v. Hamlett*, 76 Tenn. (8 Lea) 732, 736.

The signs of degrees and minutes used in stating the courses in describing a highway are no part of the English language, within a statute requiring pleadings to be drawn in the English language. *State v. Town of Jericho*, 40 Vt. 121, 122, 94 Am. Dec. 387.

### Dollar sign.

Mr. Webster, in his article on "Arbitrary Signs," in the third division thereof, "Monetary and Commercial," gives this sign thus: "\$, dollar or dollars, as \$1, \$200;" and in a note it is said: "The origin of the sign \$ has been variously accounted for, but it is probably a modified figure 8, denoting a 'piece

of eight"; i. e., reals, an old Spanish coin of the value of a dollar. *Hall v. King*, 29 Ind. 205, 206.

In *Goodall v. Harrison*, 2 Mo. 153, the court held that the mark "\$" for "dollar" is not a character known to the English language as a character to express a word or a part of word, and sustained a demurrer to a declaration with damages alone expressed by that mark for dollar. The court said it would be idle to contend that this sign is an abbreviation of any word. We have adopted the English common law by statute, but not the language, but we cannot follow the president of the Missouri court. The date of the adoption of the mark "\$" as an abbreviation of "dollar" into common use in business transactions is not known. "On entering into the business, I found it domiciled into the family of English abbreviations for the word 'dollar,' and never heard its claims questioned until now, nor its signification applied to any other word." *Jackson v. Cummings*, 15 Ill. (5 Peck) 449, 452.

The usual marks expressive of dollars and cents when employed according to general and long practice, as in stating accounts and the like, may be treated as part of our language by adoption and use, but are not a part of the English language within the statute requiring declarations and other pleadings to be drawn in the English language; and therefore a declaration on a note, in which the amount for which the note is given is only expressed in figures, with the mark for dollars prefixed, is insufficient. *Clark v. Stoughton*, 18 Vt. 50, 52, 44 Am. Dec. 361. The statute must have contemplated the use of English letters and words allowing customary abbreviations which would not obscure the sense, and figures for the purpose of expressing numbers merely; so the usual mark expressive of dollars and cents, when employed according to general and long practice, as in stating accounts and the like, may, to that extent, be treated as part of our language by adoption and use. *Clark v. Stoughton*, 18 Vt. 50, 52, 44 Am. Dec. 361.

The mark used to denote dollars has obtained general currency, and conveys the idea of dollars as distinctly as the word "dollar" itself; and hence it is not a valid objection to a judgment when the amount thereof is expressed only in figures preceded by the dollar mark after the word "dollars" written in the judgment. *Davis v. McCary*, 13 South. 665, 100 Ala. 545.

The use of the dollar mark, or an abbreviation for dollars, and a dot cutting off two figures for cents, is admissible in pleading. *Fulenwider v. Fulenwider*, 53 Mo. 439, 441.

The dollar sign "\$," when preceding the aggregate of a column of figures, will be construed to apply to each item of such column, although such items are not preceded by a

similar mark. *People v. Owyhee Lumber Co.*, 1 Idaho, 420, 422.

#### Percentage sign.

"%, " as used in a note reciting "Int. @ 6% p. a.," "is a per cent. mark, and, when used as here, has a recognized meaning, and is known to stand for six per cent." *Simmons v. Brooks*, 34 N. E. 175, 177, 159 Mass. 219.

### SILENCE.

Where there is no obligation to speak, "silence" cannot be termed suppression of a fact. *Chicora Fertilizer Co. v. Dunan*, 46 Atl. 347, 351, 91 Md. 144, 50 L. R. A. 401.

In an action by the purchaser of a herd of cattle for false representations made by the seller, it was held proper to instruct the jury that, if the seller purposely kept silent when he ought to have spoken, or by any language or acts intentionally misled the purchaser about the number of cattle, or by "silence" consciously misled or deceived him, the seller made material misrepresentations. The court said: "In any action of deceit it is true that silence as to a material fact is not necessarily, as a matter of law, equivalent to a false representation. But mere silence is quite different from concealment. A suppression of the truth may amount to the suggestion of falsehood. And if, with intent to deceive, either party to a contract of sale conceals or suppresses a material fact which he is in good faith bound to disclose, that is evidence of and equivalent to a false representation, because the concealment or suppression is, in effect, a representation that what is disclosed is the whole truth." *Stewart v. Wyoming Cattle Rancho Co.*, 9 Sup. Ct. 101-103, 128 U. S. 383, 32 L. Ed. 439.

### SILICIUM.

In an earlier edition of Webster's Dictionary, "silicium" is referred to as follows: "Silicium. Silicon, which see. The name silicium was given by those who supposed it to be a metal like sodium." Worcester thus refers to it: "Silicium. The name formerly applied to silicon, when it was classed with the metals." Its classification in a specification for a patent as a metal will not invalidate the patent. *Electric Smelting & Aluminum Co. v. Carborundum Co.* (U. S.) 102 Fed. 618, 620, 42 C. C. A. 537.

### SILK.

In general, it may be stated that all goods made substantially of "silk" will be treated as silk commercially, unless it directly appears that commerce has given another name to the admixture. *Swan v. Arthur*, 103 U. S. 597, 598, 26 L. Ed. 525.

Act Cong. March 3, 1887, Schedule L, which imposes a duty of 50 per cent. on all "goods, wares and merchandise made of silk or of which silk is the component material of chief value," includes manufactures made partly of wool, but the component material of chief value of which is silk. *Hartranft v. Meyer*, 10 Sup. Ct. 751, 135 U. S. 237, 34 L. Ed. 110.

#### SILK GLOVES.

Act June 30, 1864, 13 Stat. 210, imposing a duty of 60 per cent. on "silk gloves," cannot be construed to include gloves known commercially as "silk plaid gloves" or "patent gloves," manufactured in part of silk and in part of cotton, and made on frames. *Arthur v. Unkart*, 96 U. S. 118, 120, 24 L. Ed. 768.

#### SILK LACE.

"Silk lace," as used in Act Cong. June 30, 1864, c. 171, 13 Stat. 210, imposing a duty of 60 per cent. on silk laces, means any lace of which silk constitutes the material of chief value, though it is mixed with cotton, as well as laces which are made wholly of silk. *Drew v. Grinnell*, 6 Sup. Ct. 117, 119, 115 U. S. 477, 29 L. Ed. 453.

### SILVER.

See "Lawful Silver Money."

#### SILVER-BEARING ORE.

An indictment charging grand larceny of "silver-bearing ore" meant a portion of vein matter which has been extracted and separated from the mass of waste rock and earth, and implied severance from the freehold. *State v. Berryman*, 8 Nev. 263, 270.

### SIMILAR.

The word "similar" is often used to denote a partial resemblance only, but it is also often used to denote sameness in all essential parts. It is so used in St. 1866, c. 280, § 1, giving a judge the discretion, where the punishment provided is fine and imprisonment, to impose either without the other if it appears that the offender has not before been convicted of a "similar" offense. *Commonwealth v. Fontain*, 127 Mass. 452, 454.

In construing that part of the Revenue Act of 1862, § 9, fixing the duty to be paid on cloths composed wholly or in part of worsted, wool, or mohair, or goat's hair, and all goods of "similar" description, the court said: "The statute does not contemplate that goods classed under the words 'of similar description' shall be in all respects the same. If it did, these words would be unnecessary. They were intended to embrace good-

like, but not identical with, those named." *Greenleaf v. Goodrich*, 101 U. S. 278, 283, 25 L. Ed. 845.

A protest made by an importer against a payment of certain duties on goods which he had imported and to "all future similar importations" by him was ineffectual as to future importations. The litigation that has arisen out of the various laws fixing the duties upon imports furnishes abundant evidence that the question what goods are "similar" under the tariff acts is often a perplexing one, and a question upon which the importers and the officers of the customs very often disagree. A protest of the importer ought certainly to be in such clear terms that the officers of the customs should know exactly to what goods it relates. *Ullman v. Murphy* (U. S.) 24 Fed. Cas. 506, 507.

A contract granted to defendant the right to use a new and improved construction of fireproof floors and ceilings, which might be used as substitutes for the hollow tiling and solid, concrete-filled structures, supported between iron girders, in general use at the time. It was also stipulated therein that the defendant should not use "any construction similar" to that granted by the contract for the purpose of avoiding the same. Held, that the "similar construction" which defendant was forbidden to use comprehended every system of fireproof construction which, like that mentioned in the contract, might be used as a substitute for hollow tile and solid concrete-filled structures, supported between iron girders, and generally in use at the date of the patent. *Standard Fireproofing Co. v. St. Louis Expanded Metal Fireproofing Co.*, 76 S. W. 1008, 1012, 177 Mo. 559.

#### **SIMILAR JURISDICTION.**

Const. art. 6, § 14, which provides that corporation courts shall have "a similar jurisdiction" to that of the circuit courts of the state, is to be construed as granting to the corporation courts of the jurisdiction possessed by the circuit courts. *Chahoon v. Commonwealth* (Va.) 21 Grat. 822, 826.

#### **SIMILAR OFFICERS.**

"Similar officers," as used in Rev. St. c. 20, § 39, providing that the deacons, church wardens, or "other similar officers" of all churches or religious societies, if citizens, shall be deemed bodies corporate for the purpose of taking property, would not include one known as "treasurer," but it meant officers in churches of similar character and with corresponding functions with those of deacons in Congregational churches and church wardens in Episcopal churches. *Weld v. May*, 63 Mass. (9 Cush.) 181, 191.

#### **SIMILAR PURPOSES.**

"Similar purposes," as used in Act Cong. Aug. 3, 1882, providing that any depositions, warrants, or other papers, etc., shall be received in evidence in proof of criminality if they shall be authenticated so as to entitle them to be received for "similar purposes" by the tribunals of the foreign country from which the accused party shall have escaped, etc., refers to the previous words used, and means proof of criminality. In *re McPhun* (U. S.) 30 Fed. 57, 59; *Oteiza v. Jacobus*, 10 Sup. Ct. 1031, 1034, 136 U. S. 330, 34 L. Ed. 464.

#### **SIMILAR SERVICES.**

"Similar services," as used in Act March 3, 1891, c. 517, § 9, 26 Stat. 829 [U. S. Comp. St. 1901, p. 552], providing that the marshals, criers, clerks, bailiffs, and messengers of the Circuit Court of Appeals shall be allowed the same compensation for their respective services as are allowed for "similar services" in the existing Circuit Courts, show that the provision has reference not to an annual compensation, but to compensation for distinct acts of service, for which a charge should be made against the fund derived from the fees and costs collected in accordance with the rule of the Supreme Court. *United States v. Morton* (U. S.) 65 Fed. 204, 208, 13 C. C. A. 151.

#### **SIMILARITY.**

See "Substantial Similarity."

"Similarity" is not identity, but resemblance between different things. *Rhode Island Hospital Trust Co. v. Olney*, 13 Atl. 118, 119, 16 R. I. 184.

#### **SIMILITER.**

The "similiter" merely expresses the concurrence of the party to whom the issue is tendered with his adversary in referring the trial to the jury. It is, however, in strictness no part of the pleadings, since it neither affirms nor denies any fact in maintenance of the action or defense. The *similiter* would, therefore, seem on principle to be only matter of form, and as such an omission of it would seem to be aided by verdict. *Solomons v. Chesley*, 57 N. H. 163, 164, 167.

#### **SIMILITUDE.**

"The word 'similitude' is derived from the Latin 'similitudo,' which is translated 'similitude,' likeness, resemblance." As used in Rev. St. c. 157, § 5, making it criminal for any person to have in his possession a certain number of bank bills or notes in "similitude" of the bank bills or notes payable to

the bearer or to the order of any person, issued or purporting to have been issued by any bank or banking company, etc., with intent to utter or pass such banking bills or notes as true, and falls, knowing the same to be forged or counterfeit, it is synonymous with the words "forged" or "counterfeit." *State v. McKenzie*, 42 Me. 392, 394.

## SIMONY.

"Simony" is either the crime of buying or selling ecclesiastical preferment, or the corrupt presentation of any one to an ecclesiastical benefice for money or reward. Simon regarded the gift of the Holy Ghost by the laying on of hands as something akin to and an improvement on the sorcery which he himself had practiced, and therefore that its advantages were proper subjects of barter; but the language of Peter was: "Thy money perish with thee, because thou hast thought that the gift of God may be purchased with money;" this being the most emphatic and authoritative refutation of the idea that this special gift of God could form a proper basis for money transactions. *State v. Buswell*, 58 N. W. 728, 730, 40 Neb. 158, 24 L. R. A. 68.

## SIMPLE.

Pure; unmixed; not compounded; not aggravated; not evidenced by sealed writing or record. *Black, Law Dict.*

## SIMPLE ACCIDENT.

In the discussion of questions of liability for negligence the term "simple accident" is uniformly employed in contradistinction to culpable negligence to indicate the absence of any legal liability. *Fidelity & Casualty Co. v. Cutts*, 49 Atl. 673, 674, 95 Me. 162 (citing *Conway v. Lewiston & A. Horse R. Co.*, 90 Me. 205, 38 Atl. 110).

## SIMPLE ASSAULT.

"Simple assault is an attempt to do bodily harm, but which falls, falls short of doing the harm—doing the battery; \* \* \* striking at another within striking distance, but not striking him, for example." *State v. Lightsey*, 43 S. C. 114, 115, 20 S. E. 975.

A simple assault is an attempt or offer to beat another without touching him. *Norton v. State*, 14 Tex. 387, 393 (citing 3 Bl. Comm. 120).

## SIMPLE BLOCKADE.

A "simple blockade" is one established by a naval officer acting on his own discretion, or under the directions of superiors without governmental notifications. *The Circassian*, 69 U. S. (2 Wall.) 135, 150, 17 L. Ed. 796.

## SIMPLE BOND.

At common law there were originally three kinds of bonds: a "simple bond," a penal bond conditioned for the payment of money, and a penal bond conditioned to do a collateral thing. A simple bond was an obligation whereby the obligor bound himself, his heirs, executors, and administrators, to pay a certain sum of money to a named obligee on demand or on a day certain. *Burnside v. Wand*, 71 S. W. 337, 347, 170 Mo. 531, 62 L. R. A. 427.

## SIMPLE CONFESSION.

Confession is simple when it is by plea of guilty. *State v. Willis*, 41 Atl. 820, 825, 71 Conn. 293.

Says Lord Hale, in his Pleas of the Crown, vol. 2, p. 225: "A confession is either simple or relative, in order to obtain to the attainment of some other advantage. That which I call a simple confession is where the defendant, upon hearing of his indictment, without any other respect confesses it. This is a conviction. But it is usual for the court, especially if it be out of clergy, to advise the party to plead, and put himself upon his trial, and not presently to record his confession, but to admit him to plead. 27 Assiz. 40." *Bram v. United States*, 18 Sup. Ct. 183, 188, 168 U. S. 532, 42 L. Ed. 568.

## SIMPLE CONTRACT.

At common law all contracts not under seal were deemed to be in parol, and were called "simple contracts." Simple contracts, under the common law, included written as well as oral agreements, and are distinguished from special contracts simply by the fact that they are not under seal. *Webster v. Fleming*, 52 N. E. 975, 979, 178 Ill. 140.

Simple contracts are distinguishable, and of two classes—simple contracts, and contracts by specialty; in other words, contracts by parol, and contracts under seal. Contracts reduced to writing, but without seal, are comprehended under the first class, or simple contracts. There is no distinct class of contracts merely in writing. *Perrine v. Cheeseman*, 11 N. J. Law (6 Halst.) 174, 177, 19 Am. Dec. 388.

Simple contracts are those whose validity does not depend upon their form, but upon the presence of a consideration. With the exception of contracts under seal and contracts of record, every contract requires a consideration to support it. *Corcoran v. New York Cent. & H. R. R. Co.*, 45 N. Y. Supp. 861, 863, 20 Misc. Rep. 197.

A simple contract is an agreement between two parties, a drawing together of two minds to a common intent, and must be voluntary as well as mutual. *Cashion v. West-*

ern Union Tel. Co., 32 S. E. 746, 747, 124 N. C. 459, 45 L. R. A. 160.

A "simple contract in writing," within the meaning of the statute of limitations, providing that suit may be brought on a simple contract in writing within 14 years, includes a writing stating that one person has bought goods from another, describing the goods, and giving the price and conditions of the sale, although it is only signed by the purchaser. *Ames v. Molr*, 22 N. E. 535, 130 Ill. 582.

The term "simple contract" is synonymous with the term "parol contract." *Justice v. Lang*, 42 N. Y. 493, 497, 1 Am. Rep. 576.

A simple contract or specialty, within the meaning of Code Civ. Proc. § 1843, providing that the heirs of an intestate and the heirs and devisees of a testator are respectively liable for the debts of the decedent arising by simple contract or by specialty to the extent of the estate, interest, and right in the real property which descended to them from, or was effectually devised to them by, the decedent, comprises every kind of contractual obligation, and therefore a sole devisee is liable for indebtedness of a fixed amount arising and invested by the testator as agent. *De Crano v. Moore*, 64 N. Y. Supp. 3, 6, 50 App. Div. 361.

"Simple contracts" are all others than those specified as contracts of record and specialties. Code, § 2718; *Western Union Tel. Co. v. Taylor*, 84 Ga. 408, 418, 11 S. E. 396, 8 L. R. A. 189.

### **SIMPLE INTEREST.**

"'Simple interest' is straight interest computed on the principal sum from the time when, by the terms of the contract, the interest is to commence, to the time of payment or judgment." *Hovey v. Edmison*, 22 N. W. 594, 599, 3 Dak. 449.

### **SIMPLE LARCENY.**

"Simple larceny" or plain theft is larceny unaccompanied with any atrocious circumstances. *State v. Chambers*, 22 W. Va. 779, 786, 46 Am. Rep. 550.

"Larceny" or "theft" at common law is distinguished into two sorts, the one called "simple larceny" or "plain larceny," unaccompanied with any other atrocious circumstance, and mixed or compound larceny, which also includes in it the aggravation of a taking from one's house or person. Simple larceny, then, is the felonious taking and carrying away of the personal goods of another. Mixed or compound larceny is such as has all the properties of the former—simple larceny—but is accompanied by either one or both of the aggravations of taking

from one's house or person. Larceny from the person is either by privately stealing from a man's person, as by picking his pocket, or by open and violent assault. Open and violent larceny from a person, or robbery, is the felonious and forcible taking from the person of another of goods or money to any value by violence or putting him in fear. *Anderson v. Winfree*, 4 S. W. 351, 352, 85 Ky. 597.

Under Comp. Laws, § 5765, providing that on a first conviction for the offense of receiving stolen goods the person convicted shall not be sentenced to state prison if he shall make satisfaction to the injured party and the act of stealing was a "simple larceny," it is held that the term "simple larceny" had reference only to such larcenies as were not accompanied by any such circumstances as aggravate the offense and increase the punishment whether they be technically enumerated as larcenies or not. Discussing this subject, the court says robbery is only an aggravated larceny, although it is punished under another and more appropriate name; and it can scarcely be claimed that the receiver of goods from the robber, with guilty knowledge, could escape punishment because the principal's offense was not technically described as a larceny. So the larceny that characterizes the intent in burglary is still larceny, notwithstanding it may not be punishable as a larceny at all after conviction for the graver offense. It is a larceny accompanied by such circumstances as make the offender more severely punishable under the designation of "burglar"; the larceny being not simple, but complicated with the other and higher crime. In neither of these cases can the receiver, who takes the stolen property with guilty knowledge of the atrocious crime by which it has been obtained, claim the benefit of the statute, which only designs to ameliorate the punishment where the principal offense contains no element but such as is contained in simple stealing. *Pitcher v. People*, 16 Mich. 142, 143.

"Simple larceny" is the wrongful and fraudulent taking and carrying away by any person of the personal goods of another with intent to steal the same. Code, § 4393. *Brown v. State*, 90 Ga. 454, 455, 16 S. E. 204; *Roberts v. State*, 83 Ga. 369, 370, 375, 9 S. E. 675.

### **SIMPLE LICENSE.**

A simple or voluntary license is merely an authority, without reward or consideration, to do a particular act or series of acts on another's land without passing any interest or estate in the soil, and need not be in writing. Such license is revocable at the pleasure of the grantor, but its revocation will not be allowed where the grantee has



been induced to expend his means or money towards its enjoyment, without reimbursing him in the amount expended. *Wynn v. Garland*, 19 Ark. 23, 68 Am. Dec. 190.

### SIMPLE OBLIGATION.

"Simple obligations" are such as are not dependent for their execution on any event provided for by the parties, and which are not agreed to become void on the happening of any such event. Civ. Code La. 1900, art. 2020.

### SIMPLE TRUST.

A simple trust is where property is vested in one person upon trust for another, and the nature of the trust, not being prescribed by the settlor, is left to the construction of the law. In this case the *cestui que trust* has *jus habendi*, or the right to be put in actual possession of the property, and *jus disponendi*, or the right to call upon the trustee to execute conveyances of the legal estate as the *cestui que trust* directs. The special trust is where the machinery of a trustee is introduced for the execution of some purpose particularly pointed out; and the trustee is not, as before, a mere passive depositary of the estate, but is called upon to exert himself actively in the execution of the settlor's intention—as, where a conveyance is to trustees upon trust to sell for payment of debts. *Perkins v. Brinkley*, 45 S. E. 541, 542, 133 N. C. 154.

Trusts are divided into simple and special trusts. A simple trust is a simple conveyance of property to one upon trust for another, without further specifications or directions. In such case the law regulates the trust, and the *cestui que trust* has the right of possession and of disposing of the property, and he may call upon the trustee to execute such conveyances of the legal estate as are necessary. A special trust is where special and particular duties are pointed out to be performed by the trustee. In such cases he is not a mere passive agent, but he has actual duties to perform—as, when an estate is given to a person to sell, and from the proceeds to pay the debts of the settlor. *Cone v. Dunham*, 20 Atl. 311, 313, 59 Conn. 145, 8 L. R. A. 647.

Trusts are simple and special. In the one the trustee is passive performing no duty, and the trust is merely technical. In the other he is active, executing the donor's will, and the trust is operative. A simple trust gives to the *cestui que trust* the right to the possession and disposal of the property, and legal estate is executed in him, unless when necessary to remain in the trustee to preserve it for the *cestui que trust* or pass it to another. A special trust maintains the legal estate in the trustee to perform the du-

ties imposed by the donor and the *cestui que trust* has but a right in equity to enforce the performance. *Dodson v. Ball*, 60 Pa. (10 P. F. Smith) 492, 500, 100 Am. Dec. 586.

### SIMULATE.

"Simulated," as used in a declaration declaring that a certain debt was simulated, meant counterfeited, feigned, pretended. *Cartwright v. Bamberger*, 8 South. 264, 266, 90 Ala. 405.

### SIMULTANEOUS.

The adjectives "simultaneous" and "dis-simultaneous" are words of comparison. The former means that two or more occurrences or happenings are identical in time; the latter that they are successive—that is to say, with an interval between each two in succession. *Brush Electric Co. v. Western Electric Co.* (U. S.) 69 Fed. 240, 244.

### SIMULTANEOUSLY

"Simultaneously," as used in a claim for a patent for a fluted puffing machine which gathers the puff by crinkling one portion of the strip simultaneously with fluting it along the edges of such portion and forming flattened borders outside of the flutes, means that in the finished article one portion is seen to be crinkled, and at the same time the parts at the edges of such portion are seen to be fluted, and the portion outside of the flutes are seen to be flattened borders. *King v. Werner* (U. S.) 14 Fed. Cas. 558, 561.

### SINCE.

"Since," as used in Rev. St. c. 70, § 46, providing that a merchant or trader who has failed to keep a cashbook or other proper books of account at any time "since" March 23, 1878, shall not be entitled to a discharge in bankruptcy, means any time after the passage of the act, though the neglect may not cover the whole period. *Jones v. First Nat. Bank*, 9 Atl. 22, 23, 79 Me. 191.

"Since," as used in a notice of sums expended "since the 5th day of October," does not include that day, if such is the sense in which it would ordinarily be understood. *Monroe v. Acworth*, 41 N. H. 199, 201.

#### As applicable to future.

As used in Act 1890, providing that every corporation incorporated "since" January 1, 1890, should pay a bonus on the amount of its capital stock, does not necessarily mean, nor was it intended to mean, a period of time beginning with the 1st of January and ending with the date when the statute became effective, but the statute applies to all incor-

porations incorporated after January 1, 1890. *Roland Park Co. v. State*, 31 Atl. 298, 80 Md. 448.

"Since," as used in Act Feb. 5, 1864, providing for the payment of a bounty to any one who should enlist in the military or naval service of the United States and be credited on the quota of the state under any call or order of the President made or issued "since" the 1st of January, 1864, necessarily refers to something past, and never extends into the future. As used in the act, it means any call or order made or issued since the 1st day of January to the 4th day of February, 1864. "Since" is defined by Webster as meaning in the meantime, past, counting backward from the present, before this or now, from any time forward to the present. *Smith v. Board of State Auditors*, 48 N. W. 627, 85 Mich. 407.

#### As subsequent.

The words "since" and "subsequently," although similar in meaning, are not identical. "Since," according to Worcester, means "from the time of," and its meaning illustrated by a line from Milton: "He since the morning set out from heaven;" and Webster, in his Dictionary, says: "The proper signification of 'since' is after, and its appropriate sense includes the whole period between an event and the present time. 'I have not seen my brother since January.'" "Subsequently," according to the same authorities, means "at a later time," or "afterwards"; that is, at any time afterwards. In *re Rosenfield* (U. S.) 20 Fed. Cas. 1202, 1204.

Webster defines "since" as "after," and its appropriate sense includes the whole period between an event and the present time; but, after giving citations as examples of its use, he further says, "Since, then, denotes during the whole time after an event, or any particular time during the period." The word "subsequent," as employed in the provision of the bankrupt act with regard to the omission to keep proper books of account "subsequent to the passage of this act," was synonymous with the word "since," and no distinction was intended by its use. In *re Cretlew* (U. S.) 6 Fed. Cas. 810, 812.

### SINGER.

The term "Singer" eo nomine has come to be suggestive not merely of the manufacturer, but of sewing machines of a certain mechanism, character, or quantity different in construction and mode of operation from the Home, Grover and Baker, Wheeler and Wilson, or other machines known to the public. It would not be claimed that the name "Singer" is now associated with any machine for family use or other work that is constructed upon a different principle from that governing any of the various "Singer" ma-

chines. *Brill v. Singer Mfg. Co.*, 41 Ohio St. 127, 134, 52 Am. Rep. 74.

### SINGLE.

In a devise to a daughter providing subsequently that in case the daughter died single the property left her should go to testator's mother, and providing that, if the mother died before the daughter, the latter should have the disposal of the property, the word "single" means unmarried, or not having been married, and upon the marriage of the daughter, the testator's mother still living, the property vested in the latter absolutely. *Davidson's Appeal* (Pa.) 1 Monaghan, 185, 188.

"Single and unmarried" does not necessarily mean that the person was never married, and an examination to show a settlement by hiring service, stating that the pauper was single and unmarried, but not stating that he had no child or children, was not sufficient. *Reg. v. Inhabitants of Wymondham*, 2 Adol. & E. (N. S.) 541, 544.

### SINGLE ADULTERY.

Single adultery is adultery committed between persons only one of whom is married. *Hunter v. United States* (Wis.) 1 Pin. 91, 92, 39 Am. Dec. 277.

### SINGLE ARTICLE.

Where it is the duty of the jury in a trial of the right to property to assess the separate value of the "single articles" in controversy, the word "articles," though separated, which constitute the necessary parts of the whole, may justly be regarded as a single article. *Kibble v. Butler*, 22 Miss. (14 Smedes & M.) 203, 204.

Where a verdict in an action of replevin must assess the separate value of the "single articles" embraced in the finding, the words "single article" mean that whatever in common understanding are parts of one whole may be treated as one article in the verdict, but where the articles are clearly distinct each must be valued. *Drane v. Hiltzheim*, 21 Miss. (13 Smedes & M.) 336, 338.

### SINGLE BILL.

If a seal be affixed to a paper in the ordinary form of a note, its character as such is destroyed, and it is thereby changed to a deed or bond of the maker. Such an instrument is "a bond without condition, sometimes called a 'single bill,' and differs from a promissory note in nothing but the seal. A bond of this character is sometimes designated as a 'single bill' or 'obligatory writing,' but more usually is a sealed note; but, by whatever name called, it cannot by strict legal pro-

piety be termed a promissory note in the commercial sense, and is distinguishable in the incidents which attach to it." *Osborne & Co. v. Hubbard*, 25 Pac. 1021, 1022, 20 Or. 318, 11 L. R. A. 833.

"A bill is a common engagement for money given by one man to another. When with a penalty, it is a penal bill; when without, it is a single bill. (Toml. L. D. 230.) And it is all one with an obligation, saving that it is commonly called a bill when in English and an obligation when in Latin. But now by a bill we ordinarily understand a single bond, without a condition; by an obligation, a bond with a penalty and condition; or, according to the definition of Ch. Baron Comyn, a single bill is when a man is bound to another by bill or note without a penalty." *Briscoe v. Bank of the Commonwealth of Kentucky*, 36 U. S. (11 Pet.) 257, 328d.

#### SINGLE CROSS.

The word "single cross (X) mark," as used in Laws 1901, c. 654, making a ballot void upon which there shall be found any other mark than a single cross (X) mark made for the purpose of voting, indicates the intention of the Legislature to require the mark to consist of two single crossing lines, and to exclude all others. A ballot is void if anywhere on it, either in the circular or before the name of the candidate, there is any voting mark other than the single cross (X) mark, and therefore a ballot marked in the circle by at least three perpendicular lines and as many horizontal lines crossing the perpendicular lines is void. *Thacher v. Lent*, 75 N. Y. Supp. 732, 733, 71 App. Div. 483.

#### SINGLE DEADWOODS.

Double deadwoods distinguished, see "Double Deadwoods."

#### SINGLE DWELLING HOUSE.

Where land is sold with a reservation that only one single house with outbuilding shall within 25 years be placed on the land sold, a building which was so designed and constructed as to accommodate three families in severalty, and was so fitted up as to be occupied, and was in fact occupied, by six families at a time, was not a single dwelling house within the construction of the deed. *Gillis v. Bailey*, 21 N. H. (1 Fost.) 149, 155.

#### SINGLE LARCENY.

A "single larceny" consists in the stealing at one and the same time, or by one continuous operation, all the goods, no matter to whom belonging, which the thief had a pre-conceived intention of stealing. Where goods of several persons are stolen at the same time, the stealing of each person's goods con-

stitutes a definite offense, but may be joined in one indictment; and whether they shall be prosecuted jointly or separately is properly left to the discretion of the prosecuting officer. *United States v. Beerman* (U. S.) 24 Fed. Cas. 1065, 1070.

#### SINGLE LOT.

Rev. St. c. 138, § 7, subd. 4, provides that, where a known farm or "single lot" has been improved partly, the portion of such farm or lot that may have been left not cleared or not included, according to the usual course and custom of the adjoining country, shall be deemed to have been occupied for the same length of time as the part improved or cultivated. Held, that the phrase "single lot" meant the smallest legal subdivision of land. *Pepper v. O'Dowd*, 39 Wis. 538, 547.

#### SINGLE MAN.

"Single man," as used in Act Cong. Sept. 27, 1858, granting to every wife, settler, or occupant of the public lands above the age of 18 years one-half section if a single man, and, if a married man, 640 acres, should be construed to include an unmarried woman. The words "single man" and "married man," referring to the conjugal relation of the sexes, do not ordinarily include females. *Silver v. Ladd*, 74 U. S. (7 Wall.) 219, 226, 19 L. Ed. 138.

"Single man," as used in the clause of the Texas Constitution providing that every single man of the age of 17 and upward shall be entitled to the third part of one league of land, means an unmarried man. *Hill v. Moore*, 19 S. W. 162, 164, 85 Tex. 335.

#### SINGLE PACKAGE.

"Single package," as used in a contract by a common carrier limiting the risk taken on a single package, does not apply to a rough box having openings through which other packages could be seen, which were packed in this way so that they might be more conveniently carried, but each package contained in such box should be construed a single package, within the meaning of the contract. *Read v. Spaulding*, 18 N. Y. Super. Ct. (5 Bosw.) 395, 410.

#### SINGLE PERSON.

A partnership cannot be a "single person not the head of a family," within the meaning of a state law allowing property of a certain value to be selected and claimed as exempt by a single person not the head of a family. *In re Lentz* (U. S.) 97 Fed. 486, 488.

#### SINGLE SHIP.

"Single ship," as used in Prize Act June 30, 1864, c. 174, rule, 4, fixing the share of

prize money to which the captain of a "single ship" effecting the capture is entitled, etc., construed to include a steam launch detached from a fleet and on special service though the launch carried no books. *United States v. Steever*, 5 Sup. Ct. Rep. 765, 768, 113 U. S. 747, 28 L. Ed. 1133.

### SINGLE TENEMENT.

Where one's mill and part of his dam were in one county and part of the dam in an adjoining county, the whole property was a "single tenement," within Act June 13, 1836, § 80, and hence a suit relating to the property could be brought in either county. *Finney v. Somerville*, 80 Pa. (30 P. F. Smith) 59, 65.

### SINGLE VEIN.

The term "single vein" is used by miners to designate "a single ore deposit of identical origin, age, and character throughout." *Eureka Consol. Min. Co. v. Richmond Min. Co.* (U. S.) 8 Fed. Cas. 819, 823.

### SINGLE WOMAN.

"Single woman," as used in 7 & 8 Vict. c. 101, § 3, relating to the petition for an order of maintenance on the putative father of a bastard which may be made by a "single woman," will include a married woman in case of nonaccess by the husband. *Reg. v. Pilkington*, 2 El. & Bl. 546, 554.

### SINGLINGS.

Singlings are the product of the first process of distillation of spirituous liquors by the application of heat to a still containing the material, and differs from spirits in that the latter pass through a second distillation. *United States v. Tenbroek*, 15 U. S. (2 Wheat.) 248, 4 L. Ed. 231.

### SINGULAR.

See "All and Singular."

### SINKING FUND.

A sinking fund is "the aggregate of sums of money (as those arising from particular taxes or sources of revenue) set apart and invested, usually at fixed intervals, for the extinguishment of the debt of a government or corporation by the accumulation of interest." *Wiser v. City of Ft. Worth (Tex.)* 27 S. W. 739, 740 (citing Black).

A sinking fund is defined as "a fund arising from particular taxes, imposts, or duties, which is appropriated toward the payment of the interest due on a public loan and for the payment of the principal." *Union*

*Pac. R. Co. v. Buffalo County Com'rs*, 4 N. W. 53, 56; 9 Neb. 449 (citing *Bouv. Law Dict.*); *Brooke v. City of Philadelphia*, 29 Atl. 387, 389, 162 Pa. 123, 24 L. R. A. 781.

The object of every sinking fund is to diminish the debt whose existence warranted its foundation. *Bank for Savings v. Grace*, 7 N. E. 162, 168, 102 N. Y. 313.

### SINKING FUND TAX.

A "sinking fund tax" is a tax raised to be applied to the payment of the principal and interest of a public loan, and it cannot be levied for the payment of floating indebtedness. *Union Pac. Ry. v. York County*, 7 N. W. 270, 10 Neb. 612.

### SISTER.

See "Half-Sister"; "Stepsister."

#### Half blood.

"Sisters," as used in Act 1797, providing that in all cases in which persons shall die intestate leaving neither wife, child nor children, but leaving a father or mother and brothers and sisters, the estate shall be equally divided amongst the father, or, if he be dead, the mother, and such brothers and sisters as may be living at the time of the death of such intestate, means sisters of the whole, and not of the half, blood. Sister is defined by Johnson to be one born of the same parents, correlative to brother. *Lawson v. Perdriau* (S. C.) 1 McCord, 456, 457.

"Sisters," as used in a will giving a farm to a boy, he paying his sisters their proper legacy, should be construed to include sisters of the half blood. *Luce v. Harris*, 79 Pa. (29 P. F. Smith) 432, 435.

"Sisters," as used in a will giving property to the then living brother and sisters of the devisee, should be construed in its ordinary or primary meaning, and includes sisters of the half blood as well as the whole blood. *Wood v. Mitchell* (N. Y.) 61 How. Prac. 48, 49.

Under Laws 1818, p. 183, providing that on the death of a decedent without children or father his estate should descend to his mother, "brothers, and sisters," brothers and sisters of the half blood are included. *Moore v. Abernathy* (Ind.) 7 Blackf. 442, 449.

"Brothers and sisters" as used in Act 1835 (Swan St. p. 286, § 1), declaring that if any person shall die intestate, etc., and there shall be no children or other legal representatives, the estate shall pass to the brothers and sisters of the intestate, include not only brothers and sisters of the intestate, but half brothers and sisters of the ancestor, which also are to be preferred to the brothers and sisters of the intestate of the half blood, not

of the blood of the ancestor from whom the estate came. *Cliver v. Sanders*, 8 Ohio St. 501, 504.

A sister is a female who has the same parents with another, and the term will not include those of the half blood where they would be strangers to the blood of the testator. *Wood v. Mitchan*, 92 N. Y. 375, 379.

The word "sister" in Mill. & V. Code, § 5646, providing that no man "shall have carnal knowledge of a daughter of his brother or sister," applies as well to the half blood as to the whole blood. *Shelly v. State*, 31 S. W. 492, 493, 95 Tenn. 152, 49 Am. St. Rep. 928.

#### Posthumous children.

A statute providing that if any person shall die intestate having title to any estate or inheritance, and shall leave no children or their legal representatives, such estate shall pass to the "brothers and sisters" of the intestate, means the whole stock or class of brothers and sisters, so that a brother or sister born at any period subsequent to the death of the intestate is entitled to share equally with those then in being. "The term imports all the brothers and sisters, and cannot be limited to those living at any particular period." *Springer v. Fortune* (Ohio) 2 Cin. R. 52, 53.

## SIT.

See, also, "Sitting."

"Sit," as used in Civ. Code, § 4045, providing that no judge or justice of any court, no ordinary, justice of the peace, nor presiding officer of any inferior judicature or commission, can "sit in any cause or proceeding \* \* \* in which he has been of counsel," is synonymous with the word "preside," and any act done or order made in the case of a judicial nature is prohibited. As defined in *Anderson's Law Dictionary*, "sit" means "to hold court," and in *Black's*, "to hold a session, as of a court." *Allen v. State*, 29 S. E. 470, 471, 102 Ga. 619.

The constitutional provision declaring that no judge shall sit in any case wherein he has been of counsel means "try the case," and it does not disqualify a judge who has been of counsel for accused from receiving an indictment from the grand jury and making orders preliminary to the trial. *Cock v. State*, 8 Tex. App. 659, 660, 666.

Code Cr. Proc. art. 569, providing that no judge shall sit in any case where the accused may be related to him by consanguinity or affinity within the third degree, is to be construed as including making any orders as well as actually trying the case. *Reed v. State*, 11 Tex. App. 587, 606.

## SITE.

See "Mill Site."

A "site," according to Webster, is a seat or ground plot; and a mill site is the place where a mill stands. *Miller v. Alliance Ins. Co. of Boston* (U. S.) 7 Fed. 649, 651.

A corporate charter authorized the board of public works to purchase "sites" for city hall, school houses, etc. Held, that the word "sites" was to be understood in its ordinary and popular sense as only so much land as is reasonably required or needed for the location and convenient use of the particular building; hence the purchase of nine acres as a site for a city hall and other city buildings is not authorized where there is no determination of the board as to the necessity for so large a tract for the location and proper use of the building. *Gregory v. Jersey City*, 36 N. J. Law (7 Vroom) 166, 168.

## SITO GANADO MAYOR.

"Sito ganado mayor," used in a Mexican land grant, is to be construed as a technical Mexican and Spanish legal term well established and defined and known as the "section or township" in the survey of the United States. It was a square the "four sides of which each measured 5,000 varas," and "the distance from the center of each sito to each of its sides should be measured directly to the cardinal points of the horizon and should be 2,500 varas." *United States v. Cameron*, 21 Pac. 177, 178, 3 Ariz. 100 (citing *D'Aguirre's Case*, 68 U. S. [1 Wall.] 316, 17 L. Ed. 595; *Fossat's Case*, 61 U. S. [20 How.] 415, 15 L. Ed. 944; *Yontz's Case*, 64 U. S. [23 How.] 498, 16 L. Ed. 472; *United States v. Pico*, 72 U. S. [5 Wall.] 539, 18 L. Ed. 695).

## SITTING.

"Sitting of the court," as used in Const. art. 4, § 22, giving a right of appeal to the court in bank, and providing that the motion for a reservation of the point or question decided shall be entered of record during the "sitting of the court" at which the decision may be made, is not synonymous with "term of court," but means the session for the day. *Costigin v. Bond*, 3 Atl. 285, 65 Md. 122.

"Sittings of court," as used in Act 10, 1856, providing for the holding of district court in one place in each judicial circuit and for "sittings" in each county, means "term." *Gird v. State*, 1 Or. 308, 311.

The phrase "during the sittings of the term," as employed in the rule that in every case, unless expressly allowed by the court, the bill of exceptions shall be prepared and

submitted to the court during the sittings of the term at which such exceptions shall be taken, means those sittings which are being held at the time of the trial. *Livers v. Ardinger*, 44 Atl. 1042, 1043, 90 Md. 38.

## SITUATE.

See "There Situate."

Pub. St. c. 11, § 20, cl. 2, providing that all machinery employed in any branch of manufacture shall be assessed where such machinery is "situated or employed," means something more than merely being temporarily in use at a place. A portable sawmill, frequently moved from place to place, and temporarily placed in a town other than that in which the owner resides or has his place of business, is not "situated or employed" in such town within the meaning of the statute. *Ingram v. Cowles*, 23 N. E. 48, 49, 150 Mass. 155.

### Buildings.

Under a statute (Rev. St. Ind. 1843) exempting from taxation every building erected for religious worship, etc., and the lands whereon such building is "situate," it was held that, where a portion of a lot owned by a church, and on a part of which the church was situate, was diverted to secular uses for gain, the portion so diverted was not exempt, the church not being considered to be situate upon any portion of the lot which is so diverted. *Orr v. Baker*, 4 Ind. 86, 89.

In a policy of fire insurance a building insured was described as a brick building with a composition roof, connected by doors with an adjoining building "situate" at the corner of C. street and W. avenue. It was held that the word "situate" referred to the building insured, and not to the adjoining building. *Heath v. Franklin Ins. Co.*, 55 Mass. (1 Cush.) 257, 261.

### Corporations.

As used in Code Civ. Proc. § 55, declaring that an action against a corporation created by the laws of Nebraska may be brought in the county in which it is situated or has its principal place of business, "situated" is not synonymous with the words "principal place of business," and therefore a domestic corporation may be sued in any county where it is situated, and it is situated where it has and maintains a place of business, and servants, employes or agents engaged in conducting and carrying on the business for which it exists. The statute was not intended to limit the county in which a domestic corporation could be sued to the one in which it had its principal place of business, but was rather enacted for the benefit of creditors and persons having claims against a domestic cor-

poration authorizing suit in any county where the corporation maintains a place of business. *Fremont Butter & Egg Co. v. Snyder*, 58 N. W. 149, 150, 39 Neb. 632.

### Personal property.

"Situated," as used in Act March 31, 1841, making a county liable for property "situated" therein, would include any personal property being within the county, though it might be in transitu. Strictly speaking, personal property cannot be said to have a situs. It is situated wherever it may happen to be for the time being. *Alleghany County v. Gibson*, 90 Pa. 397, 421, 35 Am. Rep. 670.

"For some purposes, by a legal fiction, a chattel is regarded as having a situs in the town in which its owner resides, although in fact it is in another town; but this is by no means the universal rule. When the mortgagor of a chattel resides out of the state, the statute authorizes a record of the mortgage to be made in the town in which the chattel is situate, meaning its actual location, and not its owner's domicile. A short stay of movables during their transit through a place is not within its meaning, but, in the ordinary sense, movables are situate in the place where they are used day after day; where they are stored, housed, or stabled when not in actual use, and where the business in which they are employed is done. To the ordinary observation of people for whose protection and information the statute was intended, that is their location. *Lathe v. Schoff*, 60 N. H. 34, 35.

"Situated in the state," as used in Code 1880, § 1270, providing the manner of the distribution of property situated in the state on the death of the owner, does not include debts owing the testator by persons residing outside of the state, but includes debts owing in the state to testator, though the latter may reside outside the state. *Jahler v. Rascoe*, 62 Miss. 699, 704.

## SITUATION.

"Situation," as used when speaking of the situation of a thing, is synonymous with "position," and is defined to be "the state of being placed; posture." *Jones v. Tuck*, 48 N. C. 202, 205 (citing *Worcest, Dict.*).

"Situation," as used in an instruction that ordinary care means that degree of care which may reasonably be expected of a person in the situation of plaintiff's husband at the time the accident occurred, will be construed as not meaning "the physical and mental condition of the deceased, but as referring to his probable surroundings at the time of the accident." *Buesching v. St. Louis Gaslight Co.*, 73 Mo. 219, 234, 39 Am. Rep. 503.

## SITUS.

The "situs" of personal property is, for most purposes, the domicile of the owner. *Pleasanton v. Johnson*, 47 Atl. 1025, 91 Md. 673.

In 1 *Desty*, Taxn. p. 322, § 67, it is said: "The situs of personal property, whether tangible or intangible, for the purposes of taxation, unless otherwise provided by statute, is at the place of residence of the owner; the only exception being where the property is employed in business, or is in the hands of an agent of the owner having an actual situs, different from the domicile of the owner. It is not necessary, therefore, that the owner should reside within the state, to render his personal property situated within the state liable to taxation. Mr. Burroughs, in his work on Taxation, after an elaborate review of the conflicting authorities, states his own conclusions as follows in section 50, p. 59: "We conclude that the situs of personal property for the purposes of taxation depends in a great measure upon the nature of the property. (a) If it be chattels, which have a tangible existence, they are taxed in the locality in which they are situated. (b) Evidences of debt, such as state stocks and bonds of municipal corporations, transferable by delivery, and, indeed, all negotiable instruments which are of a chattel nature, are taxable where the evidence of the debt is actually situated. \* \* \* (d) Debts not negotiable are taxable where the owner resides, and may follow his person. \* \* \* (f) Stocks of corporations follow the person of the owner, and are taxed at the place of his residence. The domicile of the creditor is the situs for the purpose of taxation of negotiable promissory notes given for money loaned." *Boyd v. City of Selma*, 11 South. 393, 395, 96 Ala. 144, 16 L. R. A. 729, 733.

## Of debt.

Debts and choses in action are a species of intangible property that for purposes of taxation are generally held to be situated at the domicile of the owner. A debt owing to a person is evidenced by an account, note, bond, or other promise of the debtor, and is a mere chose in action, which goes with the person of the creditor, and can be properly assessed, under the great weight of authority, only in the county where the owner resides. A debt has no situs other than the domicile of the owner. It cannot be taxed to the debtor, for in such case it would not be a tax on property or wealth, but would be a tax on the converse, and a tax on property. The debtor may be in one state, and the creditor and security for the debt in another. It was held in *Erie R. Co. v. Pennsylvania*, 82 U. S. (15 Wall.) 300, 21 L. Ed. 179: "Debts owing by corporations, like debts owing by individuals, are not property of the debtor in any sense. They

are the obligations of the debtors, and only possess value in the hands of the creditors. With them they are property, and in their hands may be taxed. To call debts property of the debtors is a misuser of the term. All the property there can be, in the nature of things, in debts of corporations, belongs to the creditors to whom they are payable, and follows their domicile, wherever that may be. Their debts can have no locality separate from the parties to whom they are due." *Scripps v. Fulton County*, 55 N. E. 700, 701, 183 Ill. 278.

A "debt" is not property of a debtor, subject to taxation at his domicile, but its situs is at the domicile of the creditor. *Liverpool & L. & G. Ins. Co. v. Board of Assessors*, 25 South. 970, 51 La. Ann. 1028, 45 L. R. A. 524, 72 Am. St. Rep. 483.

A debt simply can have no locality separate from that of the party to whom it is due, and its situs with reference to taxation is not affected by the locality of the security. *Bullock v. Town of Guilford*, 9 Atl. 360, 361, 59 Vt. 516.

A mere debt is transitory, and may be enforced wherever the debtor or his property may be found; and, if the creditor can enforce the collection of his debt in the courts of the state, a creditor of such creditor should have equal facilities. *Pittsburgh, C., C. & St. L. R. Co. v. Bartels*, 56 S. W. 152, 153, 108 Ky. 216 (quoting *Burlington & M. R. Co. v. Thompson*, 31 Kan. 194, 1 Pac. 622, 47 Am. St. Rep. 497).

In *Caskie v. Webster* (U. S.) 5 Fed. Cas. 271, holding that a general voluntary assignment valid in one state, though assumed to be void if it had been made in another state, will carry property in that state as against a subsequent attaching creditor there, it is said a debt is a mere incorporeal right. It has no situs, and follows the person of the creditor. A voluntary assignment of it by the creditor, which is valid by the laws of his domicile, whether such assignment be called legal or equitable, will operate as a transfer of the debt, which should be regarded in all places. *Fenton v. Edwards*, 58 Pac. 320, 321, 126 Cal. 43, 46 L. R. A. 832, 77 Am. St. Rep. 141.

## SIXTH DAY.

Rev. Code, p. 458, providing that every plea to the merits shall be filed on or before the "sixth day of the term" at which the party is bound to appear, means the sixth day on which the court is in actual session. *Wash v. Randolph*, 9 Mo. 142, 144.

## SKELETON BILL.

A bill of exceptions signed by the judge, containing such statements as: "The plain-

tiff, to sustain the issues on his behalf, introduced the following evidence, as shown by the notes of the official reporter now on file in this cause, and the said reporter's transcript and execution thereof, duly certified as such transcript: (The clerk will here insert said official certified transcript of said evidence)," etc.—is a skeleton bill. *Joy v. Bitzer*, 41 N. W. 575, 576, 77 Iowa, 73, 3 L. R. A. 184.

## SKID.

A "skid" is a simple contrivance used for handling heavy articles under many conditions. It is probably used more often in connection with the loading and unloading of wagons and freight cars than for any other purpose. *Beckman v. Anheuser Busch Brewing Ass'n*, 72 S. W. 710, 711, 98 Mo. App. 555.

## SKILL.

See "All Possible Care, Skill, or Foresight"; "Mechanical Skill"; "Ordinary Skill"; "Reasonable Skill"; "Special Skill."

"Skill" is defined by Webster as "the familiar knowledge of any art or science, united with readiness and dexterity in execution or performance or in the application of the art or science to practical purposes." *Dole v. Johnson*, 50 N. H. 452, 454; *Arkridge v. Noble*, 41 S. E. 78, 80, 114 Ga. 949.

In the rule of law that a surgeon is required to exercise not only due care, but also due "skill," the word "skill" includes not only the knowledge or information which the surgeon has in reference to the propriety or desirability of a given operation, but also the ability to perform the operation in a proper and approved way. *Akridge v. Noble*, 41 S. E. 78, 80, 114 Ga. 949.

A man may be very skillful, without being very diligent or careful, yet skillful treatment by a physician would usually be understood to include all these qualities. A physician might prescribe with great skill when he came to see his patient, but be negligent and irregular in coming, or might not be careful enough in giving directions as to the management of the case in his absence. *Graham v. Gautier*, 21 Tex. 111, 119.

## SKILLED IN THE ART.

The specifications of a patent are addressed primarily to persons "skilled in the art," by which is meant, not those having very great technical knowledge relating to the subject-matter of the invention, but rather those having ordinary and fair informa-

tion; and if to these latter the specifications sufficiently describe the invention or process, it is all that is required. *Tannage Patent Co. v. Zahn* (U. S.) 66 Fed. 986, 989.

## SKILLED WORKMEN.

"Skilled workmen," as used in an instruction in an action for personal injuries by one employed in the erection of a building, stating the duty of the defendant to be to employ "skilled workmen," means that the skill required was such knowledge of building as to permit the work to be carried forward with safety to the persons engaged. *Haworth v. Severs Mfg. Co.*, 51 N. W. 68, 70, 87 Iowa, 765.

## SKIMMED MILK.

The practical common sense of the people has called milk from which the cream has been taken by its ancient name of "skimmed milk," without regard to whether the cream was skimmed in the primitive or abstracted in a more modern way. The dictionaries support this definition of the word. "The milk from which cream is separated is skimmed milk." *Century Dictionary*. "Skimmed milk, milk from which the cream has been taken." *Webster's International Dictionary*. "Skimmed milk, milk from which the cream has been removed." *Standard Dictionary*. This is the popular understanding and use of the term "skimmed milk," whether the cream has been taken by separator process, known as the "centrifugal method," though thereby more milk is abstracted than by the old-fashioned process, or whether it be done with a Southern plantation gourd, a big New Jersey clam shell, or a modern patent tin skimmer. When naming the product, the process takes the mere incident, and the substantial subject is the difference in quality between the article in its original and in its subsequent state. *Commonwealth v. Hufnal*, 39 Atl. 1052, 185 Pa. 376, 42 Wkly. Notes Cas. 78, 79.

Skim milk is secured by allowing whole milk to stand until the cream rises to the surface, and then, by means of a dipper or similar implement, the cream is skimmed from the surface, and the residue is skim milk. By the Cooley process milk is immersed in cool water, and, after the cream has risen, the milk is drawn from beneath the cream, and that which is drawn off from beneath the cream is called "Cooley skimmed milk," and has less of the butter fat than hand-skimmed milk. By the separator process the milk is passed through a centrifugal separator under rapid motion, by which the cream and fats are forced to the sides of the apparatus, and the product left is "separator skimmed milk." *Commonwealth v. Hufnal*, 4 Pa. Super. Ct. 301, 305, 325.



**SKIMMED MILK CHEESE.**

All cheese manufactured, sold, or offered for sale at any place or in any manner by any person or persons in the state at retail or wholesale, made from milk or cream of same testing less than three per cent. of butter fat, shall be deemed "skimmed milk cheese," or cheese not made from pure unskimmed, unadulterated milk or cream of same. Rev. St. Mo. 1899, § 4756.

**SKIMMING STATION.**

For the purpose of the pure food act a "skimming station" is defined as "a place where milk from not less than five patrons is skimmed by machinery and the cream resulting therefrom is taken to a creamery to be churned." *Cobbey's Ann. Neb. St. 1903, § 9410.*

**SKINS.**

See "Sheepskins."

The term "skins," as used in the fur trade, is used to designate the skins of animals which are valuable chiefly for the skins, and not for the fur. *Astor v. Union Ins. Co. (N. Y.) 7 Cow. 202, 214 (cited in Seeberger v. Schlesinger, 14 Sup. Ct. 729, 731, 152 U. S. 581, 38 L. Ed. 560).*

"Hides and skins," as used in *Tariff Act July 30, 1846, 9 Stat. 42, Schedule H*, prescribing a certain rate of duty on "raw hides and skins" of all kinds, whether dried, salted, or pickled, are a class of articles well known in the trade, and used extensively by manufacturers of leather, and cannot be construed to include Buenos Ayres sheepskins, imported with the wool on, and dried, but not dressed, usually invoiced as sheepskins, and known in commerce by that name. *Coggill v. Lawrence (U. S.) 6 Fed. Cas. 6.*

**SKINS FOR MOROCCO.**

The provision in *Tariff Act July 24, 1897, c. 11, § 1, Schedule N, par. 428, 30 Stat. 492 [U. S. Comp. St. 1901, p. 1676]*, providing for the duty on "skins for morocco," is not limited to goatskins, but includes certain sheepskins known as "New Zealand basils" or "Cape sheepskins." *Helmkrath v. United States (U. S.) 125 Fed. 634, 635.*

**SKIP.**

The skip was the name applied to a wooden box in which concrete, after being mixed, was transported to the place of deposit. *United States v. Venable Const. Co. (U. S.) 124 Fed. 267, 271.*

**SLANDER.**

Different definitions of slander are given by different commentators, but it is suffi-

cient to say that oral slander may be divided into five classes: Words falsely spoken of a person which impute to the party the commission of some criminal offense involving moral turpitude, for which the party, if the charge be true, may be indicted and punished; (2) words falsely spoken of a person which impute that the party is infected with some contagious disease, where, if the charge were true, it would exclude the party from society; (3) defamatory words falsely spoken of a person, which impute to the party unfitness to perform the duties of an office or employment of profit, or the want of integrity in the discharge of such office or employment; (4) defamatory words falsely spoken of a party, which prejudice such party in his or her profession or trade; (5) defamatory words falsely spoken of a person, which, though not in themselves actionable, occasion the party special damages. *Pollard v. Lyon, 91 U. S. 225, 227, 23 L. Ed. 308.*

Slander is defined in *Newell, Defam. 33*, as defamation, without legal excuse, published orally by words spoken, being the object of the sense of hearing. The publication of a slander is in itself evidence of malice, but, while it is not a publication when the words used are only communicated to the person defamed, they might in such a case be evidence of malice. *Frederickson v. Johnson, 62 N. W. 388, 389, 60 Minn. 337.*

All the text-books, the reported cases and the standard lexicographers, both law and literary, substantially agree in defining "slander" as the speaking of base and defamatory words which tend to the prejudice of the reputation, office, trade, business, or means of getting a living of another. *Coley, Torts, pp. 229, 235; Newell, Defam. 40; Townsh. Sland. & Lib. § 3; Rap. & L. Law Dict. 1198; 3 Bl. Comm. 183; Pollard v. Lyon, 91 U. S. 225, 23 L. Ed. 308; Harrison v. Burem, 1 Tenn. Cas. 94; Webst. Dict. An action by a depositor against a bank for refusal to honor checks is not an action of slander, within the meaning of Shannon's Code, § 4468, providing that actions for slanderous words spoken shall be commenced within six months after the words spoken. J. M. James Co. v. Continental Nat. Bank, 58 S. W. 261, 263, 105 Tenn. 1, 51 L. R. A. 255, 80 Am. St. Rep. 857.*

Every person having reasonable and probable cause to believe that a crime has been committed has the right to communicate his suspicions to a magistrate having jurisdiction of the case, but the existence of reason and probable cause for the suspicion is essential to make the communication privileged, and to relieve the person from slander. *Pierce v. Oord, 37 N. W. 677, 679, 23 Neb. 828.*

"Slander" is defined by *Comp. Laws. § 2529*, "as a false and unprivileged communi-

cation other than a libel which charges any person with crime or with having been indicted, convicted or punished, for crime." It will be observed that the communication must be false and unprivileged. The clear inference from this section is that a communication, though it charges the person with crime, may yet be privileged, and not constitute slander. *Ross v. Ward*, 85 N. W. 182, 183, 14 S. D. 240, 86 Am. St. Rep. 746.

Slander is a false and unprivileged publication other than libel which (1) charges any person with crime or with having been indicted, convicted, or punished for a crime; (2) imputes in him the present existence of an infectious, contagious, or loathsome disease; (3) tends directly to injure him in respect to his office, profession, trade, or business, either by imputing to him general disqualification in those respects which the office or other occupation peculiarly requires, or by imputing something with reference to his office, profession, trade, or business that has a natural tendency to lessen its profit; (4) imputes to him impotence or a want of chastity; or (5) which, by natural consequence, causes actual damage. *Civ. Code Cal.* 1903, § 46; *Rev. St. Okl.* 1903, § 3927; *Rev. St. Okl.* 1903, § 2238; *Civ. Code Mont.* 1896, § 33; *Rev. Codes N. D.* 1899, § 2716; *Civ. Code S. D.* 1903, § 30; *Nidever v. Hall*, 7 Pac. 136, 137, 67 Cal. 79. See, also, *Grand v. Dreyfus*, 54 Pac. 389, 390, 122 Cal. 58.

Slander or oral defamation consists, first, in imputing to another a crime punishable by law; or, second, charging him with having some contagious disorder, or being guilty of some debasing act which may exclude him from society; or, third, in charges made on another in reference to his trade, office, or profession, calculated to injure him therein; or, fourth, in disparaging words productive of special damage flowing naturally therefrom. *Civ. Code Ga.* 1895, § 3837.

#### As a crime.

A crime is an act committed or omitted in violation of a public law either forbidding or commanding it. 4 Bl. Comm. p. 5. In *Re Bergen*, 31 Wis. 386, a crime is defined as follows: "A wrong of which the law takes cognizance as injurious to the public, and punishes in what is called a criminal proceeding prosecuted by the state in its own name, or in the name of the people or the sovereign." Verbal slander, though a tort, is not a crime, under our statutes, so as to permit a wife to testify against her husband in an action for slander. *Bohner v. Bohner*, 64 N. W. 700, 701, 46 Neb. 204.

#### Libel distinguished.

False, defamatory words, when written, constitute a libel, and, when spoken, a slander. *Gambrill v. Schooley*, 48 Atl. 730, 93 Md. 48, 52 L. R. A. 87, 86 Am. St. Rep. 414.

"Slander" is defined to be oral or spoken defamatory words used by one person against another, and differs from libel, which is the printed or written declaration of one person against another. *Woodruff v. Woodruff*, 72 N. Y. Supp. 39, 40, 36 Misc. Rep. 15.

Libel, at the common law, was any false and malicious writing published of another, and having a tendency to render him contemptible or ridiculous in public estimation, or expose him to public contempt, or hinder a virtuous man from associating with him. There is a difference between slander and libel, as to what is required to constitute an actionable charge. It is perfectly reasonable to allow greater liberty of vocal speech than of a writing or printing, for the reasons that vocal utterance does not imply the same degree of deliberation, and is more likely to be the expression of momentary passion or excitement, and is not so open to the implication of settled malice. Therefore to such oral expressions little importance is generally attached. On the other hand, the same words deliberately written or printed, and afterwards placed before the public, justify an inference that they are the expressions of settled conviction, and they affect the public mind greatly. Second, an oral charge is merely heard, while a written or printed charge may be passed from hand to hand indefinitely for many years, constituting all the time a continuous condemnation. *Republican Pub. Co. v. Mosman*, 24 Pac. 1051, 1054, 15 Colo. 399. See, also, *Hillhouse v. Dunning*, 6 Conn. 391, 407; *Simpson v. Press Pub. Co.*, 67 N. Y. Supp. 401, 402, 33 Misc. Rep. 228.

#### Libel included.

*Rev. St.* 1895, art. 966, giving the Court of Civil Appeals final jurisdiction in actions of slander, does not apply to actions for libel. The authorities leave but little doubt that in the earlier day in the history of the common law the term was applied both to oral and written defamations of character, but we think it equally clear that in modern usage it is applied to oral defamation only. This is the case in its technical use, as well as in common acceptance. *Belo v. Smith*, 42 S. W. 850, 851, 91 Tex. 221.

"Slander" is the general and original word for all kinds of defamation. One can be defamed by words spoken, words written, or by signs or pictures; and, when so defamed, it is called "slander," and, as used in the statute providing that actions for slander shall not survive, was intended to embrace all these varieties of defamation, and includes an action for libel. *Johnson's Adm'x v. Haldeman*, 43 S. W. 226, 227, 102 Ky. 163.

#### SLANDER OF TITLE.

*Newell, Sland. & L.* p. 203, declares the right of action for slander of title to arise

in case any one falsely and maliciously defames the title of property, either real or personal, of another, and thereby causes him some special pecuniary damage or loss. *Carbondale Inv. Co. v. Burdick*, 72 Pac. 781, 783, 67 Kan. 329.

Though the term "slander" is more appropriate to the defamation of the character of an individual, yet the words "slander of title" have by use become a recognized phrase of the law; and an action therefor is permitted against one who falsely and maliciously disparages the title of another to property, whether real or personal, and thereby causes him some special pecuniary loss or damage. In order to maintain the action, it is necessary to establish that the words spoken were false and were maliciously spoken by the defendant, and also that the plaintiff has sustained some special pecuniary damage as the direct and natural result of their having been so spoken. As words spoken of property are not in themselves actionable, it is necessary to allege the facts which show wherein plaintiff has sustained damage. It is not actionable to speak disparagingly of the title of another unless he is damaged thereby. The utterance of a mere falsehood, however malicious, will not sustain an action, unless damage has resulted therefrom, and the damage which can be recovered is only such as is the direct and natural result of the utterance of the words. *Burkett v. Griffith*, 27 Pac. 527, 528, 90 Cal. 532, 13 L. R. A. 707, 25 Am. St. Rep. 151.

Three things are necessary to maintain an action for slander of property or title: (1) The words must be false; (2) they must be maliciously published; and (3) they must result in pecuniary loss or injury to the plaintiff. *Butts v. Long*, 68 S. W. 754, 755, 94 Mo. App. 687.

### SLANDEROUS WORDS.

Slandorous words are those which (1) import a charge of some punishable crime; or (2) impute some offensive disease, which would tend to deprive a person of society; or (3) which tend to injure a party in his trade, occupation, or business; or (4) which have produced some special damage. *Moore v. Francis*, 23 N. E. 1127, 1128, 121 N. Y. 199, 8 L. R. A. 214, 13 Am. St. Rep. 810 (citing *Onslow v. Horne*, 3 Wils. 177); *Le Massena v. Storm*, 70 N. Y. Supp. 882, 884, 62 App. Div. 150.

### SLAP.

"Slapped," as used in a complaint for divorce, alleging that defendant slapped plaintiff, evidently meant struck or beat, and is used as evidence of a cruel and inhuman treatment, in the same way that such words

are used, so that it was not necessary to allege that the complaint should show that the slapping was done in anger or with intent to injure the plaintiff. *Irwin v. Irwin*, 37 Pac. 548, 550, 2 Okl. 180.

### SLATE.

See "Natural Slate."

### SLAUGHTERHOUSE.

Slaughterhouses are houses in which animals are slaughtered. *Ford v. State (Ind.)* 14 N. E. 241, 244.

The term "business of slaughterhouse," as used in the license law of 1890, means the business of slaughtering animals for sale; and it does not matter whether it is carried on in a house or shed, or on his own property, or on leased property, or whether he sells his own animals or those of others. *Thibaut v. Hebert*, 12 South. 931, 932, 45 La. Ann. 838.

### SLAVE.

As chattel, see "Chattel."

As property, see "Personal Property"; "Property."

Indians may be slaves in New Jersey. *State v. Van Waggoner*, 6 N. J. Law (1 Halst.) 374.

### SLAVERY.

Slavery implies the relation of two persons in the character of master and slave. *De Lacy v. Antoine (Va.)* 7 Leigh, 438, 445.

"Our American law of African slavery is a system of customary law; that is, of rules and principles applicable to the institution, at first introduced and observed by the people in their practical dealing with the subject, and subsequently recognized by the courts as the grounds of judicial decision. Very few of these principles are the result of written law, but have been developed from time to time by the actual working of the system in the several slave states, and successively adopted by the courts as they have been found by experience to be proper and effective in making the institution answer the purpose for which it exists. Our system of slavery resembles that of the Romans, rather than the villeinage of the ancient common law, and hence both the community and the courts have looked to the Roman rather than to the old common law of England for rules applicable to it." *Douglass v. Ritchie*, 24 Mo. 177, 180.

Slavery is a relation founded in force, not in right; existing where it does exist by force of positive law, and not recognized as founded in natural right. Slavery, though

contrary to natural right and the principles of justice, humanity, and sound policy, as we adopt them, and found our laws upon them, yet not being contrary to the law of nations, if any other states or communities see fit to establish and continue slavery by law, so far as the legislative power of that country extends, we are bound to take notice of such law, and are not at liberty to declare and hold acts done within its limits unlawful and void, under our views of morality and policy, which the sovereign and legislative powers of such place have pronounced to be lawful. *Commonwealth v. Aves*, 35 Mass. (18 Pick.) 193, 215.

Slavery is regarded as a condition imposed on an individual by municipal law, and when that ceases or is removed his original and natural manhood is restored. He ceases to be a chattel, and becomes a free-man. *Opinion of Judge Appleton*, 44 Me. 521, 525.

## SLAY.

"Slay" is a synonym of "kill"; and hence its omission in an indictment for manslaughter, under a statute providing that the indictment should be sufficient if it aver that the defendant did kill and slay the deceased, is immaterial. *People v. McArron*, 79 N. W. 944, 945, 121 Mich. 1.

"Slay," as used in Rev. St. 1870, § 1048, providing that it shall be sufficient in every indictment for manslaughter to charge that the defendant did feloniously kill and slay the deceased, adds nothing to the force and effect of the word "kill," when used with reference to the taking of human life. It is particularly applicable to the taking of human life in battle, and when it is not used in this sense it is synonymous with "kill." The man that is slain is killed, and the man that is killed by the hand of his fellow man is slain. *State v. Thomas*, 32 La. Ann. 349, 350.

## SLEEPING CAR COMPANY.

As common carrier, see "Common Carrier."

As innkeeper, see "Innkeeper."

The term "sleeping car company," as used in the chapter relating to the listing of personal property for taxation, includes any person or persons, joint-stock association, or corporation, wherever organized or incorporated, engaged in the business of operating cars not otherwise listed for taxation in Ohio, for the transportation, accommodation, comfort, convenience, or safety of passengers, on or over any railway line or lines in whole or part within this state, such line or lines not being owned, leased, or operated by such company, whether such cars be termed sleeping, palace, parlor, chair, dining,

or buffet cars, or by some other name. *Bates' Ann. St. Ohio* 1904, § 2780-12.

Every joint-stock association, company, copartnership, or corporation incorporated or acting under the laws of this or any other state, or of any foreign nation, and conveying to, from, through, in, or across this state, or any part thereof, passengers or travelers in palace cars, drawing room cars, sleeping cars, dining cars, or chair cars, under any contract, express or implied, with any railroad company, or the managers, lessees, agents, or receivers thereof, shall be deemed and held to be a sleeping car company. *Civ. Code S. C.* 1902, § 290.

## SLEIGHT OF HAND.

Sleight of hand, within the meaning of the statute providing that whoever, by the means of three-card monte, or any other form or device, sleight of hand, or other means whatever, by the use of cards or other instruments of like character, obtains from another person any money or other property, shall be deemed guilty of swindling, is not limited to sleight of hand by means of cards, but includes sleight of hand by the use of other devices. *State v. Quinn*, 47 Iowa, 368, 369.

## SLEUTH.

The word "sleuth" or "sleuthhound" is, in its derivation, probably Icelandic, or at least northern, and comes from the word "slot," which was used in Scotland and the northern countries to indicate primarily a track in the snow, and afterwards a track in the earth as well. It did not find its way into the English dictionary until very recently, and there is said to be pronounced as though spelled "sloth." When detached from the word "hound," to which it is commonly prefixed, it means the track of an animal, as the same may be known by the scent. Held that, by the adoption and use of the word to distinguish his books, plaintiff, an author, acquired in it a certain property right, which was entirely independent of the statute laws pertaining to copyright, and should be protected. *Munro v. Beadle*, 8 N. Y. Supp. 414, 415 (reversing *Id.*, 2 N. Y. Supp. 314, where it was said that "the word 'sleuth' has a well-defined meaning, and is defined by Webster to mean the track of man or beast, as followed by the scent. It is used, in connection with a hound, to indicate a hound that follows the track of a human being or animals, and, as applied to man, would have the same meaning").

## SLIGHT.

The word "slight," according to Webster, means unconsiderable, unimportant; and, where an affidavit in support of a com-

plaint states that the threatened injury would be slight, the court will not take cognizance of the injury. *City of Janesville v. Carpenter*, 46 N. W. 128, 131, 77 Wis. 288, 8 L. R. A. 808, 20 Am. St. Rep. 123.

### SLIGHT DILIGENCE.

Slight diligence is that with which persons of less than common prudence, or, indeed, of any prudence at all, take care of their own concerns. It is distinguished from high or great diligence, which is that with which prudent persons take care of their own concerns, and common or ordinary diligence, which is that which men in general exert with respect to their own concerns. *Litchfield v. White*, 7 N. Y. (3 Seid.) 438, 442, 57 Am. Dec. 534.

"Slight care and diligence," as applied to the care and diligence which a gratuitous bailee of property is bound to exercise, is that care which every man of common sense, how inattentive soever he may be, takes of his own property. *Merchants' Nat. Bank v. Guilmartin*, 21 S. E. 55, 56, 93 Ga. 503, 44 Am. St. Rep. 182.

Slight care or diligence is such as persons of ordinary prudence usually exercise about their own affairs of slight importance. Rev. Codes N. D. 1899, § 5109; Rev. St. Okl. 1903, § 2782.

### SLIGHT EVIDENCE.

Evidence less than satisfactory evidence, which is defined as that evidence which ordinarily produces moral certainty or conviction in an unprejudiced mind, is denominated "slight evidence." Code Civ. Proc. Cal. 1903, § 1835.

### SLIGHT FAULT.

See "Very Slight Fault."

The slight fault is that want of care which a prudent man usually takes of his business. Civ. Code La. 1900, art. 3556, subd. 13.

### SLIGHT NEGLIGENCE.

Slight negligence is the want of great diligence. *Chicago, B. & Q. R. Co. v. Johnson*, 103 Ill. 512, 527; *French v. Buffalo, N. Y. & E. R. Co.*, \*43 N. Y. (4 Keyes) 108, 113; *Union Pac. Ry. Co. v. Rollins*, 5 Kan. 167, 180.

Slight negligence is the omission of a high degree of care and diligence. *Hodgson v. Dexter* (U. S.) 12 Fed. Cas. 283.

Slight negligence is the want of great or extraordinary care. *Chicago, K. & N. Ry. Co. v. Brown*, 24 Pac. 497, 499, 44 Kan. 384. Slight negligence is merely the failure to ex-

ercise great or extraordinary care. *Union Pac. Ry. Co. v. Henry*, 14 Pac. 1, 3, 36 Kan. 565.

"Slight negligence" is defined to be the want of great care and diligence. *Chicago West Div. Ry. Co. v. Klauber*, 9 Ill. App. (9 Bradw.) 613, 623; *Whiting v. Chicago, M. & St. P. Ry. Co.*, 37 N. W. 222, 224, 5 Dak. 90; Rev. Codes N. D. 1899, § 5111; Rev. St. Okl. 1903, § 2784.

"Slight negligence is the omission of that care which very attentive and vigilant persons take of their own goods, or a very exact diligence." *McGrath v. Hudson River R. Co.* (N. Y.) 19 How. Prac. 211, 220.

Slight negligence is an absence of that degree of care and vigilance which persons of extraordinary prudence and foresight are accustomed to use. *Dreher v. Town of Fitchburg*, 22 Wis. 675, 677, 99 Am. Dec. 91; *Lockwood v. Belle City St. Ry. Co.*, 65 N. W. 866, 871, 92 Wis. 97; *Griffin v. Town of Willow*, 43 Wis. 509, 512; *Hammond v. Town of Mukwa*, 40 Wis. 35, 42.

Ordinary care is the opposite of ordinary negligence. There can be negligence less than ordinary negligence. Slight negligence is the opposite of extraordinary care. *East Tennessee, V. & G. Ry. Co. v. Bridges*, 17 S. E. 645, 647, 92 Ga. 399.

Slight negligence is not a want of ordinary care, but a want of extraordinary care. *Cremer v. Town of Portland*, 36 Wis. 92, 100.

Negligence does not cease to be negligence because qualified as slight negligence. *Omaha St. Ry. Co. v. Craig*, 58 N. W. 209, 213, 39 Neb. 601.

"Slight negligence" is the want of extraordinary care and prudence, and the law does not require of a person injured by the carelessness of others to exercise that high degree of caution as a condition precedent to his right to recover damages for the injuries thus sustained. *Ellyson v. International & G. N. R. Co.* (Tex.) 75 S. W. 868, 871 (citing *Cremer v. Town of Portland*, 36 Wis. 92).

### Gross and ordinary negligence distinguished.

Strictly speaking, the expressions "gross negligence" and "ordinary negligence" are indicative rather of the degree of care and diligence which is due from a party and which he fails to perform, than the amount of inattention, carelessness, or stupidity which he exhibits. If very little care is due from him, and he fails to perform that little, it is called gross negligence. If very great care is required, and he fails to come up to the mark, it is called slight negligence. And if ordinary care is due, such as a prudent man would exercise in his own affairs, failure to bestow that amount of care is called ordinary negligence. In each case the negligence, whatever

epithet we give it, is failure to give and bestow the care which the situation demands; and hence it is more strictly accurate, perhaps, to call it simply negligence, and this seems to be the tendency of modern authority. *Briggs v. Spaulding*, 11 Sup. Ct. 924, 931, 141 U. S. 132, 35 L. Ed. 662.

Sir Wm. Jones distinguishes between ordinary negligence, gross negligence, and slight negligence thus: Ordinary neglect is the omission of that care which every man of common prudence and capable of governing a family takes of his own concerns; gross neglect is the want of that care which every man of common sense, how inattentive soever, takes of his own property; and slight neglect is the omission of that diligence which all circumspect and thoughtful persons use in securing their own goods and chattels. *French v. Buffalo, N. Y. & E. R. Co.*, \*43 N. Y. (4 Keyes) 108, 113.

"Slight negligence" is the want of high or great diligence. It differs from gross negligence, which is the want of slight diligence, and ordinary negligence, which is the want of ordinary diligence. *Litchfield v. White*, 7 N. Y. (3 Seld.) 438, 442, 57 Am. Dec. 534; *French v. Buffalo, N. Y. & E. R. Co.*, \*43 N. Y. (4 Keyes) 108, 113.

Slight negligence is the opposite of gross negligence, which is the want of slight diligence. *Chicago, B. & Q. R. Co. v. Johnson*, 103 Ill. 512, 523.

**Slight want of ordinary care distinguished.**

See "Ordinary Care."

## SLIP.

A slip is an opening between two pieces of land or wharves, an interval or vacancy between two piers. *City of New York v. Scott* (N. Y.) 1 Calnes, 543; *Thompson v. City of New York*, 5 N. Y. Super. Ct. (3 Sandf.) 487, 498; *City of New York v. Rice* (N. Y.) 4 E. D. Smith, 604, 608.

"Slip," as used in Act 1806, authorizing the mayor, aldermen, and commonalty of the city of New York, whenever they should think it for the public good, "to enlarge any of the slips in said city," means the intermediate space formed by docks. In a less general sense the word designates the docks which form the intermediate space. *Thompson v. City of New York*, 11 N. Y. (1 Kern.) 115, 120.

A "slip," as used in connection with dangers incident to a furnace stack, is caused by a part of the materials with which the furnace is charged adhering to the sides until the molten mass below it has settled down, and then making a slip or fall, so as to produce an explosion. *Giles v. Jones & Laughlins*, 54 Atl. 280, 204 Pa. 444.

## SLIPPERY.

"Slippery," when used as descriptive of a person, means that the person to whom it is applied cannot be depended on or trusted; that he is dishonest, and apt to play one false; and hence to speak of one as slippery is libelous. *Peterson v. Western Union Tel. Co.*, 67 N. W. 646, 647, 65 Minn. 18, 33 L. R. A. 302.

## SLIT.

"Slit" is defined by Webster as "to cut lengthwise; to cut into long pieces or strips; to cut or make a long fissure; to cut in general; to rend; to split." *State v. Cody*, 23 Pac. 891, 896, 18 Or. 506.

## SLOP-FED HOGS.

The term "slop-fed hogs" is used to designate hogs fattened at the still. *Bartlett v. Hoppock*, 34 N. Y. 118, 119, 88 Am. Dec. 428.

## SLOPE.

The term "slope," as used in the chapter relating to mines and mining, means an inclined way or opening used for the same purpose as a shaft. 2 P. & L. Dig. Laws Pa. 1894, cols. 3110, 3150, §§ 193, 349.

## SLOT RAILS.

Slot rails are those which form the sides of the slots or orifice through which passes the shank of the grip used in the operation of a cable. *Johnson Co. v. Pennsylvania Steel Co.* (U. S.) 62 Fed. 156, 157.

## SLOUGH.

An arm of a river apart from the main channel. *Dunlieth & Dubuque Bridge Co. v. Dubuque County*, 8 N. W. 443, 447, 55 Iowa, 538.

Where a part of the waters of a stream in its downward course diverges from the main channel and returns to it lower down, it is usually called a "slough," and especially if in its separate course it runs with a slow current, and through low lands. *Black River Imp. Co. v. La Crosse Booming & Transp. Co.*, 11 N. W. 443, 448, 54 Wis. 659.

"Sloughs" are not recognized as water courses which a railroad company, in the construction of its roadbed, may not fill up without openings for water which may seek an outlet in times of extraordinary rainfalls. *Hagge v. Kansas City S. R. Co.* (U. S.) 104 Fed. 391, 392 (citing *Jones v. Wabash, St. L. & P. Ry. Co.*, 18 Mo. App. 251; *St. Louis, I. M. & S. Ry. Co. v. Schneider*, 30 Mo. App. 620).

**SLOW UP.**

To "slow up" a train means to diminish its speed, the extent of diminution being necessarily controlled by the object or purpose in view. To "slow up" in any given case must be such slowing up as the particular exigency requires. To slow up and keep a sharp lookout for an expected or possible obstruction must mean such slowing up and watchfulness as will prevent accident. The reduction of the usual rate of speed of the passenger train to either 10 or 15 or 20 miles an hour would be a slowing up in the general sense, and, of course, in the usual acceptation of the words; but the phrase means something more when used in an order intended for a particular purpose, and based upon the possibility that an accident from a malicious obstruction may occur at the designated place, because a similar accident from the same cause had recently occurred. *Louisville & N. R. Co. v. McKenna*, 81 Tenn. (13 Lea) 280, 286.

**SLOWLY.**

A finding in an action for personal injuries from a defective sidewalk, that at the time of the accident the plaintiff was "walking slowly," cannot be construed to mean that she was walking carefully, or was using her sense of sight, or that she was paying any attention to where she was stepping, so as to support a judgment in her favor. *City of Bluffton v. McAfee*, 40 N. E. 549, 550, 12 Ind. App. 490.

**SLUICE.**

"Sluice," as used in a license to construct, maintain, and operate a sluice dam across a river and to sluice logs through it, granted by the board of county commissioners pursuant to the provisions of Gen. St. 1878, tit. 8, c. 32, means simply opening the gate or sluiceway of the dam for logs, lumber, and timber, and not in the sense of requiring the operator of the dam to apply manual labor on the logs or timber in driving them through the sluice. *Anderson v. Munch*, 13 N. W. 192, 193, 29 Minn. 414.

**SLUICE DAM.**

"The nature and purpose of a sluice dam is the utilizing the water of a stream by raising a head sufficient to float logs and lumber over obstructions and shoal places down to the dam, and then, letting it out, flood the stream below so as to carry the logs down to their destination. It is constructed with a sluiceway, or opening, for the passage of logs. When logs are not passing, it is closed to collect the water above; and when logs come down, and are desired to be passed through, it is opened to let them out, together with

sufficient water to carry them downstream. The owner of the dam has nothing to do with the handling of the logs. He simply operates the dam. The logs are never in his possession, and he has no control over them, except by virtue of a lien for tolls. It is not like a boom. The object is simply to facilitate the driving of the logs by their owner, and enable him to get them over rapids and shoal places." *Anderson v. Munch*, 13 N. W. 192, 193, 29 Minn. 414.

**SMALL BAYS.**

Rev. St. c. 40, § 17, as amended by Pub. Laws 1889, c. 306, which prohibits the catching of certain kinds of fish by the use of purse and drag nets in all "small bays," inlets, harbors, and rivers where any entrance to the same or the distance from the opposite shores of the same at any point is not more than three nautical miles in width, includes any indentation in the coast, whether it can be strictly termed a bay or not, where the sides of the coast at the entrance to the same are not over three nautical miles apart. *State v. Murray*, 24 Atl. 789, 84 Me. 135.

**SMALL BILLS.**

"Small bills," as used in Act Feb. 24, 1840, prohibiting the circulation and issuing of "small bills" when issued by individuals or corporations for the purpose of passing as a circulating medium or as a substitute for small bank notes, have not, perhaps, any established definition, but the object of the Legislature was to prevent the circulation of any and all bills intended and issued to be used as a circulating medium or as a substitute for bank notes. *Madison Ins. Co. v. Forsythe*, 2 Ind. (2 Cart.) 483, 485.

**SMART AFTER NIGHT.**

A charge that another is mighty "smart after night" does not impute the crime of larceny, and therefore the words are not actionable in themselves. *Kirksey v. Fike*, 29 Ala. 206, 207.

**SMART MONEY.**

"Smart money" is a term frequently used to designate punitive, exemplary, or vindictive damages. *Brewer v. Jacobs* (U. S.) 22 Fed. 217, 224; *Nashville St. Ry. Co. v. Griffin*, 57 S. W. 153, 156, 104 Tenn. 81, 49 L. R. A. 451; *Dirmeyer v. O'Hern*, 3 South. 132, 134, 39 La. Ann. 961; *Hendle v. Geller* (Del.) 50 Atl. 632, 633.

This court has never held that one should be compelled to pay "smart money" as exemplary damages, or any damages by way of punishment merely. Damages to be

awarded can never exceed what shall compensate for the injury done. Compensation to the plaintiff is the purpose in view, and any instruction which may lead the jury to believe that they have the right to go beyond that, and that they may punish the defendant by compelling him to pay smart money, is erroneous. In *Mooney v. Kennett*, 19 Mo. 551, 61 Am. Dec. 576, the use of the words "smart money," as applied to exemplary damages, was held erroneous. *Stuyvesant v. Wilcox*, 52 N. W. 465, 467, 92 Mich. 233, 31 Am. St. Rep. 580.

Exemplary, punitive, and vindictive damages are such damages as are in excess of the actual loss, and are allowed in theory when a tort is aggravated by evil motive, actual malice, deliberate violence, or oppression or fraud. Such damages are sometimes called "smart money." *Springer v. J. H. Somers Fuel Co.*, 46 Atl. 370, 371, 196 Pa. 156.

Where an injury has been wanton and malicious, or gross and outrageous, the courts permit juries to add to the measure of compensation of the plaintiff which he would have been entitled to recover, had the injury been inflicted without design or intention, something further by way of punishment for example, which has sometimes been called "smart money"; and this has always been left to the discretion of the jury, as the degree of punishment to be so inflicted must depend on the peculiar circumstances of the case. *Day v. Woodworth*, 54 U. S. (13 How.) 363, 371, 14 L. Ed. 181.

In this court the doctrine is well settled that in actions of tort the jury, in addition to the sum awarded by way of compensation for the plaintiff's injuries, may award exemplary, punitive, or vindictive damages, sometimes called "smart money," if the defendant has acted wantonly or oppressively, or with such malice as implies a spirit of mischief or criminal indifference to civil obligations; but such guilty intention on the part of the defendant is required to charge him with exemplary or punitive damages. Exemplary or punitive damages, being awarded, not by way of compensation to the sufferer, but by way of punishment to the offender, and as a warning to others, can be awarded only against one who has participated in the offense. *Lake Shore & M. S. Ry. Co. v. Prentice*, 13 Sup. Ct. 261, 263, 147 U. S. 101, 37 L. Ed. 97.

The term "smart money" is used to designate damages allowed in excess of compensatory damages by way of punishment to the wrongdoer. It is synonymous with exemplary, vindictive, and punitive damages. Mr. Justice Foster concludes a discussion of the expression "smart money," as used by Grotius and jurists contemporary with that author, with the following language: "It is

interesting, as well as instructive, to observe that 120 years ago the term 'smart money' was employed in a manner entirely different from the modern signification which it has obtained, being then used as indicating compensation for the smarts of the injured person, and not, as now, money required by way of punishment and to make the wrongdoer smart." *Murphy v. Hobbs*, 5 Pac. 119, 123, 7 Colo. 541, 49 Am. Rep. 366 (citing *Fay v. Parker*, 53 N. H. 342, 16 Am. Rep. 270).

## SMELL THE LAND.

An expression peculiar to sailors, meaning the approach of vessels too near the bank or bottom; that is, when ships approach too near the bank or bottom, they "smell the land," etc. *The Alexander Folsom* (U. S.) 52 Fed. 403, 413, 3 C. C. A. 165.

## SMELTING.

By the definitions of the dictionaries the word "smelting" is shown to be sometimes employed to signify simply melting or fusing, and sometimes, and more commonly, in its practical sense, to mean the reduction of ores by melting them in the presence of some agents which would react upon the compounds of the ore when fused, and thereby separate them. *Cowles Electric Smelting & Aluminum Co. v. Lowrey* (U. S.) 79 Fed. 331, 343, 24 C. C. A. 616; *Lowrey v. Cowles Electric Smelting & Aluminum Co.* (U. S.) 68 Fed. 354, 369.

The Standard Dictionary defines "smelting" as obtaining a metal from the ore by a process that includes fusion; "roasting," as heating metals highly with access of air, but without fusion. "Smelting, even in its more general terms, is the obtaining of metal from the ore by a process that includes fusion, while roasting ore is to heat highly with access of air, but without fusing; thereby distinguishing the roasting of ore from smelting, rather than including it therein." The definitions given by Webster are: "Smelt. To melt or fuse, as ore." "Roast. To dissipate by heat the volatile parts of, as ores." The definitions by Worcester: "Smelt. To melt or fuse, as ore." "Roast. To expel volatile matters from, by exposing to heat, as ores." These definitions of the term "smelt," taken in connection with the fact that smelting is ordinarily accomplished by means of extensive plants erected for that purpose, and very often at great distances from the mines, while only the most extremely sulphide ores are roasted, and the roasting is generally done in a primitive manner, without any fusion or melting of the metal, "satisfy us that the process of roasting ores \* \* \* is entirely different and distinct from smelting." *United States v. United Verde Copper Co. (Ariz.)* 71 Pac. 954, 956.



Raising and smelting lead ore, when expressed in a corporation charter as the purpose of the creation of the corporation, may be construed as including the power to purchase smelting works, with all the appurtenances which are necessary for carrying on the business, and to assume a contract made by their vendors, providing means for transferring their ores, when smelted, to market. *Moss v. Averell*, 10 N. Y. (6 Seld.) 449, 454.

## SMITING.

A mere assault or a threatening posture is not "smiting," within St. 5 & 6 Edw. VI, c. 4, relating to brawling. *Jenkins v. Barrett*, 1 Hagg. 12.

## SMOKEHOUSE.

"Smokehouses" are houses maintained for the purpose of smoking meats. *Ford v. State*, 14 N. E. 241, 244, 112 Ind. 373.

A smokehouse "is a building in which meats or fish are cured by smoking; also one in which smoked meats are stored. In common parlance, the term embraces any outbuilding, appended to a dwelling, in which the family supply of meat is habitually kept and stored for use, and where meat may be smoked when necessary." *Walt v. State*, 13 South. 584, 99 Ala. 164.

## SMOKER'S ARTICLES.

As used in Tariff Act 1883 (22 Stat. p. 513, c. 112), placing a duty on "smokers' articles," does not necessarily require that the article should, of and by itself, be capable of being used for smoking, and packages of paper specially prepared as cigarette wrappers, cut to the proper size and separated in a division of about 250 pieces, being the proper number for a cigarette book, are within the term. *Isaacs v. Jonas*, 13 Sup. Ct. 677, 679, 148 U. S. 648, 37 L. Ed. 596.

## SMOKESTACK.

A builder is competent to state what is meant among mechanics when the term "smokestack" is used. *Skelton v. Fenton Electric Light & Power Co.*, 58 N. W. 609, 610, 100 Mich. 87.

## SMOKING TOBACCO.

There is no substantial difference between smoking tobacco and cigarettes. Cigarettes consist of smoking tobacco similar in all material respects to that used in pipes. The circumstance that a longer cut than that commonly used in pipes is most convenient for cigarettes is not important. It may be used for either purpose, and is all embrac-

ed in the term "smoking tobacco." *Carroll v. Ertheller* (U. S.) 1 Fed. 688, 690.

## SMUGGLE.

The word "smuggle" is a technical word, having a known and separate meaning, a necessary meaning in a bad sense, and implies something illegal, and is inconsistent with an innocent intent. The idea conveyed by it is that of a secret introduction of goods with intent to avoid the payment of duty. *United States v. Claffin* (U. S.) 25 Fed. Cas. 433, 435; *United States v. Dunbar* (U. S.) 60 Fed. 75, 77.

## SMUGGLING.

As felony, see "Felony."

To constitute "smuggling," for which an indictment may be sustained, it is necessary that the property should have been brought in in a secret and clandestine manner, with the intent to defraud the revenue; and the nonpayment of or accounting for the duties prior to the importation will not constitute the offense. *United States v. Thomas* (U. S.) 28 Fed. Cas. 76, 77.

By the established definition of the word "smuggling," both in English and American law, to constitute the offense, the goods must be unladen and brought on shore. *Keck v. United States*, 19 Sup. Ct. 254, 172 U. S. 434, 43 L. Ed. 505.

The word "smuggling" carries with it the implication of knowledge. In 2 Bouv. Law Dict. 530, "smuggling" is defined as fraudulently taking into a country, or out of it, merchandise which is lawfully prohibited; and such is the general understanding of its meaning. *Dunbar v. United States*, 15 Sup. Ct. 325, 328, 156 U. S. 185, 39 L. Ed. 390.

## SNEAK.

"Sneak," as defined by Webster, is "to creep or steal away privately; to withdraw meanly, as a person afraid or ashamed to be seen, as to sneak away from company; to behave with meanness, servility; to crouch; to truckle; to hide, especially in a mean and covertly manner; a mean, sneaking fellow." The use of the word "sneak" in a publication, with the gentlemen of the board of health in the line of spy and sneak, "meaner and dirtier than they had the face to ask the police department to do—and so they went to B.," implies cowardliness, servility, and meanness; thus leaving it a question of fact, as the sense in which the words were used. It is possible, perhaps, to give the language an innocent construction; but it also implies attributes of character which tend to make a man contemptible and disgrace him in the eyes of the community. *Byrnes v. Mathews*, 12 N. Y. St. Rep. 74, 82.

## SNOWFLAKE.

The word "snowflake," as applied to bread or crackers, is a mere description of the whiteness, lightness, and purity of the article. The word "snowflake," therefore, is a word which of necessity belongs to the public, common alike to all, and hence it cannot be adopted as a trade-mark. *Larabee v. Lewis*, 67 Ga. 561, 562, 44 Am. Rep. 735, 736.

## SNOWSTORM.

The word "snowstorm" in the popular mind stands associated with the idea of unusual force, violence, or disturbed action beyond an ordinary snow. An insurance policy against loss by storm does not cover a loss by a freshet caused by the melting of snow and prevailing winds and rain. *Stover v. Insurance Co. (Pa.)* 3 Phila. 38, 42.

## SO.

See "And So"; "And So Forth"; "And So On."

The word "so" means "hence" and "therefore," when it is used to connect that which is an illustration of or conclusion from that which is stated before. *Clem v. State*, 33 Ind. 418, 431.

### As relating back.

"So," as defined by Webster, means "in the same manner as has been stated, in this or that condition or state, under these circumstances; in this way, with reflex reference to something which is asserted," and is so to be construed when used in an indictment. *Blanton v. State*, 24 Pac. 439, 441, 1 Wash. St. 265.

A testator, after devising property to his sons, directed that, if either of them should remain unmarried until death, then his or their part of the property "so gave" should be equally divided among other children. It was held that the words "so gave" referred to the property given; that is, were the description of a particular part of the property which he intended to devise, and not the interest or estate which he intended to create by the devising clause. *Terrel v. Sayre*, 3 N. J. Law (2 Penning.) 183, 188.

"So sold," as used in Statute of Frauds, § 17, providing that a contract for the sale of goods, wares, and merchandise for the price of £10 sterling or upwards must be in writing, or that there must be an acceptance by the buyer of part of the goods so sold, means sold for the price of £10 sterling or upwards. *Tomkinson v. Staight*, 17 C. B. 697, 705.

As used in an act declaring that, in case a writ shall be lost or embezzled, the rec-

ord thereof cannot be given in evidence, the statute authorizing it only in cases where the direction of the act is followed, the language of which is, "and the record of such writ, so made, shall be as good evidence as the writ itself," the words "so made" refer to the antecedent directions for recording the execution before it is delivered to the sheriff, and should be read thus, "The record of a writ recorded before it is delivered to the sheriff shall be as good evidence as the writ itself," and hence subsequent recording of the execution is of no avail. *Elmer v. Burgin*, 2 N. J. Law (1 Penning.) 186, 193.

"So made," as used in Gen. St. c. 11, § 139, providing for the execution of a tax deed by the auditor, and section 140, providing that the deed so made by the auditor shall be received in all courts as prima facie evidence of a good and valid title in such grantee, his heirs and assigns, does not mean made after compliance with all the previous requirements of law; for a deed which is made after compliance with all the prerequisites of the statute is conclusive evidence of title. *Broughton v. Sherman*, 21 Minn. 431, 433.

"So delivered," as used in a bill of lading relieving the carrier from liability as soon as the goods are delivered from the tackles of the steamer at her port of destination, and in another clause that the goods shall be received by the consignee thereof package by package as so delivered, means as delivered from the tackles of the vessel. *The Santee (U. S.)* 21 Fed. Cas. 411, 413.

In a will reciting that: "If the contract entered into between Crawford and myself should be consummated according to the conditions thereof, it is my opinion there will be a surplus after paying my debts and the bequests hereinbefore made. If so, I desire that the same be divided between my legatees in the same ratio that I have already given them"—the words "if so" mean no more than this: If there is a surplus. They neither necessarily nor naturally make the previous fact, stated as the ground of the testator's opinion that there might be a surplus, a part of the contingency upon which the operation of the clause disposing of the surplus was to depend. *Appeal of Yearnsan*, 25 Wis. 21, 25.

Internal Revenue Act July 20, 1868, § 96 (15 Stat. 164) provides that if any distiller, rectifier, wholesale liquor dealer, compounder of liquors, or manufacturer of tobacco or cigars shall knowingly and willfully omit, neglect, or refuse to do or cause to be done any of the things required by law in the carrying on or conducting of his business, or shall do anything by this act prohibited, if there be no specific penalty imposed by any other section, he shall pay a certain penalty, and, if the person "so offending" be a distiller, rectifier, wholesale liquor deal-

er, or compounder of liquors, all distilled spirits owned by him or in which he has any interest shall be forfeited to the United States. Held, that the person "so offending" is not one and every one who is guilty of the knowing and willful omission, neglect, and refusal, or who does the thing prohibited by the act, but is one and only one who is guilty of a knowing and willful omission, neglect, or refusal to do something which is required, or does something which is prohibited for which no specific penalty is imposed by any other section of the act. *United States v. 1,412 Gallons of Distilled Spirits* (U. S.) 27 Fed. Cas. 332, 333.

St. 1895, c. 419, § 9, creating the offense of being present where gaming implements are found, and providing that every person "so present" shall be punished, etc., should not be construed literally, with the result of making it criminal to be in the same place with gaming implements, if the place merely has been complained of as the common gaming house, but so as to render it necessary that the place is used unlawfully as a common gaming house in fact, to constitute the offense. *Commonwealth v. Smith*, 44 N. E. 503, 504, 166 Mass. 370.

#### SO CALLED.

Where testatrix's estate consisted in part of cash in her house and at her bankers, long annuities, Colombian bonds, and a promissory note dated prior to her will and payable to herself, a residuary devise of "cash or money, so called," would not include the note, annuities, and bonds. *Beales v. Crisford*, 13 Sim. 592, 594.

#### SO FAR INTEMPERATE AS TO IMPAIR HEALTH.

The words "so far intemperate as to impair health," in a life policy providing that the policy shall be void if the insured becomes so far intemperate as to impair health or induce delirium tremens, includes the immoderate drinking of liquor in such quantities as to cause the death of insured, though he is not habitually addicted to the use of such liquors, and although they do not produce delirium tremens. *Ætna Life Ins. Co. v. Davey*, 8 Sup. Ct. 331, 333, 123 U. S. 739, 31 L. Ed. 315.

A life insurance policy, providing that it should be void if the insured should become "so far intemperate as to impair his health" or to induce delirium tremens, means that, if the insured shall become so far intemperate as to impair his health or as to induce delirium tremens, then, and in the case of the happening of either of these alternatives, the contract should be void, and that, if the impairment of health is caused by his intemperance, then the degree of intemperance which has been forbidden has

been reached, and a single debauch, lasting only a few days, which resulted in the impairment of health or in delirium tremens, would constitute the forbidden intemperance. —*Ætna Life Ins. Co. v. Ward*, 11 Sup. Ct. 720, 723, 140 U. S. 76, 35 L. Ed. 371.

A clause of a life insurance policy providing that the company should not be liable if the insured should become "so far intemperate as to seriously or permanently affect his health" should be construed as relating only to the person insured, and that a violation of the policy could not be shown by evidence that the assured drank sufficient to seriously impair a man's health, since what would impair one man's health might not affect another's. *Odd Fellows' Mut. Life Ins. Co. v. Rohkopp*, 94 Pa. 59, 61.

#### SO LONG AS.

An agreement providing that, in consideration of a certain person's becoming the obligor's wife, he would give her at the rate of \$1 per week, from the date of marriage, "so long as she remains my wife," etc., should be construed to call for the payment of a sum of money to her after the termination of the coverture; the amount to be ascertained by its duration. *Brown v. Slater*, 16 Conn. 192, 41 Am. Dec. 136.

The phrase "so long as she remains my widow," in a devise by a husband to his wife, are words of limitation, marking the duration of the estate, and not words of condition, imposing a condition in restraint of marriage. *Summit v. Yount*, 9 N. E. 582, 583, 109 Ind. 506.

A consent decree for alimony provided for the payment of an annual sum to plaintiff for "so long as she may be and remain sole and unmarried," payable quarterly. By a bond and trust deed, reciting the decree, the husband bound himself, his heirs, executors, and administrators, to perform such decree. Held, that the payment of the alimony did not terminate on the death of the husband; the plaintiff remaining sole and unmarried. *Storey v. Storey*, 18 N. E. 329, 331, 125 Ill. 608, 1 L. R. A. 320, 8 Am. St. Rep. 417.

When used in a will devising all of the testator's realty to his wife, "to remain hers so long as she remain unmarried after my decease" are words of limitation, and show an intention on the part of the testator to limit the duration of the estate, at longest, to the natural life of the widow, and can mean no more than "during widowhood." *Nash v. Simpson*, 3 Atl. 53, 54, 78 Me. 142.

#### SO MUCH AS REMAINS.

A provision in a will that, upon the death of the tenant for life, "so much" of the estate devised to her "as remains her

property at her death" shall go to the children of the testator, implies a power of sale by the tenant for life. *McClellan v. Larchar*, 16 Atl. 269, 272, 45 N. J. Eq. (18 Stew.) 17.

"So much as shall remain undisposed of or unspent," in a will, does not amount to a residuary clause. *Mills v. Newberry*, 1 N. E. 156, 160, 112 Ill. 123, 54 Am. Rep. 213.

#### SO NEAR THERETO.

The words "so near thereto," as used in a statute authorizing the punishment of misbehavior threatening the authority of the court, "so near thereto as to obstruct the administration of justice," mean, not the place where the misbehavior is committed, but the power of the misbehavior to harm the administration of justice. If the force put in motion by the misbehavior, at whatever place it is committed, assails or threatens the independence and authority of the court, it is so near thereto as to be punishable under this section. *Ex parte McLeod* (U. S.) 120 Fed. 130, 141 (citing *Myers v. State*, 46 Ohio, 473, 22 N. E. 43, 15 Am. St. Rep. 638).

#### SO SOON AS.

A will directing that a certain grant of lands should be sold "so soon as" the leases are canceled is equivalent to a direction to sell the land whenever the leases are canceled. *Toland v. Toland*, 55 Pac. 681, 682, 123 Cal. 140.

#### SOAP.

"Soap," as used in a specification in a patent for a detergent soap, means any of the compounds of alkali with oil or fat, which are known and used in the arts under that name. *Buchan v. McKesson* (U. S.) 7 Fed. 100, 103.

#### SOAPSTONE.

Soapstone is a steatite, and is so called from its soapy feeling. It is defined by Webster as a soft magnesium rock having a soapy feeling, presenting grayish, brown, green, and whitish shades of color. It is a variety of talc, which consists of silica and magnesium. *Okey v. Moyers*, 91 N. W. 771, 117 Iowa, 514.

#### SOBER.

"Sober and temperate," as used in the representations made to secure a life insurance policy, are to be taken in their ordinary sense. The language does not imply total abstinence from intoxicating liquors. The moderate and temperate use of intoxicating liquors is consistent with sobriety. But, if a man use spirituous liquors to such an extent as to produce frequent intoxica-

tion, he is not sober and temperate, within the meaning of the contract. *Brockway v. Mutual Ben. Life Ins. Co. (U. S.)* 9 Fed. 249, 253.

#### SOBRANTE.

"Sobranste," in a Mexican land grant, is used with reference to the surplus. *United States v. San Jacinto Tin Co.*, 8 Sup. Ct. 850, 858, 125 U. S. 273, 31 L. Ed. 747.

#### SOBRE.

A Spanish word, meaning that something is over, or above, or upon another. *Ruis' Heirs v. Chambers*, 15 Tex. 586, 592.

#### SOCIETY.

See "Affiliated Societies"; "Agricultural Society"; "Religious Society"; "Scientific Societies."

Charitable society, see "Charity."

"Society," as used in connection with a husband's right to the enjoyment of his wife's society, means such capacities for usefulness, aid, and comfort as the wife possessed. *Furnish v. Missouri Pac. Ry. Co.*, 15 S. W. 315, 317, 102 Mo. 669, 22 Am. St. Rep. 800.

In the statement that society should be able to rely upon the judgments and decrees of its courts, and, although it knows they are liable to be reversed, yet it has a right, so long as they stand, to presume they have been properly rendered, "society" means third persons, or strangers to the decree. *Hay v. Bennett*, 38 N. E. 645, 650, 153 Ill. 271.

The word "society," in the act relating to corporations, lodges, and societies, shall be deemed to include churches, associations, congregations, grand and subordinate lodges, chapters, councils, encampments, divisions, and all other orders enumerated in the preceding section. *Horner's Rev. St. Ind.* 1901, § 3817.

#### Association synonyms.

"Society" and "association" are convertible terms, and therefore *Laws 1895, c. 398, § 153*, providing that any incorporated medical society, instituting proceedings against physicians for practicing medicine without lawful registration, shall receive the fines imposed and collected in such prosecutions, applies to any incorporated medical society, whether it be designated a society or an association. *New York County Medical Ass'n v. City of New York*, 65 N. Y. Supp. 531, 32 Misc. Rep. 116.

#### Church synonyms.

The words "church" and "society" are popularly used to express the same thing, namely, a religious body organized to sus-

tain public worship. *Josey v. Union Loan & Trust Co.*, 32 S. E. 628, 629, 106 Ga. 608; *Church & Congregational Soc. v. Hatch*, 48 N. H. 393, 396.

### SOCIETY FOR RELIGIOUS WORSHIP.

The term "society for the purpose of religious worship," in the statute prohibiting any church, congregation, or society formed for the purpose of religious worship to hold more than 10 acres of land, is strictly confined to corporations for the purpose of religious worship, and does not include benevolent or missionary societies. *Gilmer v. Stone*, 7 Sup. Ct. 689, 691, 120 U. S. 586, 30 L. Ed. 734.

### SOD OIL.

"Sod oil," as used in the tariff act, is the oil which has been felled into skins during the operation of tanning and has been subsequently washed out with soda. *United States v. Leonard* (U. S.) 100 Fed. 288.

### SODOMY.

As buggery, see "Buggery."

Sodomy "is a connection between two human beings of the same sex—the male—named from the prevalence of the sin in Sodom." *Ausman v. Veal*, 10 Ind. 355, 356, 71 Am. Dec. 331.

"Sodomy" and "the crime against nature" have often been used as synonymous terms; and hence the infamous crime against nature, either with man or beast, made punishable by Cr. Code, § 47, includes not only the offense of sodomy, but any other bestial and unnatural copulation. *Honselman v. People*, 48 N. E. 304, 305, 168 Ill. 172.

The repeal by Rev. St. 1846, p. 730, of the act of 1841, which provided that it shall not be necessary in sodomy to prove emission, proof of penetration being sufficient, revived the common law in force prior to the passage of such act, and made emission a necessary ingredient of the offense, which ingredient, though it may be inferred from penetration and other circumstances, must be made out by the prosecution in order to convict. *People v. Hodgkin*, 94 Mich. 27, 28, 53 N. W. 794, 34 Am. St. Rep. 321.

### SŒVITIA.

Everything is "sœvitia" which tends to bodily harm, and in that manner renders cohabitation unsafe. *Hill v. Hill*, 2 Mass. 150.

### SOFT ENGLISH LEAD.

A contract to deliver to certain parties a certain quantity of "soft English lead"

may mean lead made wholly of English ores, or it may mean soft lead made in England, no matter from what ores. The words are to be construed in such a case with reference to the circumstances and intent of the parties, and the meaning thereof is a proper question for the jury. *Pollen v. LeRoy*, 30 N. Y. 549, 563.

### SOFT HOGS.

The term "soft hogs" is used to designate hogs fed upon mast, such as beech nuts and acorns. *Bartlett v. Hoppock*, 34 N. Y. 118, 119, 88 Am. Dec. 428.

### SOFT WOOD.

In the business of buying and selling firewood, one class is denominated "hard wood," and another class is denominated "soft wood." To which of these classes a particular species belongs is for the jury to determine. The words "soft wood," as used in a sheriff's return, reciting that the sheriff had levied on 60 cords of soft wood, more or less, was probably intended to represent what in commerce has been applied to certain kinds of wood to distinguish it from other kinds. The precise definition of the term does not appear to have been explained by the evidence, and the term is not one to which the law has attached a specific meaning, and therefore the court cannot with propriety expound it. *Darling v. Dodge*, 36 Me. 370, 374.

### SOIL.

The "soil" of a navigable river is the alveus or bed of the river. *People v. Gold Run Ditch & Mining Co.*, 4 Pac. 1152, 1155, 66 Cal. 138, 56 Am. Rep. 80.

### SOJOURN.

"Sojourn" is a temporary residence, as that of a traveler in a foreign land; to have a temporary abode; to live, and not at home. One who lives in New Jersey and does business in New York "sojourns" in such city, within Code Civ. Proc. § 916, providing that the place where a witness is required to attend to be examined under a commission to take testimony in an action pending in another state must be in the county "in which he resides or sojourns." *Wittenbrock v. Mabins*, 10 N. Y. Supp. 733, 57 Hun, 146.

"Sojourning," as used in a Maryland act prohibiting the importation of slaves into the state for sale or to reside, and providing that nothing in the act contained should be construed or taken to affect the right of any person traveling or sojourning with any slave or slaves in the state, such slaves not being

sold or otherwise disposed of in the state, means something more than travelling, and applies to a temporary, as contradistinguished from a permanent, resident. *Henry v. Ball*, 14 U. S. (1 Wheat.) 1, 5, 4 L. Ed. 21.

In the several provincial statutes of 1692, 1701, and 1767, in reference to settlements for the purpose of the poor laws, the terms "coming to sojourn or dwell," "being an inhabitant," "residing and continuing one's residence," and "coming to reside and dwell," are frequently and variously used, and we think they are used indiscriminately to mean the same thing, namely, to designate the place of a person's domicile. This is defined in Const. c. 1, § 1, for another purpose, to be "the place where one dwelleth or hath his home." *Inhabitants of Abington v. Inhabitants of North Bridgewater*, 40 Mass. (23 Pick.) 170, 176.

### SOJOURNER.

As used in a statute requiring sojourners practicing medicine to be duly registered, and defining a "sojourner" as any person opening an office or appointing any place where he might meet patients or receive calls, a physician duly registered, residing and practicing in one county, having also an office in another, of which he made advertisement, and where he received and prescribed for patients, without being registered there, was a sojourner within the meaning of the act. *Ege v. Commonwealth*, 9 Atl. 471, 472, 20 Wkly. Notes Cas. 73.

### SOJOURNMENT.

The word "sojournment" is derived from the French substantive "sejour," or the French verb "sejourner," which means a temporary residence or dwelling for a short time. "Sejour" or "sejourner" is a compound word. To the word "jour," which literally signifies a day, is prefixed the personal pronoun "se," which gives it a personal signification, and restricts its application to persons. Neither the word "sejour," nor any of its derivations, can with any propriety be applied to brute animals, or to anything but the human species. It cannot with propriety be said of a horse that he sojourns in a place. Hence the literal meaning of the word "sejour," or "sejourment," is a dwelling in a place for a day only; and by an extended and somewhat figurative mode of expression it is used to signify a dwelling in a place for a short time, without ascertaining the precise length of time. This time of sojournment may be longer or shorter, in relation to the object to which it is applied. Thus it is said that the children of Israel sojourned 430 years in the land of Egypt. This is figurative mode of expression, but may nevertheless be allowed, in regard to a nation whose term of existence is indefinite,

and may last many thousand years. *Baptiste v. De Volunbrun* (Md.) 5 Har. & J. 86, 88.

### SOLARES.

"Solares" is the term used in the Spanish law to denote the house lots of a small size, within the limits of a city, pueblo, or town, on which dwellings, stores, etc., are to be built. It is distinguished from the "suertes," or sowing grounds, which are used for cultivating or planting, as gardens, vineyards, orchards, etc., and from "ejidos," which is in the nature of common lands. *Hart v. Burnett*, 15 Cal. 530, 554.

### SOLD.

See "Actually Sold."

See, also, "Sell."

A letter promising commissions to a broker on a sale of land, "if sold through your agency," must be understood as meaning if a valid agreement for the sale of the property has been entered into between the owner and a person or persons ready or willing to purchase and with whom the owner was satisfied. *Condict v. Cowdrey*, 5 N. Y. Supp. 187, 188, 57 N. Y. Super. Ct. 66.

The term "sold, granted, and bargained," in a deed stating that the premises are sold, granted, and bargained, but which contains a subsequent declaration that the deed is understood to be a quitclaim, will not be construed to change the character of the deed from that of a quitclaim, as, when the parties to a contract expressly define the meaning of the terms which they use, such meaning will be given them, regardless of their natural meaning. *Morrison v. Wilson*, 30 Cal. 344.

Lord Eldon in *Browning v. Wright*, 2 Bos. & P. 21, said: "The words 'sold, granted, bargained, enfeoffed, and confirmed' certainly import a covenant in law." It seems now to be settled that in conveyances by deeds of bargain and sale they have no such effect; but, on the creation of an estate less than freehold, a covenant of title is implied from the words of leasing. *Phillips v. City of Hudson*, 31 N. J. Law (2 Vroom) 143, 151 (citing Rawle, 272).

The word "sale" or "sold," in Act 1843 § 76, providing that land on which there are delinquent taxes of 1841 shall be sold at the same time and in the same manner as provided for taxes of 1843, embraces the bidding at the public sale, the payment of the money by the purchaser, and the giving of the certificate by the county treasurer to the bidder or purchaser. They do not of themselves import a power in the officer selling to give a deed; but the clause in said section, "and in all re-

spects with like effect," taken in connection with sections 64 and 65 of the act, providing for the issuance of a treasurer's certificate and the execution of a deed on the expiration of the redemption period, expressly confer upon the auditor the power to execute deeds to purchasers at tax sales for delinquent taxes of 1841. *Sibley v. Smith*, 2 Mich. 488, 487, 491.

Where a contract of sale is executory, the word "sold" is held to mean "contracted to sell." *Russell v. Nicoll* (N. Y.) 3 Wend. 112, 119, 20 Am. Dec. 670.

#### Change of title implied.

When used in a contract for the sale of chattels, "sold" does not necessarily imply a change of title. Whether the contract changed the title to the goods, or only agreed to sell and deliver it thereafter, depends on the whole language used in the contract. *Gallup v. Sterling*, 49 N. Y. Supp. 942, 945, 22 Misc. Rep. 672 (citing *Anderson v. Read*, 106 N. Y. 333, 351, 13 N. E. 292).

"Sold," as used in Civ. Code, § 1140, providing that the title to personal property sold or exchanged passes to the buyer whenever the parties agree upon a present transfer, does not necessarily refer to a consummated sale, since "sold" may sometimes refer only to an agreement to sell. *Blackwood v. Cutting Packing Co.*, 18 Pac. 248, 251, 76 Cal. 212, 9 Am. St. Rep. 199.

The word "sold" does not necessarily and in all connections mean that a conveyance must be made or that the title must pass. *Shainwald v. Cady*, 28 Pac. 101, 102, 92 Cal. 83 (citing *Eaton v. Richerl*, 23 Pac. 286, 83 Cal. 185).

From a statement that a person had sold lands, it does not necessarily follow that the vendor had parted with both title and right of possession. Property is often sold conditionally, the title or possession, or both, to remain with the vendor until the performance of the condition. Property is often said in popular language to be sold, when it is only bargained. *Brooks v. Libby*, 36 Atl. 66, 89 Me. 151.

To constitute a breach of a provision in a policy against a sale or transfer of title, there must have been an actual sale or transfer of property, valid as between the parties. A change of title was necessary to invalidate the contract, and it must at least be in the form of a transfer. *Orrell v. Hampden Fire Ins. Co.*, 79 Mass. (13 Gray) 431, 434.

#### Consideration implied.

"Sold," as used in the following clause of a deed: "This deed witnesseth that I, J. H. R., have this day sold and by these presents do convey unto G. T. R., etc."—Imports *ex vi termini* that the deed was made for a

valuable consideration. *Reaves v. Ore Knob Copper Co.*, 74 N. C. 593, 596.

"Sold," as the word is used when saying that certain articles have been sold, implies a price or consideration of some kind. *State v. Lavake*, 6 N. W. 339, 340, 28 Minn. 526, 37 Am. Rep. 415.

#### Conveyed synonymous.

In construing a deed in which the land was conveyed by a description as being "all those parcels of land which were 'sold' to B. by Y.," and the covenant of warranty excepted "any incumbrances on said land heretofore 'conveyed' by Y. to B. which may have existed at the date of said conveyance," the court said: "The probabilities are that the word 'sold' is used as synonymous with 'conveyed,' and that the references are to the same land; and where it appeared that Y. contracted to sell to B. more land than he conveyed, parol evidence was held admissible to explain whether the deed passed the land described in the agreement or only that actually conveyed. *Braddish v. Yocum*, 23 N. E. 114, 116, 130 Ill. 380.

#### Delivery implied.

"Sold," as used in an instruction, in an action in which the issue was whether defendant was to become liable on a duebill for piling before he got the piling, directing the jury to find for plaintiff, if it sold the piling to defendant and received the duebill in payment, conveys the idea that the piling or the appellee's interest in the same was delivered to the purchaser, as a completed contract of sale always contemplates a delivery. *Jacobs v. Selmyer Mercantile Co.*, 57 S. W. 932, 933, 68 Ark. 621.

"Sold," as used in a complaint for goods sold, does not import a delivery; and hence, where no promise to pay is alleged, no promise will be implied, and the complaint is therefore defective. *Kilpatrick-Koch Dry Goods Co. v. Box*, 45 Pac. 629, 630, 13 Utah, 494.

"Sold," when used in a complaint alleging that certain goods were sold and delivered, includes the delivery; and hence a general denial of a complaint is a denial that the goods were sold and delivered, since "sold and delivered" constitute one act. *Feldmann v. Shea*, 59 Pac. 537, 538, 6 Idaho, 717.

A policy taken out by commission merchants on goods sold, but not removed, means all goods which once belonged to the insurers, or, having once been held by them on commission, had been fully sold and technically delivered, so that the title and right of possession changed, but the articles had not yet been actually removed from the place of storage. *Waring v. Indemnity Fire Ins. Co.*, 45 N. Y. 606, 6 Am. Rep. 146.

The phrase "goods sold," in a common count for goods sold, where not followed by the allegation of a promise to pay, is defective, since "sold" does not necessarily import a delivery, and hence a promise to pay cannot be implied. Chitty says: "In order to maintain an account for goods sold and delivered, it is essential that the goods should have been delivered to the defendant or his agent." Kilpatrick-Koch Dry Goods Co. v. Box, 45 Pac. 629, 630, 13 Utah, 494.

#### **Sale on execution.**

Where a fire policy provided that, if the property should be "sold or conveyed," the policy should become void, a sale on execution did not avoid the policy; the provision being applicable only to a voluntary assignment. Strong v. Manufacturers' Ins. Co., 27 Mass. (10 Pick.) 40, 43, 20 Am. Dec. 507.

#### **Sale at retail implied.**

On the trial of one accused of "playing at a game with cards at a house for retailing spirituous liquors," proof that the playing took place in a room over a storeroom in which spirituous liquors were sold did not justify a conviction. The word "sold" does not imply a sale at retail, any more than a sale at wholesale. Early v. State, 23 Tex. App. 364, 5 S. W. 122.

#### **SOLD AND CONVEYED.**

Land is "sold and conveyed," within the meaning of a statutory grant of land to a railroad company free from taxation till sold and conveyed, when the railroad company has parted with the entire equitable interest in the land and received full compensation therefor, although it still holds the bare legal title. State v. Winona & St. P. R. Co., 21 Minn. 472, 477.

Where a railroad company, to whom lands are granted by the state to aid in the construction of its road, such lands to be exempt from taxation until sold and conveyed, has sold the lands and received the consideration, so that it retains no lien upon nor actual interest in them, though it retains the naked legal title only as trustee for the purchaser, it has sold and conveyed them, within the meaning of the exempting clause. Brown County v. Winona & St. P. Land Co., 37 N. W. 949, 951, 38 Minn. 397 (following State v. Winona & St. P. R. Co., 21 Minn. 472).

"Sold and conveyed," within the meaning of Illinois Central Railroad Charter, § 22, providing that certain lands owned by the company shall be exempt from all taxation under state laws until sold and conveyed by said corporation or trustees, includes lands sold and paid for, though not actually conveyed, as any other construction

would enable the land to be held exempt from taxation for all time. Champaign County v. Reed, 100 Ill. 304, 307.

An allegation that goods were "sold and conveyed" is sustained by proof of the conveyance of the goods, which was a sale in form, although in fact it was a consignment of them, to be sold for or on account of the consignor, with authority for the consignee to apply the proceeds toward payment of a pre-existing debt, which the consignor owed to the consignee. Burpee v. Sparhawk, 97 Mass. 342, 344.

Where a fire insurance policy contained a provision that, if the property should be "sold and conveyed," the policy should be void, and at the time of the issuance of the policy the property was under a mortgage, and the policy, with the assent of the company, was assigned to the mortgagee, the subsequent delivery of the proceeds and control of the property to the mortgagee was not such a sale as would invalidate the policy. Washington Ins. Co. v. Hayes, 17 Ohio St. 432, 436, 93 Am. Dec. 628.

#### **SOLD AND DISPOSED OF.**

The words "sold and disposed of," in a pleading alleging that a mortgagor sold and disposed of all of the mortgaged property, should be construed to mean an absolute sale of the entire property, and are not open to the objection that they fail to show that the mortgagor sold more than his equity therein, or sold it in hostility to the mortgage. Cone v. Iverson, 33 Pac. 81, 33, 4 Wyo. 203.

#### **SOLD FROM HER.**

The words "not to be sold from her," as used in a will providing that certain money should be loaned to a specified person for her sole use, not subject to the debts of her husband, not to be sold from her, but to remain in her possession, does not restrict such person's use or power to alienate or encumber the estate. Mathews v. Paradise, 74 Ga. 523, 524.

#### **SOLD IN THE CITY.**

Goods "sold in the city," within the meaning of a law imposing a tax on all articles of trade or commerce sold in the city of Pittsburg, includes goods sold by agents of a merchant who resides and maintains his store in Pittsburg and delivers the goods from such store, although the sales are made outside of the city and state. Shriver v. City of Pittsburg, 66 Pa. 446, 447.

#### **SOLD NOTE.**

A note or memorandum of a sale, made by a broker, and given by him to the buyer



of the property sold. *Saladin v. Mitchell*, 45 Ill. 79, 83.

## SOLD SHORT.

See "Short."

## SOLDER.

"Soldering the joint" is a means of joining the top and bottom of a can to the sides. *Combined Patents Can Co. v. Lloyd (Pa.)* 15 Phila. 485.

## SOLDIER.

See "Common Soldiers."

"Soldier," as used in St. 1863, c. 38, legalizing the "acts and doings of cities and towns in paying or agreeing to pay bounties and recruiting expenses for soldiers already furnished by them on the requisition of the United States," means persons mustered and received in the military service of the United States. *Barker v. Inhabitants of Chesterfield*, 102 Mass. 127, 130.

"Soldiers," as used in Act May 17, 1865, declaring that soldiers who, disguised in the dress of the country or clothed in the uniform of either army, wrongfully take property from citizens, shall suffer death, means one who belongs to a regularly organized body of combatants, and as such is engaged in the military service, either as an officer or private. *Vaughn v. State*, 43 Tenn. (3 Cold.) 102, 107.

"Soldier," as used in 2 Rev. St. p. 60, § 22, providing that nuncupative wills should not be valid unless made by a soldier while in actual military service, or by a mariner while at sea, embraces every grade from the private to the highest officer, and includes the gunner, surgeon, or the general. *Ex parte Thompson (N. Y.)* 4 Bradf. Sur. 154, 158, 159 (citing *In re Donaldson*, 2 Curt. Ecc. 386; *Shearman v. Pyke*, 3 Curt. Ecc. 539; *In re Prendegast*, 5 Notes of Cas. 92; *Merlin*, Test. §§ 2, 3, arts. 5, 8).

In the chapter relating to the militia, the word "soldier" shall include all musketeers and all persons in the guard or in the militia when called into service, except commissioned officers. Code Iowa 1897, § 2207; Rev. Laws Mass. 1902, p. 281, c. 16, § 1.

The words "pensioner," "soldier," and "sailor," as used in the chapter relating to state and military aid and soldiers' relief, shall be held to include a commissioned officer. Rev. Laws Mass. 1902, p. 702, c. 79, § 4.

### Medical officer.

A medical officer in the military service of the East India Company is a "soldier,"

within St. 1 Vict. c. 26, § 11. *In re Donaldson*, 2 Curt. Ecc. 386.

### Marine.

Laws 1862, c. 110, and Laws Extra Sess. 1862, c. 11, providing that any property of any soldiers in the actual military service of the United States, levied upon or held by a writ of attachment issued from the courts of this state, shall be released, means one in the war or military department, rather than the naval service. "A soldier in the military service means one belonging to the soldiery, militia, or army of the Union or state." *Abrahams v. Bartlet*, 18 Iowa, 518, 514.

### Militiaman.

"Soldier," as used in St. 9 & 10 Vict. c. 66, § 1, providing that the time during which any person shall be serving her majesty as a "soldier, marine, or sailor" shall be excluded from the computation of the time a residence for which creates irremovability, applies to the time during which a person is serving as a militiaman. *Overseers of Poor of Township of Horton v. Overseers of Township of Leeds*, 5 El. & Bl. 595, 598.

### SOLDIERS' ADDITIONAL HOMESTEAD SCRIP.

"Soldiers' additional homestead scrip" is scrip such as purports to carry a soldier's right to make and perfect entries of land under Rev. St. U. S. § 2305 [U. S. Comp. St. 1901, p. 1413], and connected sections. *Macintosh v. Renton*, 8 Pac. 830, 2 Wash. T. 121.

## SOLE.

Where a statute which provided that a city council should judge of the qualifications, elections, and returns of their own members was amended by making them the "sole" judges, the only change which would reasonably suggest itself to the rational mind is that they were thereby given exclusive jurisdiction, instead of the former concurrent jurisdiction. *Darrow v. People*, 8 Pac. 661, 664, 8 Colo. 417; *Id.*, 8 Pac. 924, 926, 8 Colo. 426.

### As several.

The word "sole" cannot be construed to mean "several." Its signification is well recognized to be the same as "only," or "exclusively." *Seitz v. Seitz*, 11 App. D. C. 358, 369, 378.

### SOLE AND EXCLUSIVE.

The phrase "sole and exclusive," in the sentence that a crime is committed in a place within the sole and exclusive jurisdiction of the United States, means exclusive

of any other domestic jurisdiction, and has no reference to foreign authority. *Watts v. United States*, 1 Wash. T. 288, 296.

### SOLE AND EXCLUSIVE FISHERY.

The words "sole and exclusive fishery" are not equivalent to "several fishery." *Holford v. Bailey*, 8 Q. B. 1000, 1018.

The words "sole and exclusive fishery," as used in a declaration reciting that defendant had been summoned to answer plaintiff in an action of trespass, and charged that defendant with force and arms broke and entered a fishery, to wit, "the sole and exclusive fishery" of plaintiff in a certain river, were, after verdict, equivalent to a description of a several fishery. These words contain a description of precisely the same right as is ordinarily expressed by the term "fishery"; that is, the right of fishing, exclusive of all others, in a particular place. The words are not an improper translation of the words "separalis piscaria." *Holford v. Bailey*, 13 Q. B. 426, 445.

### SOLE AND SEPARATE BUSINESS.

An agreement between a farmer and his wife that she should have for her own the proceeds of dairy and poultry products sold, under which she received such proceeds, a portion of which was expended for groceries and clothing for the family, and a part used by the husband, did not constitute the production and sale of such articles the "sole and separate business" of the wife, within the meaning of *Burns' Rev. St.* 1894, § 6975, so as to render the husband her debtor for the sum so used by him. *Kedey v. Petty* 54 N. E. 798, 801, 153 Ind. 179.

### SOLE BENEFIT.

"Sole and proper benefit and behoof," when found in a conveyance to a married woman, whether in the usual granting clause or in the habendum, means that she is given a separate equitable estate. *Smith v. McGuire*, 67 Ala. 34, 36.

"Sole benefit," as used in the United States pension laws (*Rev. St.* § 4747 [*U. S. Comp. St.* 1901, p. 3279]), declaring that no money due to any pensioner shall be subject to levy under legal process, but shall inure to the sole benefit of the pensioner, did not preclude the payment of pension money to the wife of the pensioner for the purpose of purchasing a home in her name, which was for their joint benefit. *Holmes v. Tallada*, 17 Atl. 238, 125 Pa. 133, 23 Wkly. Notes Cas. 463, 3 L. R. A. 219, 11 Am. St. Rep. 880.

### SOLE CAUSE OF DEATH.

The words "proximate and sole cause of death," in a life policy providing that the

insurance shall not extend to any case except where the injury is the proximate and sole cause of the disability or death, characterized a death resulting from poisoning caused by virulent matter communicated to the wound coincident with its infliction. *Martin v. Manufacturers' Acc. Indemnity Co.*, 45 N. E. 377, 380, 151 N. Y. 94.

### SOLE CORPORATION.

See "Corporation Sole."

### SOLE INTEREST.

A "sole interest" means the same thing as an absolute interest. *Garver v. Hawkeye Ins. Co.*, 28 N. W. 555, 556, 69 Iowa, 202.

### SOLE LEGATEE.

The term "sole legatee" is generally used to describe those to whom there has been a bequest of personal property, but it may include a devise of real estate also. *Bell v. Welch*, 38 Ark. 139, 147.

### SOLE OWNER.

The clause in a policy of insurance that, if the insured shall not be the "sole and unconditional owner" in fee simple of the property, etc., aptly refers to the real estate, and not to the personality insured. *German Ins. Co. v. Miller*, 39 Ill. App. 633, 635.

An application for a policy of fire insurance, reciting that the applicant was the "sole owner" of the land and property to be insured, means that the assured has the fee-simple title. "Sole owner" must mean that no one else has or owns an interest in the real estate. If one should state that he was the sole owner of real estate, describing it, the bearer would understand that he owned all there was or could be owned, and that no one else had any interest therein. If one should covenant in a deed that he was the sole owner of real estate, such a covenant would be broken if he owned a life estate only. There is no distinction between "sole owner" and the owner of an absolute interest in real estate. *Garver v. Hawkeye Ins. Co.*, 28 N. W. 555, 556, 69 Iowa, 202.

One who holds property under a contract for its sale and conveyance to him by the owner in fee simple by deed of quitclaim on payment of the purchase money named therein, and who has fully paid the purchase money, but has not yet received the deed, is the sole and unconditional owner of the property, within the meaning of a condition in an insurance policy rendering the policy void in case the assured is not the sole and unconditional owner of the property insured. *Lewis v. New England Fire Ins. Co.* (C. C.) 29 Fed. 496, 497.

A fire policy provided that, if insured was not the "sole and unconditional owner," the policy should be void. The company offered to show that the property was covered by a chattel mortgage. The court said that "while, under the statute (Revision, § 2217), the mortgagee holds the legal title to the personal property covered by a mortgage, the mortgagor is nevertheless considered the owner. \* \* \* The ownership remains in the mortgagor. It is absolute, and depends upon no condition, and may therefore be said to be unconditional. It is true his ownership may be defeated upon the happening of certain conditions, but this cannot be said to make his ownership conditional." *Hubbard v. Hartford Fire Ins. Co.*, 33 Iowa, 325, 333, 11 Am. Rep. 125.

A vendee, in possession of property under a parol agreement by which he unconditionally bound himself to buy and pay for the property, is the "sole and unconditional owner," within the meaning of that term as used in fire insurance policies, and may truthfully represent himself as such in an application therefor. *Milwaukee Mechanics' Ins. Co. v. B. S. Rhea & Son* (U. S.) 123 Fed. 9, 10, 60 C. C. A. 103.

Where the assured had made an arrangement to sell the goods insured, whereby the purchaser had possession and use of them in his business, and was to keep up the stock, the title to remain in the assured until the purchase money was fully paid, he was the unconditional owner of the property, within the meaning of an insurance policy providing that, if he was not the "sole and unconditional owner," etc., the policy should be void. *Burson v. Fire Ass'n of Philadelphia*, 20 Atl. 401, 402, 136 Pa. 267, 20 Am. St. Rep. 919.

#### SOLE OWNERSHIP.

"Sole ownership" is fairly implied from the allegation of a complaint that plaintiff owns the premises in fee. *King v. Townsend*, 29 N. Y. Supp. 181, 184, 78 Hun, 380.

Since a fee-simple estate is the highest tenure known to the law, and since land-owners in fee simple, in the absence of any proof to the contrary, are presumed to be the owners of the buildings located and standing on the premises, it follows that the interest of the fee-simple owner of land in the buildings thereon is "the entire, unconditional, and sole ownership" of such property, within the meaning of a fire insurance policy requiring such ownership, and the fact of the existence of a lease of such buildings for a term of 10 years does not change the rule. *Lycoming Fire Ins. Co. v. Haven*, 95 U. S. 242, 245, 24 L. Ed. 473.

The omission of the owner of the equitable title to property to state the nature

thereof will not render a policy of insurance invalid, under a condition forfeiting the insurance in case the interest is other than the entire, unconditional, and sole ownership, if the fact is not so represented to the company. *Pelton v. Westchester Fire Ins. Co.*, 77 N. Y. 605. And he will be regarded as the absolute owner, although he may not have paid the purchase money. *Rumsey v. Phoenix Ins. Co.* (U. S.) 1 Fed. 396. Under these principles, where plaintiff insured certain buildings on land which he had contracted to purchase, but on which he had made no payment, and the policy was conditioned to be void if his interest was other than the "entire, unconditional, and sole ownership," or if the insured property was a building on land not owned by him in fee simple, the policy was not vitiated merely because he failed to hold the legal title to the land. *Imperial Fire Ins. Co. v. Dunham*, 12 Atl. 668, 675, 117 Pa. 400, 2 Am. St. Rep. 686.

The ownership of property by a single person is designated as a "sole or several ownership." Civ. Code Cal. 1903, § 681; Rev. Codes N. D. 1899, § 3281; Civ. Code S. D. 1903, § 197.

#### SOLE PRIVILEGE.

A conveyance of a gristmill lot, with the exclusive privilege of grinding grain, and giving the grantee the "sole privilege to take a stated amount of water for grinding," did not restrict the use of such water to the sole purpose of grinding grain. *Hartwell v. Mutual Life Ins. Co.*, 3 N. Y. Supp. 452, 50 Hun, 497.

#### SOLE USE.

##### As granting estate in fee.

A declaration of trust, reciting that the trust was for the benefit of the grantor's widow and two children, and that, in case the children should die before the age of maturity, the grantee was to convey all and every part of said property to the grantor's widow, "for her sole and separate use and benefit," forever, "grants to the widow an estate in fee, contingent on her surviving the children before they become 21 years old." *Knowlton v. Atkins*, 31 N. E. 914, 134 N. Y. 313.

A devise to a widow "for the sole use of herself and her children" could not be construed to give the children any estate in the property devised. Such words showed that the children's support and maintenance were objects for which the testator desired to provide, but the mode which he adopted for securing this result was the gift of the devise to the widow for life. *Whitridge v. Williams*, 17 Atl. 938, 939, 71 Md. 105, 17 Am. St. Rep. 513.

**As conveying separate estate.**

A deed conveying to a married woman land "for her sole and separate use and benefit" should be construed to create in her a statutory separate estate; such words in the deed not changing the character of the estate. By force of the provisions of the Code, such would be the legal effect of the deed, although it contained no such words. *Denechaud v. Berrey*, 48 Ala. 591, 603.

The words "to her sole and separate use," in a deed to a married woman, are sufficient to create a separate estate. *Grotenkemper v. Carver* (Tenn.) 9 Lea, 280, 287.

The words "sole use," in a deed, bill of sale, or even a will, after an absolute gift to a man or to an unmarried woman, might under some circumstances be regarded as one of those pleonastic expressions so common in conveyancing, which do not affect the construction; but when the gift is by a son to a mother, who is the wife of a man not his father, the words "to her sole use" come to have a clear significance of his intent to make a provision for her personal benefit. *Smith v. Wells*, 48 Mass. (7 Metc.) 240, 243, 39 Am. Dec. 772.

"Sole use," as used in a deed conveying property to a married woman for her "sole use," creates a separate estate in the woman, even if they are employed in a conveyance to her by a stranger; and they effect the same purpose when used in a deed from a husband to the wife. *Small v. Field*, 14 S. W. 815, 818, 102 Mo. 104 (citing *Turner v. Shaw*, 96 Mo. 22, 8 S. W. 897, 9 Am. St. Rep. 319).

The expression "to her sole and separate use," when employed in a gift of property to a married woman, are the technical words that have been held to most aptly and tersely express the idea that the husband is to be excluded from any share in the property given, and that the use of such words makes it distinctly probable that it was the intention of the donor to exclude the husband. *Manning v. Mayberry* (Tenn.) 54 S. W. 682, 683.

A gift or devise to a married woman, after marriage, of her property to her "sole use or disposal," is to be construed as sufficient to exclude the husband's marital rights in the property, and is sufficient for such purpose. *Cark v. Maguire*, 16 Mo. 302, 314, (citing *Story*, Eq. § 1382).

**SOLELY.**

A case rests "solely" on circumstantial evidence only where the main fact, or, as one case puts it, where the gravamen of the offense, or, as another case has it, where the act of the crime, rests solely upon circumstantial evidence. *Beason v. State*, 67 S. W. 96, 98, 43 Tex. Cr. R. 442.

In construing a deed to a railroad company conveying one tract of land "only" for

depot and other railroad purposes, and then granting another parcel, and stating in a subsequent clause that both of said pieces or parcels are granted "solely" for said road purposes, it was said that the words "only" and "solely" are words of restriction or exclusion. As used in this deed, their effect clearly is to prohibit the grantee from using the lands for other than the specified purposes. *Horner v. Chicago, M. & St. P. Ry. Co.*, 38 Wis. 165, 175.

A contract with certain brokers "solely to sell" land on certain commission merely gave the brokers the exclusive right to sell the property; that is, constituted them the sole agents for that purpose. *Smith v. Schiele*, 93 Cal. 144, 149, 28 Pac. 857, 858.

In commenting on an instruction that if the person's negligent act solely contributed to bring about the injury of which he complained he cannot recover, the court say: "The criticism is in the use of the word 'solely,' and the contention is that the court should have told the jury that, if both plaintiff and the company were negligent, the plaintiff could not recover. To give to the word 'contribute' its legal signification would make the charge unintelligible, as one act cannot 'contribute' solely to effect a given result, but only in connection with some other act; and there can be no sole contributory cause of an accident. We may assume, therefore, that the trial judge meant, if the negligent act of the plaintiff produced or was the sole cause of the injury, she could not recover." *Memphis St. R. Co. v. Shaw*, 75 S. W. 713, 714, 110 Tenn. 467.

Rev. St. § 5474, authorizing a druggist to sell any liquors which are used "solely in the admixture of necessary remedial compounds," refers to the use of liquors by a druggist in the admixture of necessary remedial compounds as they are required in the ordinary business of a druggist, and does not authorize a druggist to sell a patent medicine containing alcohol. *State v. Wilson*, 80 Mo. 303, 306.

**SOLEMN.**

Formal; in regular form; with all the forms of a proceeding. *Black, Law Dict.*

**SOLEMN ADMISSION.**

Solemn or judicial admissions, made for the express purpose of dispensing with the proof of some fact at the trial, in the form of express stipulations, on being filed and becoming a part of the record, are generally conclusive of all the facts involved. It would seem that this class of admissions are the only ones that are ever held to be conclusive. *Consolidated Steel & Wire Co. v. Burnham*, 58 Pac. 654, 656, 8 Okl. 514.

**SOLEMN FORM.**

A will is said to be proved in "solemn form" when those in interest are cited to be present at its probate or approbation. In *re Straub's Will*, 24 Atl. 569, 570, 49 N. J. Eq. (4 Dick.) 264.

Under the English practice there were two modes of proving a will of personal property: The "common form," in which the will was propounded by the executor and proved *ex parte*; the "solemn form," in which the next of kin of the testator were cited to witness the proceedings, and in which the proof was taken *per testes*, or in form of law, as it was called. In this state, probate in common form is the only one which appears to have been adopted by any positive enactment of the Legislature. *Richardson v. Green* (U. S.) 61 Fed. 423, 426, 9 C. C. A. 565; *Luther v. Luther*, 13 N. E. 166, 168, 122 Ill. 558.

The method of probate in solemn form is identical with that proceeding at common law. A probate in that form concludes all parties notified as to all questions which were raised in the probate proceedings, or which could have been properly raised therein. Such a judgment is therefore conclusive that the paper probated is the last will and testament, executed in the manner provided by law, and of all facts necessary to give the court jurisdiction of the proceedings. *Sutton v. Hancock*, 45 S. E. 504, 506, 118 Ga. 436.

**SOLEMN OATH.**

The phrase "solemn oath" is synonymous with the phrase "corporal oath," and an oath taken with the uplifted hand may be properly described by either phrase in an indictment for perjury. *Jackson v. State*, 1 Ind. (1 Cart.) 184, 185.

**SOLEMN OCCASION.**

"Solemn occasion," within the meaning of a statute providing that the opinions of the justices can be required only upon important questions of law upon solemn occasions, was said in *Opinion of the Justices*, 126 Mass. 557, to mean occasions when such questions of law are necessary to be determined by the body making the inquiry, in the exercise of the legislative or executive power intrusted to it by the Constitution and laws of the commonwealth. A similar construction must be given to Const. art. 6, § 3, providing that justices shall be obliged to give their opinion upon important questions of law upon solemn occasions, when required by the Governor, Council, Senate, or House of Representatives; and therefore the justices are not required, and it would not be proper for them, to answer questions of policy or expediency. *Opinion of the Justices*, 51 Atl. 224, 226, 95 Me. 564.

**SOLEMN WAR.**

Every contention by force between two nations in external matters under authority of their respective governments is war. If it be declared in form, it is called "solemn," and is of the perfect kind, because one whole nation is at war with another whole nation, and all the members of the nation declaring war are authorized to commit hostilities against all the members of the other in every place and under every circumstance. In such a war all the members act under general authority, and all the rights and consequences of war attach to their condition. But hostilities may exist between two nations, more confined in its nature and extent, being limited as to places, persons, and things; and this is more properly termed "imperfect war," because not solemn, and because those who are authorized to commit hostilities act under the special authority, and can go no further than the extent of their commission. Still, however, it is a public war, because it is an external contention by force between some of the members of the two nations, authorized by the legitimate powers. *Bas v. Tingy*, 4 U. S. (4 Dall.) 37, 38, 42, 1 L. Ed. 731.

**SOLEMNIZE.**

"To solemnize marriage" means nothing more than to be present at a marriage contract, in order that it may have due publication before a third person or persons, for the sake of notoriety and the certainty of its being made. To solemnize or celebrate means nothing more, and may be done before parents, friends, or strangers able to testify to the fact. *Dyer v. Brannock*, 66 Mo. 391, 410, 27 Am. Rep. 359.

"Solemnize," as used in *Rev. Laws*, p. 181, providing that every justice of the peace of the state, every stated and ordained minister of the gospel, and every religious society, according to its rules, shall be empowered to solemnize marriage, is synonymous with "celebrate," and means "nothing more than to be present at a marriage contract, in order that it may have due publication before a third person or persons, for the sake of notoriety and the certainty of its being made, and may be done before parents, friends, or strangers able to testify to the fact. In point of mere legal competency for witnessing or solemnizing the contract of marriage, the law has made no distinction of persons." *Pearson v. Howey*, 11 N. J. Law (6 Halst.) 12, 19.

In answering an objection that a common-law marriage is not such a marriage as the Legislature has authorized the courts to dissolve by divorce, such a marriage not being one "contracted and solemnized" within the meaning of the statute on divorce, the court said: "We think the word 'solemnized,'

as used in our statute, is not to be construed as meaning only a ceremonial solemnization, whether religious or official, but that for the purpose of divorce a marriage may be self-solemnized by the parties to it, and a contract between them which constitutes them man and wife is a marriage 'contracted and solemnized,' within the meaning of our statute authorizing divorce." *Bowman v. Bowman*, 24 Ill. App. 165, 172.

## SOLICIT.

The word "solicit," as used in the pleadings in an action acted on by the courts, imports an initial, active, and wrongful effort. There is a sense in which the operations of a Children's Aid Society, with its means of liberal aid, the opportunities it offers to travel, to visit new scenes and find new homes, very seductive to the youthful imagination, may amount to a solicitation; but the solicitation thus implied springs from the very nature of and is incident to the enterprise, has its sanction in the act incorporating the society, is legitimate, and may fairly be contrasted with wrongful solicitation, of which the courts take cognizance. *Nash v. Douglass* (N. Y.) 12 Abb. Prac. (N. S.) 187, 190.

Act April 3, 1899, providing that any foreign corporation that may desire to transact business in the state, or solicit business in the state, or establish a general or special office in the state, shall be required to file a copy of its articles, does not apply to a sale of goods to a resident of Texas at a place of business of the corporation in a foreign state, where it is not stated that the parties contemplated shipping the goods from that state into Texas. *Reed v. Walker*, 21 S. W. 687, 688, 2 Tex. Civ. App. 92.

## SOLICITING AGENT.

An insurance agent, who, under an arrangement with another to exchange risks that either cannot place, forwards to him an application on which the other, being a recording agent, issues a policy, occupies as to the company whose policy is issued the position of a "soliciting agent," under Acts 18th Gen. Assem. c. 211, § 1, providing that any one who shall solicit insurance or procure applications therefor shall be held the soliciting agent of the company issuing the policy on such application; and this, though he did not actually solicit the application, but simply received it and asked for a policy upon it. *St. Paul Fire & Marine Ins. Co. v. Sharer*, 41 N. W. 19, 76 Iowa, 232.

## SOLICITOR.

The term "solicitors" has been used in England since the judicature act of 1873 to designate attorneys at law. They are members of the bar, and are not heard in the su-

perior courts, and the power of admitting them to practice and striking them off of the roll has not been given to the inns of court. In *re Ricker*, 29 Atl. 559, 564, 66 N. H. 207, 24 L. R. A. 740.

The word "solicitors," as used in St. 1879, p. 79, incorporating Virginia City, and authorizing the collection of a license tax, applies to individuals who are engaged or employed especially for the purpose of soliciting, importing, or entreating for the purchase of goods. It is an independent occupation or business. The Legislature only intended to reach those persons who might be employed in this particular business as a means of making a living, and the word does not apply to tailors, merchants, and tradesmen who solicit custom in their respective callings, and who pay license fees on such calling, though as a matter of fact, in conducting their business, they solicit custom from the public. *Ex parte Siebenhauer*, 14 Nev. 365, 369.

## SOLID.

"Solid," as used in a claim for a patent for a bottle stopper, describing the same as being "solid," does not mean that the cork shall be of one part or one material, homogeneous throughout. Such meaning is not among the definitions of the word. *De La Vergne Bottle & Seal Co. v. Valentine Blatz Brewing Co.* (U. S.) 66 Fed. 765, 775, 14 C. C. A. 77.

## SOLID ASSURANCE.

"Solid assurance," as used in a letter requesting merchants to insure a certain sum on a cargo of goods to be shipped on board a vessel, which should be done by the most "solid assurance," is equivocal. It may mean such an insurance as would completely protect the property against captures by British cruisers, the imminent dangers of which were foreseen and acknowledged by the parties, or it might mean that the underwriters should be men of solidity and able to pay in case of loss. *De Tastett v. Crusillat* (U. S.) 7 Fed. Cas. 542, 544.

## SOLID MATTER.

"Solid matter," as used in Gen. St. 1878, c. 70, § 31, providing a rate for printing legal notices, and declaring a folio to be equal to the space occupied by 250 ems of solid matter, means printed matter between the lines of which there shall be no leading and no padding beyond the usual and ordinary spacing between the words. *Hobe v. Swift*, 59 N. W. 831, 832, 58 Minn. 84.

## SOLID ROCK.

Under a contract to excavate "solid rock" at so much a foot, no extra compensation

can be required for flint rock, though its cost is much more than the ordinary rock. The term "solid rock" will be construed to have been used in its plain, ordinary, and popular sense, and to include flint rock. *Fruin v. Crystal Ry. Co.*, 14 S. W. 557, 558, 89 Mo. 397.

Where a contract provided for the excavation of "solid rock," requiring blasting, at a certain price, and that stratified rock, requiring blasting, should be paid for as solid rock, there was no implication that by "solid rock" was meant only stratified rock. "It is as plain as English words can make it that no rock can be too hard to be classified as solid rock." *Osborne v. O'Reilly*, 43 N. J. Eq. (16 Stew.) 647, 650, 12 Atl. 377, 378.

## SOLIDARY OBLIGATION.

A "solidary obligation," under the law of Louisiana, binds each of the obligors for the whole debt, while a joint obligation only binds the parties thereto for their proportion of the debt. Solidarity, under the law of Louisiana, must be expressly stipulated, and is never presumed. *Groves v. Sentell*, 14 Sup. Ct. 898, 901, 153 U. S. 465, 38 L. Ed. 785.

## SOLIDO.

See "In Solido."

## SOLUBLE CREOSOTE.

"Soluble creosote," an article prepared from coal tar dead oil, is less specifically provided for as a "chemical compound" than under a provision for "products or preparations of coal tar," and is properly classified for duty under the latter head, in paragraph 443, Free List, § 2, c. 349, Tariff Act Aug. 27, 1894, 28 Stat. 539, or paragraph 15, Schedule A, § 1, c. 11, Tariff Act July 24, 1897, 30 Stat. 152 [U. S. Comp. St. 1901, p. 1627]. *Schoellkopf v. United States* (U. S.) 124 Fed. 89.

## SOLUBLE PHOSPHORIC ACID.

By the term "soluble phosphoric acid," whenever used in the article relating to manures and fertilizers, is meant phosphoric acid in any form or combination readily soluble in pure cold water. Pub. Gen. Laws Md. 1888, p. 972, art. 61, § 8; Code Va. 1887, § 1895.

## SOLVENCY—SOLVENT.

See, also, "Insolvency—Insolvent."

"Solvency" is the ability to pay debts. He who cannot pay all that he owes is not

solvent. *State ex rel. Hyman v. Lewis*, 8 South. 602, 604, 42 La. Ann. 847; *Kennedy v. New Orleans Sav. Inst.*, 36 La. Ann. 1, 8; *State Nat. Bank v. New Orleans Brewing Ass'n*, 22 South. 48, 52, 49 La. Ann. 934 (quoting *Seixas v. Citizens' Bank of Louisiana*, 38 La. Ann. 424); *McKown v. Furgason*, 47 Iowa, 636, 637; Civ. Code La. 1900, art. 3556, subd. 26.

A solvent is one who is able to pay all his debts in full at once or as they become due. *In re Randall* (U. S.) 20 Fed. Cas. 222, 224.

The law defines "solvency" to be "the present ability of the debtor to pay out of his estate all his debts." *Ring v. Paint & Glass Co.*, 44 Mo. App. 111, 116; *Oliver-Finnie Grocer Co. v. Miller*, 53 Mo. App. 107, 111.

The term "solvent," when applied to a person, means that he has property sufficient to pay all his debts, and that all his debts can be collected by legal process. *Marsh v. Duncel* (N. Y.) 25 Hun, 167, 169; *Huffman v. Hulbert* (N. Y.) 13 Wend. 375, 377; *People v. Halsey* (N. Y.) 36 How. Prac. 487, 505; *Herrick v. Borst* (N. Y.) 4 Hill, 650, 652; *Osborne v. Smith* (U. S.) 18 Fed. 126, 130; *McDonald v. Cash*, 45 Mo. App. 66, 76; *Larkin v. Hapgood*, 56 Vt. 597, 601; *Johanson v. Hoff*, 72 N. W. 965, 966, 70 Minn. 140; *Hoffman v. Nolte*, 29 S. W. 1006, 1010, 127 Mo. 120.

"Solvency" imports adequate means of a party to pay his debts, which embraces within its meaning the opportunity, by reasonable diligence, to convert and apply them to such purpose. In other words, a person is deemed insolvent who, at the time in question, is unable to pay his debts in the ordinary course of business. *Sterrett v. Third Nat. Bank of Buffalo* (N. Y.) 46 Hun, 22, 26; *In re Doscher* (U. S.) 9 Am. Bankr. R. 547, 556, 120 Fed. 408.

"Solvency" consists, not only of the present ability of the debtor to pay his debts, but of his being in such condition of his means that payment may be enforced. A knowledge on the part of a purchaser of goods, at the time of making the purchase, that he will not be able to pay for them, is equal to an intent not to pay for them. *Reid v. Lloyd*, 52 Mo. App. 278, 282.

The definition of "solvency," to the effect that it consists alone of the present ability of the debtor to pay, without regard to the efficiency or inefficiency to compel payment, may be ordinarily sufficient; but, when applied to cases where the question is whether there was such solvency as to sustain a deed, consideration must be had, not only to the present ability to pay, but as to whether there is such a condition of pecuniary means that payment can be enforced by process of law. *Eddy v. Baldwin*, 32 Mo. 369, 374.

While it is true that insolvency and inability to pay are synonymous, solvency does not mean ability to pay at all times, under all circumstances, and everywhere on demand; nor does it require that a person should have in his possession the amount of money necessary to pay all claims against him. The difficulty in paying particular demands is not insolvency. *Walkenshaw v. Perzel*, 27 N. Y. Super. Ct. (4 Rob.) 428.

"Solvency of a merchant," or merchants, or merchant corporation, is not an ultimate ability to pay debts, or an excess of assets over liabilities, but rather an excess of assets available for the discharge of liabilities in the usual course of trade. *Ring v. Charles Vogel Paint & Glass Co.*, 44 Mo. App. 111, 116.

"Solvent," as used in Act 1849, providing that a creditor of a bank who has made application for his money may, at any time after 10 days from a refusal of payment, apply for an order enjoining the bank and declaring it insolvent, but requiring, before permanent injunction shall issue, proof satisfactory to the justices of the Supreme Court that the demand cannot be satisfied out of any property of the defendant, or that, after fully hearing all the parties, it shall appear and be so determined that the institution is not clearly solvent, would include the condition of a bank which has property sufficient to pay all demands, though it is unable to pay in money at the time. *Livingston v. Bank of New York* (N. Y.) 5 Abb. Prac. 338, 341.

The term "solvency," as applied to a new insurance company about to begin business, held to mean a statutory one, to wit, a compliance with the condition upon which it is permitted to do business. *Bankers' Life Ins. Co. v. Howland*, 48 Atl. 435, 437, 73 Vt. 1, 57 L. R. A. 374.

In the ordinary acceptance of the term, "insolvent," when applied to a bank, means inability to meet liabilities in the usual course of business. But a bank may be solvent, and yet, from temporary causes, over which its officers have no control, suspend until these causes can be overcome. But they must be causes for which prudence and foresight cannot provide, or over which the bank or its officers had no control, or could have none. Such causes, when they do occur, are usually soon overcome. A bank may be insolvent when it is in failing circumstances, and is solvent when it possesses sufficient assets to pay within a reasonable time all its liabilities through its own agencies; and again it may be insolvent when, from the uncertainty of being able to realize on its assets within a reasonable time, a sufficient amount to meet its liabilities cannot be realized, and therefore it makes an assignment, by which the control of its affairs and prop-

erty passes out of its hands. *Dodge v. Martin* (U. S.) 17 Fed. 600, 665.

#### SOLVENT CREDITS.

"Solvent credits," required by the Alabama laws of 1868 to be returned for taxation, include deferred premiums, loan premium notes, and renewal premiums, or other similar credits of an insurance company, for which the policy stands as security. *Alabama Gold Life Ins. Co. v. Lott*, 54 Ala. 499, 506.

#### SOLVENT NOTES AND ACCOUNTS.

A note payable in "solvent notes and accounts of other men" is not equivalent to a note payable in money, but is a contract to pay the sum expressed in the note, at or before maturity, dollar for dollar, in solvent notes and accounts of other men, or, if paid after maturity, the value in money of that amount of such solvent notes and accounts at the time of the maturity of the note. *Williams v. Sims*, 22 Ala. 512, 516.

#### SOME.

"Some," as defined in the Century Dictionary, is "a certain indefinite or indeterminate quantity or part of; more or less; often used so as to denote a small quantity or deficiency." As defined in Worcester's Dictionary, it denotes "a certain but indeterminate number of; more or less as to number. \* \* \* 'And when he sowed, some seeds fell by the wayside, and the fowls came and devoured them.' Matt. xlii, 4." As used in a contract for the sale of certain cartons, providing that, if the vendee should receive "some" that are not up to the sample, he should return them to the vendor, who would replace them, means a small or inconsiderable number, and means the same as the words "about," or "more or less," receive in commercial contracts, where the engagement is to furnish "about" a given number or quantity of articles, or to furnish a given number or quantity of articles "more or less." *St. Louis Paper Box Co. v. J. C. Hubinger Bros. Co.* (U. S.) 100 Fed. 595, 598, 40 C. C. A. 577.

"Some" is a term too uncertain in its signification to sustain a verdict for any definite amount, and evidence that a party to a suit fed "some" grain to his horses may mean a single ounce or several tons, a single quart or 20,000 bushels. *Lewis v. Jones*, 17 Pa. (5 Harris) 262, 267, 55 Am. Dec. 550.

#### SOME DAYS.

A complaint against the city for negligence in allowing ice and snow to remain on a sidewalk "some days," or for a num-



ber of days, did not show that it had remained there for a length of time greater than two days, and hence did not necessarily allege notice of the defect to the city. *Chase v. City of Cleveland*, 9 N. E. 225, 228, 44 Ohio St. 505, 58 Am. Rep. 843.

### SOME DISPOSITION.

A promise by the drawee of a draft to make "some disposition" of it when he should be in the place where the payee resided may fairly mean to pay the same when he should be at such place, and is a waiver of regular presentation or acceptance. *Hough v. Loring*, 41 Mass. (24 Pick.) 254, 258.

### SOME MEANS.

"Some means" is a relative expression, to be measured by the surrounding circumstances. Ordinarily, when we say that a man has something left after paying his debts or sustaining a loss, we do not mean, nor may we be understood as asserting, that he has nearly twice as much left as he paid or lost. When it is said that a debtor has "some means," or something, left after settling with his creditors at 45 cents on the dollar, it is necessarily understood that this something or some means is very small in proportion to the amount paid. Where the aggregate amount paid the creditors was only \$7,000, it could not have been understood that the "some means" which the settlement was to leave the debtor was more than \$1,000 or \$2,000. The statement, then, that the debtor had only "some means" left of his own after making the settlement, was under the circumstances a false representation. Relatively he had much means. *Elfelt v. Snow* (U. S.) 8 Fed. Cas. 443, 446.

### SOME OTHER.

A by-law of a benefit insurance association provided for benefits to one disabled from following his usual or "some other" occupation. It was contended that "some other" meant "any other," and that the insured was not entitled to the benefit if he could do any work; but the court refuses to so construe it, holding that, as "some other" was used in connection with "usual," which does not necessarily mean "entire" or "only," and as a member might have more than one occupation, one usual and one an occasional business, "some other" referred to some such occupation with which he was familiar. *Neill v. Order of United Friends*, 44 N. E. 145, 146, 149 N. Y. 430, 52 Am. St. Rep. 738.

### SOME PART.

The statute of frauds, declaring that sales of the value of more than \$50 shall be void,  
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unless some memorial is made, or the articles delivered, or "some part" of the purchase money paid, means anything, or part of anything, given by way of consideration for the sale, which may be either money or money's worth; but the object was to have something passed between the parties besides mere words—some symbol, like earnest money. 2 Bl. Comm. 448. Hence, where the entire transaction lay in parol, there could not be said to be a part payment of the purchase money within the statute. *Artcher v. Zeh* (N. Y.) 5 Hill, 200, 205.

### SOME WRITING.

"Some writing," as used in Rev. St. 1857, c. 73, § 11, providing that all trusts concerning lands must be created and declared by "some writing," means any writing whatever, however informal, from which the extent of the trust in the estate and the terms of it can be sufficiently understood, whether it was intended by the signer as such or not. *McClellan v. McClellan*, 85 Me. 500, 506.

### SOMEWHAT.

"Somewhat" is defined as meaning in some degree or measure; a little. *Atchison, T. & S. F. R. Co. v. Vanordstrand*, 73 Pac. 113, 115, 67 Kan. 386.

### SON.

The description "son," child, etc., as used in wills, etc., must be taken *prima facie* to mean legitimate child, etc. *Flora v. Anderson* (U. S.) 67 Fed. 182, 185.

"Son," as used in a will devising to several for life, and, after the death of the surviving tenant for life, "to a son of my nephew A., and his heirs and assigns, and for want of such issue over," was a gift in fee to the first-born son of A. *Ashburner v. Wilson*, 17 Sim. 204, 208.

"Son" may be used to mean a male child, issue, or offspring, but also may be applied to a distant male descendant, or any young male person may be so designated, as a pupil, a ward, an adopted male child, or dependent. *Webst. Dict.*; *Cent. Dict.* Hence, as used in a letter by a man, speaking of a boy as "son" does not sufficiently recognize the child as his offspring to comply with Comp. St. 1897, c. 23, § 31, providing that every illegitimate child shall be considered as heir of the person who shall in writing sign in the presence of a competent witness, having acknowledged himself to be the father of such child. *Lind v. Burke*, 77 N. W. 444, 445, 56 Neb. 735.

The word "sons," though generally applicable only to the children of the first degree, is sometimes used to signify all the

descendants in the direct line. Civ. Code La. 1900, art. 3556, subd. 27.

#### **As word of limitation or purchase.**

The word "sons," in a will to a certain person and his sons, is either a word of purchase or limitation, according to the intent of the testator. Appeal of Yarnall, 70 Pa. (20 P. F. Smith) 335, 341.

In a will "son" is ordinarily a word of limitation, giving an estate in tail male; but, depending on the intention, it may be read as a word of purchase, including descendants. East v. Twyford, 31 Eng. Law & Eq. 62, 78, 9 Hare, 713, 730.

"First and every other son," as used in a will, may be taken as words of purchase, where it is necessary to give them that construction in order to effectuate the intention of the deviser, as in Robinson v. Robinson, 1 Burrows, 38, though ordinarily speaking they are not words of purchase. Phipps v. Mulgrave, 5 Term R. 320, 323.

A testator devised a remainder of his estate to the sons and daughters of A. At the date of the will some were dead and some were living. Held that, though the testator was aware of this fact, their deaths not having been alluded to in the will and they being therein regarded as alive, and the instrument showed that its object was to provide a share of the testator's bounty for the children of those deceased, the words "sons and daughters of A." did not mean those merely who were alive at the death of the testator, but included as well the descendants of A.'s children who were dead at that time, who were entitled to the share which their ancestors, if living, would have taken. Jamison v. Hay, 46 Mo. 546, 548.

The words "sons and daughters," in a will making a devise to a son for life, with the provision that, if he left heirs, he might make appointment among his sons, and, failing to appoint, then the fee should go to the sons equally, or, on failure of sons, to his daughters equally, and, on failure of both sons and daughters, to another son of testator and his heirs in fee, are descriptive of the persons who are to take, and are words of possession, and not limitation. McDonald v. Dunbar (Pa.) 2 Monag. 483, 493.

### **SON ASSAULT.**

A "plea son assault" means that defendant struck in his own defense. State v. Wood (S. C.) 1 Bay, 351, 352.

### **SOON.**

See "As Soon As"; "So Soon As."

A definition by the court, in its instructions, of the word "soon" as used in a con-

tract to convey land by quitclaim deed, to be performed soon, as meaning within a reasonable time, was held not erroneous. Sanford v. Shephard, 14 Kan. 228, 232.

### **SOONER.**

"Sooner," as used in a will providing that the testator's executors might sell his realty in one year after his decease, and sooner if they deemed it desirable, was used to prevent the executors from construing the limitation of one year as postponing the sale for a year, and as prohibiting them from selling at any time within the year, and cannot be construed as showing an intention to limit the exercise of the power of sale to the period of one year from the time of the testator's death. Marsh v. Love, 6 Atl. 889, 890, 42 N. J. Eq. (15 Stew.) 112.

### **SORT.**

"Sort," as used in Acts 1868, c. 448, prohibiting any person from throwing into the Penobscot river "refuse wood or timber of any sort," refers to the form or shape of the refuse wood or timber, and not to the different kinds of wood. State v. Howard, 72 Me. 459, 465.

Tariff Act 1890, Schedule K, cl. 383, provides that a duty on wool "which has been sorted or increased in value by a rejection of any part of the original fleece shall be twice the duty to which it would otherwise be subject. Held, that the term "sorting," as used in such paragraph, meant a change of the original fleeces, and was not limited to an inspection of wools as to color, and that such clause applied to wools of all colors. In re Higgins (U. S.) 50 Fed. 910, 913.

"Sorting and rafting," as used in Acts 1891, c. 174, establishing the rule by which to fix the price for sorting and rafting logs and timber rafted and secured at a certain boom, means substantially the same as "rafting" in the charter of the boom company, specifying the fees and tolls allowed for rafting logs and timber. The act of sorting is a necessary part of the work of rafting. The very nature of the business, which is a proper element to be taken into consideration in giving construction to the language of the charter, indicates that logs of different owners arrive in the boom, and in rafting have to be separated or sorted out. "Sorting and rafting" may well be construed as imposing no greater duties than are implied in rafting in the charter. Proprietors of Machias Boom v. Sullivan, 27 Atl. 189, 191, 85 Me. 343.

### **SOUND.**

The plain English word "sound," unless restricted by the adjunct "body" or "mind," is considered as embracing both. A war-

ranty of the soundness of a slave includes soundness of mind, as well as of body. *Hogan v. Bowlware* (S. C.) 3 McCord, 251, 254; *Piper v. Stinson*, Id.

**As a false representation in criminal law.**

A representation that a horse is "sound, kind, and true" is a false representation, within the meaning of a statute providing a punishment for obtaining goods by false pretenses, if made knowingly during negotiations for the sale of the horse, with intent to cheat and defraud the purchaser, and the latter is induced to purchase by reason thereof; the falsity not being apparent at the time. *Watson v. People*, 87 N. Y. 561, 564, 41 Am. Rep. 397.

A statement in negotiations of sale that a horse is sound and kind may be a mere affirmation or expression, and may thus come under what is sometimes designated as dealers' talk, and be treated as only the mere language of commendation, by which the seller seeks to enhance the price of his goods. It may be also the assertion of a fact material to the negotiations, which the seller may properly make, if justified in so doing by his knowledge of the animal, as the basis on which the sale is to be made. When so made and intended, if it be false and known to him to be such, the seller is guilty of obtaining property by false pretenses, within the prohibition of the statute, if he thereby induces the buyer to part with his property. *Commonwealth v. Jackson*, 132 Mass. 16.

A statement by a seller of a horse to the purchaser that the horse is sound and healthy, though made with the knowledge that it is false, is merely a statement of a falsehood, and does not constitute a false pretense. *State v. Holmes*, 82 N. C. 607, 608.

A statement, in negotiations for the sale of a horse, that its eyes are sound, is a mere statement of a matter of opinion, and not of fact, and therefore is not a false representation, though the horse's eyes are in fact diseased. *State v. Hefner*, 84 N. C. 751, 753.

A representation in the sale of a mare that she is sound in limb and body is false, if she is broken down in her loins. *State v. Sherrill*, 95 N. C. 663, 665.

**As a warranty in sales.**

A bill of sale of one horse, "sound and kind," is a warranty of soundness. *Brown v. Bigelow*, 92 Mass. (10 Allen) 242, 244, 245.

Where articles sold were represented to be sound and in good order, the word "sound" applies to condition only, not quality or kind, and is opposed to defective, decaying, or injured. *Hawkins v. Pemberton* (N. Y.) 35 How. Prac. 376, 383, 29 N. Y. Super. Ct. (8 Rob.) 42, 52.

"Sound," as used in a warranty that certain slaves were "sound," would extend to the condition of both mind and body. It is more comprehensive than the term "healthy." *Nelson v. Biggers*, 6 Ga. 205, 206.

A guaranty of a horse as being "sound and right" will be construed to mean that the horse was "right in conduct and behavior as to all matters materially affecting its value, as well as in physical condition." *Walker v. Holsington*, 43 Vt. 608, 611.

A warranty of a horse, which states that he is "sound and free from disease," is to be construed as meaning that the horse is not diseased. *Johnson v. Wallower*, 15 Minn. 472, 478 (Gil. 387, 392).

"Sound," as used in a warranty in a bargain and sale of a slave, that the slave was sound and healthy, means free from any defect by which the slave would be unfitted for the services usually performed by slaves, and includes a stipulation that there is no defect in an eye of the slave, so as to make it unfit for ordinary purposes. *Bell v. Jeffreys*, 35 N. C. 356, 357.

"Sound," as used in a warranty of a horse or other animal, implies the absence of any disease or seeds of disease in the animal at the time, which actually diminishes, or in its progress will diminish, his natural usefulness in the work to which he would properly and ordinarily be applied. *Kiddell v. Burnard*, 9 Mees. & W. 668, 670.

The words "sound and kind in every respect," when used to characterize a team of horses, imports that the horses are not in the habit of making sudden plunges without cause, and therefore a warranty in such language is broken if the horses have such habit. *Hall v. Colyer*, 8 N. Y. Supp. 801, 55 Hun, 611.

Where by the contract of sale of a horse the animal was warranted to be "sound," it was held that the fact that the animal had a bog spavin was a breach of the warranty. *Fitzgerald v. Evans*, 52 N. W. 143, 144, 49 Minn. 541.

Where a horse was warranted sound, such term included, not only actual disease, but a physical condition showing that the seeds of a disease had been planted in the horse's system, where they afterwards developed into the perfect disease. The mere state of the blood or condition of the body which might render a horse predisposed to take glanders, if he should be so exposed as to contract such disease, would not be sufficient; but the disease must be actually contracted, and, if so contracted, the fact that it was in its incipency at the time of the warranty did not deprive the fact from its operation to render the horse unsound.

Woodbury v. Robbins, 64 Mass. (10 Cush.) 520, 522.

### SOUND AND DISPOSING MIND AND MEMORY.

See "Sound Mind and Memory."

### SOUND DISCRETION.

A "sound discretion" is not a mere capricious exercise of power or will, but the exercise of a right judgment in determining, etc. *Cabeen v. Gordon* (S. C.) 1 Hill, Eq. 51, 54.

The "sound discretion" with which the city council is vested in selecting the means of exercising powers which are delegated to them by the Legislature is very broad, but not absolutely and in all cases beyond judicial control. "Modern decisions in other states," says the Court of Appeals of Maryland, "have in some instances extended the control of the courts over municipal ordinances, upon the ground of their unreasonableness, further, perhaps, than the adjudications of this state would justify us in going. The cases on this subject and the conclusions to be drawn from them are well stated by Judge Dillon in his work on Municipal Corporations (sections 253 to 260). They will also be found collected in Wood on Nuisances, 774, note 1. While we may not be willing to adopt and follow many of these cases, and while we hold that this power of control by the courts is only to be most cautiously exercised, we are yet of the opinion there may be a case in which an ordinance, passed under grants of power like this we have cited, is so clearly unreasonable, arbitrary, abusive, and partial as to raise the presumption that the Legislature never intended to confer the power to pass it, and to justify the courts in interfering and setting it aside as a plain abuse of authority." *City of Baltimore v. Radecke*, 49 Md. 217, 229, 33 Am. Rep. 239.

### SOUND HEALTH.

The words "sound health," as used in the provision in a life insurance policy, do not mean perfect health. We are all born with the seeds of mortality in us. No definition can be given to these words that will apply in all cases, but the term means generally the absence of any vice in the constitution and of any disease of a serious nature that has a direct tendency to shorten life, in contradistinction to a temporary ailment or indisposition. *Packard v. Metropolitan Life Ins. Co.*, 54 Atl. 287, 288, 72 N. H. 1.

An affirmation in an application for insurance that the applicant is in "sound health" does not imply absolute freedom

from bodily infirmity or tendency to disease. *Morrison v. Wisconsin Odd Fellows' Mut. Life Ins. Co.*, 18 N. W. 13, 16, 59 Wis. 162.

The term "sound health," says the Supreme Court in *Brown v. Metropolitan Life Ins. Co.*, 65 Mich. 306, 32 N. W. 610, 8 Am. St. Rep. 894, when used in questions in applications for life insurance, "means a state of health free from any disease or ailment that affects the general soundness and healthfulness of the system seriously, not a mere temporary indisposition, which does not tend to weaken or undermine the constitution of the assured." *Manhattan Life Ins. Co. v. Carder*, 82 Fed. 986, 989, 27 C. O. A. 344; *Metropolitan Life Ins. Co. v. Howle*, 58 N. E. 908, 909, 62 Ohio St. 204; *Boyle v. Northwestern Mut. Relief Ass'n*, 70 N. W. 351, 353, 95 Wis. 312; *Plumb v. Penn Mut. Life Ins. Co.*, 65 N. W. 611, 613, 108 Mich. 94 (citing *Hann v. National Union*, 97 Mich. 513, 56 N. W. 834, 37 Am. St. Rep. 365).

A man may have a sick headache temporarily, and still be considered in "sound health," although, abstractly considered, it is not sound health. So a man might have an attack of rheumatism—a temporary attack of rheumatism. Abstractly, he would not be considered to be in sound health, and yet, in the meaning of a policy of insurance representing the insured as in sound health at the time of its issuance, he would be in sound health, if it was just a temporary attack of rheumatism. These little infirmities, or rather these little attacks of temporary disease, headache, or a little attack of rheumatism, or some little attack of that kind, are not what is meant by "sound health," because they have no probable bearing upon the insured's life. *Dietz v. Metropolitan Life Ins. Co.*, 32 Atl. 119, 120, 168 Pa. 504.

A person is not in "sound health," within the meaning of a policy of life insurance providing that no obligation was assumed by the company unless at the date of the policy the assured was in "sound health," who for upwards of three years before the date of the policy was afflicted with chronic asthma to such an extent that he was unable to pursue his usual calling; such ailment, accompanied by subsequent and resultant complications, leading to his death. *Volker v. Metropolitan Life Ins. Co.*, 21 N. Y. Supp. 456, 1 Misc. Rep. 374.

In determining whether there had been a misrepresentation which would avoid the policy in a certificate for reinstatement of a life policy reciting that insured was in good health, the court said that "it would be most unreasonable to construe the term 'sound health,' as used in life insurance, to mean that insured is absolutely free from all bodily infirmities or tendencies to disease. If this were its true meaning, few persons

of middle age could truthfully say they were in sound health. It is shown in this case that, a short time before the time the certificate was issued, deceased had a cold and complained some of his chest, but continued at his work until the latter part of June, 1892; the certificate reaching the company on the 20th day of June. A physician was not called until June 26th. The disease which finally took the life of the insured was not detected by the physician until some time in July. We think defendants failed to show such misstatements as will avoid the reinstatement of assured. *Sieverts v. National Benev. Ass'n*, 64 N. W. 671, 673, 95 Iowa, 710.

"Sound health," as used by a witness in an action against a life insurance company in stating that the insured appeared to be in "sound health," means no more than perfectly well. *Billings v. Metropolitan Life Ins. Co.*, 41 Atl. 516, 70 Vt. 477.

"Sound health," as used in a policy of life insurance, is capable of different meanings; but, where a person insured is an idiot and crippled, sound health will be construed as referring only to her physical condition, apart from her mental imbecility or the fact that she was crippled. *Robinson v. Metropolitan Life Ins. Co.*, 37 N. Y. Supp. 146, 147, 1 App. Div. 269.

A warranty, in the sale of a slave, that he is of "sound mind and health," imports that the slave is sound in mind and sound in health. Such warranty is not broken by the existence of a contraction of the little finger of each hand, though it diminished the usefulness and value of the slave; but such defect would be a breach of a warranty that he was healthy. *Harrell v. Norvill*, 50 N. C. 29, 32.

### SOUND MANNER.

A condition in a lease of a coal mine requiring the lessee to work the mine in a sound, safe, and workmanlike manner is broken by allowing the mine to fill with water and remain in that condition for months, if the result is injurious to the mine. *Consolidated Coal Co. v. Schaefer*, 25 N. E. 788, 135 Ill. 210.

### SOUND MEMORY AND DISCRETION.

The phrase "sound memory and discretion" is only a technical expression for a sound mind. *In re Guiteau* (U. S.) 10 Fed. 161, 165.

"Sound memory and discretion" means a responsible, sane mind; and if a person is laboring under disease of his mental faculties to such an extent that he does not know what he is doing, or that what he is doing is wrong, then he is wanting in that sound

memory and discretion which are essential to constitute him guilty of murder. *In re Guiteau* (U. S.) 10 Fed. 161, 163.

"Sound memory and discretion," as used in the definition of murder, to the effect that it is when a person of "sound memory and discretion unlawfully killeth any reasonable creature in being," means one who has sufficient knowledge to know and understand the nature of the act, and that it is a violation of his moral and social duty, and will subject him to punishment. *Commonwealth v. Moore* (Pa.) 2 Pittsb. R. 502, 503.

### SOUND MIND AND DISCRETION.

By "sound mind and discretion," in the ordinary definition of murder, is meant that the one attempting the killing has a will or legal discretion. *State v. Mills*, 21 S. E. 106, 107, 116 N. C. 992.

### SOUND MIND AND DISPOSING MEMORY.

See "Sound Mind and Memory."

### SOUND MIND AND MEMORY.

The term "sound mind and memory" means nothing more than the term "sound and disposing mind." *Yoe v. McCord*, 74 Ill. 33, 37; *Campbell v. Campbell*, 22 N. E. 620, 622, 130 Ill. 466, 6 L. R. A. 167; *Waugh v. Moan*, 65 N. E. 713, 715, 200 Ill. 298 (citing *Dickie v. Carter*, 42 Ill. 376).

The terms "sound mind and memory," "sound and disposing mind and memory" and "sound and disposing mind" are convertible, and are used interchangeably to denote that degree of mental strength and power deemed requisite to testamentary capacity. *Daly v. Daly*, 55 N. E. 671, 183 Ill. 269.

"Sound and disposing mind and memory" exist when the testator is capable of exercising thought, judgment, and reflection, and if he knows what he is about and has memory and judgment. *Chandler v. Ferris* (Del.) 1 Har. 454; *Smith v. Day* (Del.) 45 Atl. 396, 397, 2 Pennewill, 245; *Pritchard v. Henderson* (Del.) 50 Atl. 217, 222, 3 Pennewill, 128.

The phrase "a sound mind" has two significations. In common parlance it means a mind of more than ordinary strength, discreet and well-balanced. In law it means a mind not affected with insanity in any form. At common law and under the statutes of New York the legal presumption is that every man is *compos mentis*, and the burden of proof that he is non *compos mentis* rests on the party alleging the same; and therefore he who sets up the claim that a

testator at the time of making his will was non compos mentis must prove it. *Delafield v. Parish*, 25 N. Y. 9, 102.

A person shall be considered of "sound mind" who is neither an idiot nor lunatic, nor affected with insanity, and who hath arrived at the age of 14 years, or before that age, if such person know the distinction between good and evil. *Hurd's Rev. St. Ill.* 1901, p. 645, c. 38, § 282.

**As capacity to understand nature of act.**

A man of "sound mind and disposing memory," or of "sound and disposing mind and memory," is one who has a full and intelligent knowledge of the act he is engaged in, a full knowledge of the property he possesses, and an intelligent perception and understanding of the disposition he desires to make of it and of the persons and objects he desires as the recipients of his bounty. It is not necessary that he collect all this in one review; but if he understands in detail all that he is about, and chooses with understanding and reason between one disposition and another, it is sufficient. *Wilson v. Mitchell*, 101 Pa. 495 (citing *Daniel v. Daniel*, 39 Pa. [3 Wright] 191; *Tawney v. Long*, 76 Pa. [26 P. F. Smith] 106); *Shaver v. McCarthy*, 5 Atl. 614, 110 Pa. 339; *In re Pensyl's Estate*, 27 Atl. 669, 672, 157 Pa. 465; *Appeal of Pensyl (Pa.)* 27 Atl. 669, 672; *Appeal of Voglesong*, 46 Atl. 424, 196 Pa. 194; *In re Douglass' Estate*, 29 Atl. 715, 716, 162 Pa. 567; *Miller v. Oestrich*, 27 Atl. 742, 746, 157 Pa. 264.

A "sound and disposing memory" is one which not only knows when it is disposing of property, but is able to dispose of it with understanding and reason. *Young v. Ridenbaugh*, 67 Mo. 574, 588.

"Sound mind," within the meaning of statutes relating to the capacity of making a will, or what degree of mental power the testator should possess, means sufficient capacity to comprehend the nature of the act and its effects, and that one should perfectly understand the extent of his property which he is disposing of and his relation to all persons who have claims upon his bounty. *In re Blakely's Will*, 4 N. W. 337, 341, 48 Wis. 294.

"Soundness of mind," in making a will, is for the testator to have such mental capacity as to enable him to know the objects of his bounty, the character and value of his estate, and to make a rational survey of his estate and dispose of it according to a fixed purpose of his own. *Wilson v. Hays' Ex'r*, 58 S. W. 773, 774, 109 Ky. 321.

"Soundness of mind" means the ability to know and comprehend that one is disposing of his property by will, the general

value and character of the property, and to whom the same is being given. *Thompson v. Ish*, 12 S. W. 510, 515, 99 Mo. 160, 17 Am. St. Rep. 552.

"Soundness of mind" implies such a mental condition as enables the testator to understand and comprehend the execution of his will and all the conditions which would enter into its rational performance. It is not enough that he understands some of these, or some part of them, or that he could form some rational idea upon a branch of the subject; but he must have mind enough to comprehend and understand the scheme or general plan of the entire transaction. *Spratt v. Spratt*, 43 N. W. 627, 630, 76 Mich. 384.

Soundness of mind, such as will enable a person under the statute to make a will, has relation to the business to be transacted, namely, the disposition of her property by will. Her mind must have been sound with reference to whatever is involved in this transaction; that is to say, she must have been able to understand, and carry in her mind in a general way, the nature and situation of her property, and her relations to those persons who are about her, to those who would naturally have some claim to her remembrance, to those persons in whom, and those things in which, she has been mostly interested. She must have been capable of understanding these things, and the nature of the act she was doing, and the relation in which she stood to the objects of her bounty, and to those who ought to be in her mind on such an occasion, and free from any delusion which was the effect of disease, and which would or might lead her to dispose of her property otherwise than she would have done if she had known and understood correctly what she was doing. *Whitney v. Twombly*, 136 Mass. 146, 147.

A person is of "sound mind," and competent to make a will, who has sufficient mind to know and understand the business in which he is engaged, who has sufficient mental capacity to enable him to know and understand the extent of his estate and the persons who would naturally be supposed to be the objects of his bounty, and who could keep these in mind long enough to, and could, form a rational judgment in relation to them. *Lowder v. Lowder*, 58 Ind. 538, 540.

A "sound and disposing mind" or memory is one which is capable of understanding the nature of the business and the elements of the will which testator is executing; that is, the nature, extent, and situation of his property, and the mode of distribution, and the number, names, condition, and circumstances of all those who come reasonably within the range of his bounty. *Garland v. Smith*, 28 S. W. 191, 193, 127 Mo. 567.

The term "sound mind" does not mean that the testator shall have the same command of his mental faculties that he may have when in health. The law, recognizing that wills are often made in extremis, when the bodily powers are breaking and the mental faculties are enfeebled, only requires that the testator shall retain so much of his mental power as will enable him to understand his relations to those who would be the natural objects of his bounty, the property he wished to distribute, and the manner in which he intends to distribute it. By soundness of mind is not meant that the mind should be in its full vigor and power, but that its faculties, its machinery, should be in working order, so to speak, with an active power to collect and retain the elements of the business to be performed for a sufficient time to perceive their obvious relation to each other. *Kempsey v. Maginnis*, 2 Mich. N. P. 49, 53, 54.

"Sound and disposing mind and memory," which a testator must possess in order to make a valid will, means that "he ought to be capable of making his will, with the understanding of the nature of the business in which he is engaged, a recollection of the property he means to dispose of, of the persons who are the objects of his bounty, and the manner in which it is to be distributed between them. It is not necessary that he should view his will with the eye of a lawyer and comprehend its provisions in their legal form. It is sufficient if he has such a mind and memory as will enable him to understand the elements of which it is composed and the disposition of his property in its simple forms. It is the business of the testator to dictate the purposes of his mind, and the scrivener to express them in legal form. In deciding upon the capacity of the testator to make his will, it is the soundness of his mind, and not the particular state of his bodily health, that is to be attended to. The latter may be in a state of extreme imbecility, and yet he may possess sufficient understanding to direct how his property shall be disposed of. His capacity may be perfect to dispose of his property by will, and yet very inadequate to the management of other business, as, to make contracts for the purchase or sale of property; for most men at different periods of their lives have meditated upon the subject of the disposition of their property by will, and when called upon to have their intention committed to writing they find much less difficulty in declaring their intentions than they would in comprehending business in some measure new. The soundness of the testator's mind is to be judged of from his conversations or from his actions at the time the will is made, or from both taken together. It is not sufficient per se that he should be able to describe his feelings or give suitable answers

to ordinary questions. This he may do, and yet the mind may be too much diseased to enable him to dispose of the estate with understanding and discretion." *Harrison v. Rowan* (U. S.) 11 Fed. Cas. 658, 661 (quoted in *Hall v. Unger* [U. S.] 11 Fed. Cas. 261, 263); *Sloan v. Maxwell*, 3 N. J. Eq. (2 H. W. Green) 563, 571.

The question as to the capacity of a testator to make a will may be summed up in the most simple and intelligent form: Were his mind and memory sufficiently sound to enable him to understand the business in which he was engaged at the time when he executed his will? *Stevens v. Vancleve* (U. S.) 23 Fed. Cas. 35, 38.

The phrase "sound mind and memory" means that the person under consideration possesses sufficient understanding and mental power to comprehend what property he has to dispose of and the natural objects of his affection and bounty, and to understand the nature of his acts and the effect his will would have on the natural objects of his bounty and affections. *Ring v. Lawless*, 60 N. E. 881, 885, 190 Ill. 520.

#### As requiring unimpaired memory.

One whose mind is sound is of "sound mind and memory" as regards testamentary capacity, although his memory is somewhat impaired. *Taylor v. Pegram*, 37 N. E. 837, 840, 151 Ill. 106.

If the testator was of sound mind, but of poor or impaired memory, he was of "sound mind and memory." The failure of memory is not sufficient to create the incapacity, unless it be quite total or extend to his immediate family and property. A sound mind is not incompatible with a poor memory. If the testator's mind was sound, that was enough, without requiring it to be in a suitable state. A man's mind, his temper, his disposition, his feelings, may be in an improper state, without impairing his legal capacity to make a deed or will. Littleton makes the terms of "nonsane memory," "non compos mentis," "not of sound memory," convertible terms; and Coke in his Notes defines one "non compos mentis," aside from natural idiots, lunatics, and drunken men, as "one that by sickness, grief, or other accident wholly loseth his memory and understanding." So that, as known in the law, "sound memory" is something quite different from good or unimpaired memory. Failure of memory does not constitute unsoundness of memory; and hence to say in an instruction to a jury, in the proceeding for the proof of a will, that the testator should be of sound mind or memory, instead of sound mind and memory, draws an unwarrantable distinction between "sound mind" and "sound memory." *Yoe v. McCord*, 74 Ill. 33, 37.

The test whether a testator is of "sound and disposing mind and memory" is whether he has mind enough to know and appreciate his relations to the natural objects of his bounty and the character and effect of the dispositions of his will. If he has such knowledge, he is of sound and disposing mind and memory, although his mind may not be entirely unimpaired. *Appeal of Dunham*, 27 Conn. 192, 203.

It is said in *Buswell, Insanity, § 365*, that to constitute a "sound and disposing mind" it is not necessary that the mind shall be unbroken, unimpaired, unshattered by disease or otherwise, or that the testator should be in full possession of his reasoning faculties. So, if the testator be in a dying state, he has capacity, if, when his attention is roused, his mind acts clearly and with discriminating judgment in respect of the act to be done and its relations. Thus it is held that one may be competent to make a codicil, changing in two or three particulars the dispositions previously made by him in his will, although he may be incompetent to perform acts requiring the exercise of a greater intellect or judgment, as to make an entirely new disposition of his property. In *Jarm. Wills*, p. 38, note 1, it is thus stated: "The question is not so much, what was the degree of memory possessed by the testator? as, had he a disposing memory? Was he capable of recollecting the property he was about to bequeath, the manner of distributing it, and the objects of his bounty? In a word, were his mind and memory sufficiently sound to enable him to know and understand the business in which he was engaged at the time when he executed his will?" *Campbell v. Campbell*, 22 N. E. 620, 624, 130 Ill. 466, 6 L. R. A. 167.

#### **As requiring disposing memory.**

It is not sufficient that the testator be able when he makes his will to answer familiar and usual questions, but he ought to have a disposing memory, which the law calls a "sane and perfect memory," and means that degree of recollection that will enable him to look about the property he had to dispose of and the persons to whom he wishes to dispose of it; and, if he has the power of summoning up in his mind what his property is and those persons are that then are the objects of his bounty, he has a "sound mind and memory." *Campbell v. Campbell*, 22 N. E. 620, 622, 130 Ill. 466, 6 L. R. A. 167.

#### **As requiring entire absence of delusion.**

"A 'sound mind' is one wholly free from delusion. It is not the strength of mind which determines its freedom from delusion. It is its soundness." In *re Tittel's Estate* (Cal.) Myr. Prob. 12, 13.

The "sound mind" which is essential to testamentary capacity does not mean a mind

wholly free from delusion. *Shreiner v. Shreiner*, 35 Atl. 974, 178 Pa. 57.

A person of "sound and disposing mind," within the rule that testator must be a person of sound and disposing mind, is a person in the possession of the natural mental faculties of man, free from delusion, and capable of rational thinking, reasoning, acting, and determining for himself. In *re Black's Estate* (Cal.) Myr. Prob. 24, 27.

"A sound mind is one wholly free from delusion of the intellectual faculties, existing in a certain degree of vigor and harmony; the propensities, affections, and passions being under the subordination of the judgment and will, and the former being the controlling power, with a just perception of the natural connection or repugnancy of ideas. Weak minds, again, only differ from strong ones in the extent and power of their faculties; but, unless they betray symptoms of a total loss of understanding, or of idiocy or of delusion, they cannot properly be considered unsound." *Duffield v. Robeson* (Del.) 2 Har. 375, 379.

The expression "sound mind" does not mean, in the execution of a will, that one must possess a perfect intelligence. It is the degree of intelligence that determines and controls. It is easy to distinguish between a sound mind and the condition of a maniac, but there is some difficulty in determining testamentary capacity where there is the presence of a manifest change in one's mind, amounting to aberration or impairment, attributable, perhaps, to thoughts on certain subjects, or fancies, or occasioned by grief, illness, and causes of a similar nature. A monomaniac may have capacity to make a will; the theory being that, as to one subject, he is insane, but as to all others sane. That an aged person is forgetful, and at times labors under slight delusions, does not per se establish testamentary incapacity. In *re Halbert's Will*, 37 N. Y. Supp. 757, 759, 15 Misc. Rep. 308.

By the terms "sound and disposing mind and memory" it has not been understood that a testator must possess these qualities of the mind in the highest degree; otherwise, very few could make testaments at all. Neither has it been understood that he must possess them in as great a degree as he may have formerly done; for even this would disable most men in the decline of life. The mind may have been in some degree debilitated, the memory may have become in some degree enfeebled, and yet there may be enough left clearly to discern and discreetly to judge of all those things and all those circumstances which enter into the nature of a rational, fair, and just testament; but, if they have so far failed as that these cannot be discerned and judged of, then he cannot be said to be of a "sound and disposing mind and memory." A per-



son laboring under a mental delusion as to the conduct of one who would be the natural recipient of his bounty, and to whom he had promised a certain sum as recompense for labor and care, cannot be regarded as possessed of a "sound and disposing mind and memory." *Kastell v. Hillman*, 30 Atl. 535, 540, 53 N. J. Eq. 49.

Lord Mansfield holds the legal test of a sound mind to be the knowledge of right and wrong, of good and evil, of which the converse is ignorance of knowledge of right and wrong, of good and evil. Lord Erskine defines it to be the absence of any practical delusion, traceable to a criminal or immoral act. Coke said: "A little madness deprives the lunatic of civil rights and dominion over property, and annuls wills; but, to exempt from responsibility for crime, complete ignorance of the knowledge of right and wrong must exist." *Mutual Life Ins. Co. v. Terry*, 82 U. S. (15 Wall.) 580, 585, 21 L. Ed. 236.

#### As affected by slight weakness of mind.

"Sound and disposing mind," required of a testator in order to render his will valid, means the "mental capacity to fairly and rationally consider the character of the property to be disposed of, the nature of the ties of blood or of affinity, marriage, or friendship, the persons to whom he wishes his property to go, and the means of disposing of it. The question of strength or weakness of mind does not enter into the consideration of this issue. You are to look only to soundness or unsoundness. Thus a person of naturally sound mind may be by sickness or other distress so reduced physically as to be quite inadequate to fully grasp and comprehend some abstract propositions of the exact or natural sciences, and yet be able to comprehend his property and determine whom he desires should be the recipients of his bounty." In *re Crittenden's Estate* (Cal.) Myr. Prob. 50.

"Weakness of mind may exist in many different degrees without making a man intestable. Courts will not measure the extent of people's understandings or capacities, if a man be legally compos mentis. Be he wise or unwise, he is the disposer of his own property, and his will stands as the reason for his action." *Duffield v. Morris' Ex'r*, 2 Har. 375. A testatrix has sufficient testamentary capacity to make a will where at the time of its execution she was capable of exercising thought, reflection and judgment, knew what she was doing and how she was disposing of her property, and had sufficient memory and understanding to comprehend the nature and character of the transaction. Mere weakness of mind or partial imbecility, from disease of the body or from age, will not render a person incapable of making a will. *Pritchard v.*

*Henderson* (Del.) 50 Atl. 217, 222, 3 Pennewill, 128.

"Sound and disposing mind and memory," as used in the rule that a testator must possess a sound and disposing mind and memory, means that he must have mind and memory sufficient "clearly to discern and discreetly to judge of all those things and all those circumstances which enter into the nature of a rational and just testament; but, if they have so far failed that those cannot be discerned and judged of, then he cannot be said to be of a sound disposing mind and memory." By these terms it is not to be understood that a testator must possess "understanding and intellectual power in the highest degree, nor that he must possess them in as great a degree as he may have formerly done." *Den v. Vancleve*, 5 N. J. Law (2 Southard) 589, 660.

"Sound mind and memory" does not mean a mind without a flaw or a memory without fault, and it would be unreasonable to require such an ideal mind and memory in order to constitute testamentary power to make a will, because it would impose a condition incompatible with human infirmity. Neither is it requisite to testamentary capacity that the mind and memory be of the ordinary or average standard of the human intellect, nor is a mind weakened and disordered by age and bodily maladies necessarily incompetent to the testamentary act; for such a mind may still possess the intelligence and integrity which the law judges to be sufficient, but it is essential that the testator should have sufficient capacity to comprehend perfectly the condition of his property, his relations to the persons who were, or are, or might have been, the objects of his bounty, and the scope and meaning of the provisions of his will. He must have sufficient active memory to collect in his mind, without prompting, the parts or elements of the business to be transacted, and to hold them in his mind a sufficient length of time to perceive their obvious relations to each other, and be able to form some rational judgment in reference to them. In *re Blair*, 16 N. Y. Supp. 874, 876, 16 Daly, 540.

#### SOUND ORDER.

"Sound order," as used in instructions for the packing of goods which are purchased for the purpose of manufacture at a certain place, to which they are to be shipped, means such order as would with ordinary care insure the sound condition of the goods on their arrival at such place. *Reynolds v. Palmer* (U. S.) 21 Fed. 433, 437.

#### SOUNDING.

"Sounding" is the usual method of testing to find out whether a piece of wood is

sold to the core when it appears to be solid on the outside. *McGrath v. Delaware, L. & W. R. Co.*, 55 Atl. 242, 243, 69 N. J. Law, 331.

### SOUNDING IN DAMAGES.

A debt or demand not "sounding in damages merely" is one which, when the facts upon which it is based are established, the law is capable of measuring accurately by a pecuniary standard. *Rosser v. Bunn*, 66 Ala. 89, 93; *Nelms v. Hill*, 5 South. 344, 85 Ala. 583.

Mutual debts not "sounding in damages merely," which may be set off, are that class of claims for which the law furnishes no standard of measurement, even when the facts are ascertained, such as actions of trespass, assault and battery, or for slander, malicious prosecution, and the like; while, on the other hand, if the claim be one which, when the facts upon which it is based are established, the law is capable of measuring its value by a pecuniary standard, then it is not a claim sounding in damages merely. *Collins v. Greene*, 67 Ala. 211, 215; *Johnson v. Aldridge*, 9 South. 513, 93 Ala. 77.

A prosecution for contempt of court, in order to compel obedience to an order made in a chancery proceeding, is not a case "sounding in damages," within the meaning of Rev. St. 1891, c. 37, § 25, which makes the judgment of the Appellate Court final in such cases. *Leopold v. People*, 30 N. E. 348, 349, 140 Ill. 552.

### SOUNDING IN FOLLY.

The statement that a single word "sounding in folly" is conclusive against the presumption of a lucid interval of an insane person to all legal purposes means that any word evidencing a continuance of the insanity or insane delusion defeats the attempt to show a lucid interval. It does not mean that any and every foolish or absurd remark of the person whose insanity is in issue will, if he has once been insane, demonstrate that he is still insane. Some people may and do talk foolishly and absurdly without impeachment of their sanity, and a person who is so unfortunate as to have been once insane is not to be remanded in law to the condition of insanity, with all its disabilities, for doing the same thing, when his words do not necessarily show insane delusion. *Wright v. Jackson*, 18 N. W. 486, 489, 59 Wis. 569.

### SOUNDLY.

"To judge soundly is to form a correct opinion, truly, justly, without error." *Kramer v. Weinert*, 1 South. 26, 28, 81 Ala. 414.

### SOUNDNESS.

Of mind and memory, see "Sound Mind and Memory."

A warranty of the "soundness" of a slave extends to mind and body. *Simpson v. McKay*, 34 N. C. 141, 143.

A warranty of soundness in a horse cannot be construed as a warranty that the horse is not afflicted with a temporary and curable injury, which does not injure him for present service. *Roberts v. Jenkins*, 21 N. H. 116, 120, 53 Am. Dec. 169.

The want of castrating in a male mule does not meet an allegation of unsoundness. *Duckworth v. Walker*, 46 N. C. 507.

### SOUTH.

As used in a deed describing the granted premises in general terms and reserving the wood and timber on the premises south of the meadow or lowland, the word "south" should be construed as not designating the course of a boundary line, but to indicate the position of the reserved wood and timber, as compared with the meadow and lowland, and to except out of the grant all wood and timber growing southwardly of, or more to the southward than, the lowland between the two ascents. *Cronin v. Richardson*, 90 Mass. (8 Allen) 423, 424.

In describing courses, the words "north," "south," "east," and "west" mean true courses, and refer to the true meridian, unless otherwise declared. Pol. Code Cal. 1903, § 3903; Pol. Code Mont. 1895, § 4103.

### SOUTHERLY.

There are very few words in our language more indefinite and uncertain in their meaning than the words "southerly," "easterly," and "northerly." The word "southerly," as applied to the course of a proposed highway, designating the course as "thence southerly to avoid" a certain creek, and "thence easterly and northerly through" certain lands, means nearly south, but how near, and whether east or west of south, it is impossible to tell without the use of other qualifying words; and so with regard to the words "easterly" and "northerly." It is impossible to determine with any certainty the course intended thereby. *Scraper v. Pipes*, 59 Ind. 158, 164.

"Southerly," as used in a record or return of town selectmen laying out a highway between two termini, from the first of which it runs in a southerly direction over certain land, then south through other land to the second terminus, does not make the description of the way void for uncertainty; for it does not necessarily follow that southerly

may be southeast or southwest, or any direction between those points. *Spaulding v. Town of Groton*, 44 Atl. 88, 91, 68 N. H. 77.

"Southerly," as used by a grantor who owned land on the southerly side of a street, reserving to himself a right of way from the street to his land, southerly of it, means the grantor's land which was geographically situated south of the rear line of the lot. *Leach v. Hastings*, 18 N. E. 405, 406, 147 Mass. 515.

The words "southerly to the river," are insufficient to describe a course and terminus of a proposed highway, stated to be southerly to the river from a certain point. *Clement v. Burns*, 43 N. H. 609, 614.

#### As due south.

In the absence of monuments and in a deed, "southerly" means due south. *Smith v. Newell* (U. S.) 86 Fed. 56, 58.

The word "southerly" means running due south, as used in the general statutes relating to shell-fisheries, in speaking of a certain line between the navigable waters of one town and those of another as running southerly from a certain point in a divisional line upon the main land. *Rowe v. Smith*, 48 Conn. 444, 447.

The word "southerly," as used in the description of courses in a deed, will not be construed to mean due south, where the land is clearly described by unmistakable monuments and boundaries. *Howard v. College of the Holy Cross*, 116 Mass. 117, 120.

The words "northerly," "southerly," "easterly," and "westerly" mean due north, due south, due east, or due west, unless controlled by other words, or by lines, monuments, or natural objects. *Pol. Code Cal.* 1903, § 3904; *Pol. Code Mont.* 1895, § 4104.

#### SOUTHWESTERLY.

"Southwesterly" may mean any direction between south and west lines, and hence a petition for a road, stating that it will begin at a point about 150 yards in a southwesterly course from a certain place, is too indefinite to comply with *Hill's Ann. Laws*, § 4062, requiring such petition to specify the place of beginning. *Sime v. Spencer*, 47 Pac. 919, 920, 30 Or. 340.

#### SOUVENIR.

A "souvenir" is a keepsake or remembrance, and will not include pieces of tapestry and paintings. *In re Glaenger* (U. S.) 67 Fed. 532, 533.

#### SOVEREIGN.

A chief ruler, with supreme power; a king or other ruler, with limited power. *Black, Law Dict.*

#### SOVEREIGN PEOPLE.

The words "sovereign people" are familiarly used to describe the political body, who, according to our republican institutions, form the sovereign, and who hold the power and conduct the government through their representatives. Every citizen is one of these people and a constituent member of this sovereignty. *Scott v. Sandford*, 60 U. S. (19 How.) 393, 404, 15 L. Ed. 691.

#### SOVEREIGN POWER.

The term "sovereign power" of a state is often used without any very definite idea of its meaning, and it is often misapplied. Prior to the formation of the federal Constitution, the states were sovereign in the absolute sense of the term. They had established a certain agency under the Articles of Confederation, but this agency had little or no power beyond that of recommending to the states the adoption of certain measures. It could not be properly denominated a government, as it did not possess the power of carrying its acts into effect. The people of the states, by the adoption of the federal Constitution, imposed certain limitations in the exercise of their powers which appertain to sovereignty. But the states are still sovereign. The sovereignty of a state does not reside in the persons who fill the different departments of its government, but in the people, from whom the government emanated; and they may change it at their discretion. Sovereignty, then, in this country, abides with the constituency, and not with the agent; and this remark is true, both in reference to the federal and state governments. *Spooner v. McConnell* (U. S.) 22 Fed. Cas. 939, 943.

The "sovereign powers" of a government include all the powers necessary to accomplish its legitimate ends and purposes. Such powers must exist in all practical governments. They are the incidents of sovereignty, of which a state cannot divest itself. *Boggs v. Merced Min. Co.*, 14 Cal. 279, 309.

By the term "sovereign power of the state" is meant the people of the state in their sovereign capacity, acting through their representatives in the Legislature. *Kennebec Water Dist. v. City of Waterville*, 52 Atl. 774, 778, 96 Me. 234.

"Sovereign power in the state" is such power as may subject all property in the commonwealth to those general regulations which are necessary to the common good and general welfare; such power as extends to the protection of the lives, limbs, health, comfort, and quiet of all persons, and the protection of all property, within the state. *Donnelly v. Decker*, 17 N. W. 389, 391, 58 Wis. 461, 48 Am. Rep. 637.

In all governments of constitutional limitations "sovereign power" manifests itself in

but three ways: By exercising the right of taxation; by the right of eminent domain; and through its police power. *United States v. Douglas-Willan Sartoris Co.*, 22 Pac. 92, 96, 3 Wyo. 287.

There is no ground to deny the full and sovereign power of the commonwealth, within its limits, by legislative acts, to exercise dominion over the sea and the shores of the sea, and all its arms and branches, and the lands under them, and all other lands flowed by tide water, subject to the rights of riparian ownership. The entire right of property in the soil was granted to the colonists in their aggregate capacity, and, if any power remained in the crown, it was that of dominion and regulation of the public right; and this was wholly determined by the Declaration of Independence, acknowledged and acceded to by the treaty of peace, sanctioned by an act of Parliament. This right of dominion and controlling power over the sea and its coasts, shores, and tide waters, when relinquished by the parent country, must vest somewhere; and, as between the several states and the United States, it is settled that it vested in the several states, in their sovereign capacity, respectively, and was not transferred to the United States by the adoption of the Constitution, intended to form a more perfect union. *Commonwealth v. Alger*, 61 Mass. (7 Cush.) 53, 81.

#### SOVEREIGN RIGHT.

A "sovereign right" is a right which the state alone, or some of its governmental agencies, can possess. The statutes of limitation of Minnesota, applicable to actions brought by the state or a municipal corporation, are applicable, whether brought in what is called the sovereign right of the state, or in a proprietary capacity. *City of St. Paul v. Chicago, M. & St. P. Ry. Co.*, 48 N. W. 17, 21, 45 Minn. 387.

#### SOVEREIGN STATE.

The words "sovereign state" are cabalistic words, not understood by the disciple of liberty, who has been instructed in our constitutional schools. It is our appropriate phrase when applied to an absolute despotism. The idea of sovereign power in the government of a republic is incompatible with the existence and foundation of civil liberty and the rights of property. *Gaines v. Buford*, 31 Ky. (1 Dana) 481, 501.

#### SOVEREIGNTY.

By sovereignty in its largest sense is meant supreme, absolute, uncontrollable power; the *jus summi imperii*; the absolute right to govern. Sovereignty in government is that public authority which directs or orders what is to be done by each member of society in relation to the others in the association or

organization. Government is not sovereignty, but it is the machinery or expedient which expresses the will of the sovereign power. *Cherokee Nation v. Southern Kan. R. Co.* (U. S.) 33 Fed. 900, 906. It is the union and exercise of all human power possessed in a state. Abstractly it resides in the body of the nation, and belongs to the people; but the powers are generally exercised by delegation. *Union Bank v. Hill*, 43 Tenn. (3 Cold.) 325, 328, 331.

"Sovereignty," according to the best authorities, is the supreme power which governs the body politic, or society which constitutes the state, and this power is independent of the particular form of government, whether monarchical, aristocratic, or democratic. *Wheat. El. Int. Law*, pt. 1, c. 2, § 5. To every sovereign belong certain rights, which are deemed essential to its existence. These are called by the civilians "*jura majestatis*," or rights of sovereignty. Among them is the "*jus eminens*," or the supreme power of the state over its members and whatever belongs to them. When applied to property alone, it is called the "*dominium eminens*," or right of eminent domain; that is, the right of the sovereignty to use the property of its members for the public good or necessity. *Gilmer v. Lime Point*, 18 Cal. 229, 250.

"Sovereignty" is a term used to express a supreme political authority of an independent state or nation. Whatever rights are essential to the existence of this authority are rights of sovereignty. The rights to declare war, to make treaties of peace, to levy taxes, and to take property for public uses, termed the "right of eminent domain," are all rights of sovereignty. In this country this authority is vested in the people, and is exercised through the joint action of the federal and state governments. To the federal government is delegated the exercise of certain rights or powers of sovereignty, and with respect to sovereignty, "rights" and "powers" are synonymous terms; and the exercise of all other rights of sovereignty, except as expressly prohibited, is reserved to the people of the respective states, or vested by them in their local government. When we say, therefore, that a state of the Union is sovereign, we only mean that she possesses supreme political authority, except as to those matters over which such authority is delegated to the federal government or prohibited to the states. *Moore v. Smaw*, 17 Cal. 199, 218, 79 Am. Dec. 123.

"Sovereignty" is the right to govern. In Europe the sovereignty is generally ascribed to the prince; here it rests with the people. There the sovereign actually administers the government; here, never in a single instance. Our governors are the agents of the people, and at most stand in the same relation to their sovereign in which regents in Europe stand to their sovereigns. Their princes have personal powers, dignities, and pre-eminences

Our rulers have none but official, nor do they partake in the sovereignty otherwise, or in any other capacity than as private citizens. *Chisholm v. Georgia*, 2 U. S. (2 Dall.) 419, 471, 1 L. Ed. 440.

Who, or what, is a sovereignty? What is his or its sovereignty? On this subject the errors and the mazes are endless and inexplicable. To enumerate all, therefore, will not be expected. To take notice of some will be necessary to the full illustration of the present important cause. In one sense, the term "sovereign" has for its correlative "subject." In this sense, the term can receive no application; for it has no object in the Constitution of the United States. Under that Constitution there are citizens, but no subjects. The term "subject" occurs, indeed, once in the instrument; but to mark the contrast strongly the epithet "foreign" is prefixed. In another sense, according to some writers, every state which governs itself without any dependence on another power is a sovereign state. There is a third sense in which the term "sovereign" is frequently used. In this sense sovereignty is derived from a feudal source, and like many other parts of that system, so degrading to man, still retains its influence over our sentiments and conduct, though the cause by which that influence was produced never extended to the American states. The accurate and well-informed President Henault, in his excellent chronological abridgment of the History of France, tells us that, about the end of the second race of kings, a new kind of possession was acquired under the name of "fief." The governors of cities and provinces usurped equally the property of land and the administration of justice, and established themselves as proprietary seigniors over those places in which they had been only civil magistrates or military officers. By this means there was introduced into the state a new kind of authority, to which was assigned the appellation of "sovereignty." In process of time the feudal system was extended over France and almost all the other nations of Europe, and every kingdom became in fact a large fief. Into England this system was introduced by the Conqueror, and to this era we may probably refer the English maxim that the king or sovereign is the fountain of justice. But in the case of the king the sovereignty had a double operation. While it vested him with jurisdiction over others, it excluded all others from jurisdiction over him. With regard to him there was no superior power, and consequently on feudal principles no right of jurisdiction. "The law," says Sir William Blackstone (1 Bl. Comm. 241, 242), "ascribes to the king the attribute of sovereignty. He is sovereign and independent within his own dominions, and owes no kind of subjection to any other potentate upon earth. Hence it is that no suit or action can be brought against the king, even in civil matters, because no

court can have jurisdiction over him; for all jurisdiction implies superiority of power." The state of Georgia is not a sovereign power, in the sense that it is exempt from suit in the federal courts by a private citizen. *Chisholm v. Georgia*, 2 U. S. (2 Dall.) 419, 455, 1 L. Ed. 440.

## SOW.

A sow is the female of the hog kind, or swine; so that an indictment under an act making it a misdemeanor to shoot any horse, hog, etc., of another, which charges that the prisoner shot "one sow," is good. *Shubrick v. State*, 2 S. C. 21, 22.

## SPACE.

See "For the Space of."

As used in an affidavit that on a certain page of a bill of exceptions a "space" was left for depositions, etc., the word has reference to the paper on which the bill of exceptions was written; that is, that there was space left on that paper. *Pennsylvania Co. v. Sears*, 36 N. E. 353, 136 Ind. 460.

## SPACE OF INTERSECTION.

"Space of intersection," as used in Rev. St. U. S. § 2336 [U. S. Comp. St. 1901, p. 1436] providing that, when two or more veins of different mining claims intersect, the prior location shall be entitled to all ore within the space of intersection, means the intersection of the claims, and not merely of the veins. *Calhoun Gold-Min. Co. v. Ajax Gold-Min. Co.*, 59 Pac. 607, 613, 27 Colo. 1. 50 L. R. A. 209, 83 Am. St. Rep. 17.

Rev. St. U. S. § 2336 [U. S. Comp. St. 1901, p. 1436], provides that, when two or more mineral veins intersect or cross each other, priority of title shall govern, and the prior location shall be entitled to all ore or mineral contained within the space of intersection, but the subsequent location shall have the right of way through the space of intersection for the purposes of a convenient working of the mine, and, when two or more veins unite, the oldest or prior location shall take the vein below the point of union, including all the space of intersection. Held, that the words "space of intersection" were intended to mean the space of intersection of the veins, and not space of intersections of the surface location, and, in event of a junior location of a claim crossing a senior location, a right of way for the purpose of excavating and taking away the mineral contained in the cross-vein will be reserved, and on a grant of the cross-vein itself such right of way would pass as incident to the grant. *Branagan v. Dulaney*, 8 Pac. 669, 671, 8 Colo. 408.

**SPAN.**

"Span," as used in Act Cong. July 25, 1886 (14 Stat. 244), granting permission for the construction of a bridge across the Missouri river at Kansas City, and providing that the same shall be constructed as a pivot drawbridge, with a draw over the main channel of the river, and with spans not less than 160 feet in length, denotes the space or distance between the columns or piers, and does not refer to a part of the structure. *Hannibal & St. J. R. Co. v. Missouri River Packet Co.*, 8 Sup. Ct. 874, 880, 125 U. S. 260, 31 L. Ed. 731.

**SPAN OF HORSES.**

Rev. St. c. 102, § 58, subd. 6, providing that among other personal property a "span of horses" shall be exempt from sale under an execution or attachment, means a team of full-grown horses, which may be connected or united for the purpose of labor, and does not include a mare and her colt, four months old. The word as used in the statute cannot be taken, in its broadest signification, as meaning animals of the equine family, old or young. *Ames v. Martin*, 6 Wis. 361, 362, 70 Am. Dec. 468.

**SPARE.**

A contract for the sale of straw, by which the seller agreed to sell and deliver to the buyer all the straw he had to "spare" during a certain season, not exceeding three tons, should be construed to mean all the straw, not exceeding three tons, which the seller did not need for his legitimate personal use. Though the use of the term rendered the amount deliverable uncertain, the contract was not void for that reason, since that is certain which can be made certain, and evidence that the seller sold an amount of the straw to another after the contract with plaintiff was competent to show the quantity he "had to spare." *Parker v. Pettit*, 43 N. J. Law (14 Vroom) 512, 515.

**SPARE CONDUCTOR.**

Where an applicant for insurance stated in his application that he was a "spare conductor" on a freight train, such phrase indicated that he was occasionally, and not regularly or continuously, employed as a conductor. *Aldrich v. Mercantile Mut. Acc. Ass'n*, 21 N. E. 873, 874, 149 Mass. 457.

**SPEAK.**

The guaranty in Const. art. 1, § 8, providing that every citizen may speak, write, and publish his sentiments upon all subjects, does not give to the citizen the right to mur-

der, nor does it give him the right to advise the commission of that crime by others. What it does permit is liberty of action only to the extent that such liberty does not interfere with or deprive others of the equal right. In the eye of the law each citizen has an equal right to live and to act, and to enjoy the benefits of the laws of the state under which he lives, but no one has the right to use the privileges thus conferred in such a way as to murder his fellow citizens; and one who imagines he has labors under a serious misconception, not only of the true meaning of the constitutional provision referred to, but of his duties and obligations to his fellow citizens and to the state itself. Thus the publication of the article in an anarchistic paper inciting a murder is not within the protection conferred by such provision. *People v. Most*, 75 N. Y. Supp. 591, 592, 71 App. Div. 160.

**SPEAKING DEMURRER.**

A "speaking demurrer" is one that sets up the ground of demurrer debors the declaration. 1 Troubat & H. Prac. § 582. *Wright v. Weber*, 17 Pa. Super. Ct. 451, 455.

A "speaking demurrer" is one in which many of the causes of demurrer alleged do not appear on the face of the declaration. *Walker v. Conant*, 31 N. W. 786, 787, 65 Mich. 194.

A "speaking demurrer," as styled by the books, is one which, in order to sustain itself, requires the aid of a fact not appearing upon the complaint. *Davison v. Gregory*, 43 S. E. 916, 918, 132 N. C. 389 (citing *Von Glalin v. De Rossett*, 76 N. C. 292).

A "speaking demurrer" is one which introduces some new fact or averment which is necessary to support the demurrer, and which does not appear distinctly on the face of the bill. *Brooks v. Gibbons* (N. Y.) 4 Paige, 374, 375.

Where a demurrer recites facts not in the bill by way of defense, it is called a "speaking demurrer," and the new facts cannot be considered. *Richardson v. Loree* (U. S.) 94 Fed. 375, 379, 36 C. C. A. 301.

A demurrer becomes "speaking" in character whenever it alleges or assumes the existence of a fact not set forth in the plea which it seeks to attack. Where an equitable petition to construe or reform a deed, which had been executed by a deceased person as trustee, alleges nothing with respect to the appointment of a successor to the trustee, it cannot, by way of demurrer, be assumed that a successor has in fact been appointed, as such a demurrer would be a speaking one, and not maintainable. *Clarke v. East Atlanta Land Co.*, 38 S. E. 323, 325, 113 Ga. 21.

**SPEAKING ORDER.**

An order which contains matter which is explanatory and illustrative of the mere direction which is given by it is known as a "speaking order." *Duff v. Duff*, 35 Pac. 437, 438, 101 Cal. 1.

**SPEAKING A VESSEL.**

"Speaking a vessel," within the meaning of Act Fla. Feb. 27, 1872, providing that all steamers or vessels entering or leaving any port shall pay to the pilot who shall first speak such steamer or vessel the regular rate of pilotage, means a plain and distinct offer by the pilot for his services, so made to the master of the vessel as he may have it in his power to employ or refuse him. A speaking could never have been intended to be left to the uncertainties of the human voice. There was no such speaking a vessel, entitling the pilot to compensation, in a case where a pilot left his boat anchored  $2\frac{1}{2}$  miles from the channel, came with a small boat, showing no light, until from 100 to 300 feet of a steamer, and no flash-light until the steamer had passed and left him abaft the beam, so that such flash was not seen by any of the officers of the steamer, nor the pilot's hail heard by those on the steamer. *The Mascotte* (U. S.) 39 Fed. 871, 872.

"Speaking a vessel for pilot service," as used in a rule adopted by pilot commissioners, providing that the term shall be construed to mean either by the usual form of hailing, and, if without hailing distance and within one-half mile, then the usual code of signals shall be made use of, implies that the parties are within speaking distance, and can only be done by word of mouth, supplemented, it may be, by some such device for projecting the sound of the voice as a speaking trumpet, or even personal gesticulation. *The Ullock* (U. S.) 19 Fed. 207, 208 (citing *Commonwealth v. Ricketson*, 46 Mass. [5 Metc.] 412; 2 Pars. Shipp. & Adm. 109).

**SPECIAL.**

General distinguished, see "General."

"Special" is defined by Webster as "particular; peculiar; different from others; designed for a particular purpose, occasion, or person; limited in range; confined to a definite field of action." *Platt v. Craig*, 63 N. E. 594, 595, 66 Ohio St. 75.

The primary signification of the word "special" is designating a species or sort. It is also used as meaning "particular or peculiar; denoting something more than ordinary or appropriate; designed for a particular purpose; or extraordinary and uncommon." *Kundolf v. Thalheimer*, 12 N. Y. (2 Kern.) 593, 596.

"Special" refers to something designed for a particular purpose, and when applied to jurisdiction it indicates a legal authority extending to only a part of a particular subject; when applied to terms of court, means those terms in which the subordinate or special power of the court is exercised. *Gracie v. Freeland*, 1 N. Y. (1 Comst.) 228, 232.

The word "special," as used in relation to the appointment of a special curator, has very much the same meaning as the words "ad hoc," which is the original, while the word "special" is the translation, and in decisions they are used indifferently. *Sallier v. Rosteet*, 32 South. 383, 384, 108 La. 378 (citing *Hansell v. Hansell*, 44 La. Ann. 548, 10 South. 941).

"Special," as used in Rev. Civ. Code, art. 2997, requiring the mandate to sell corporate stock to a third person to be express and special, is distinguished from "general." *Woodhouse v. Crescent Mut. Ins. Co.*, 35 La. Ann. 238, 242.

**SPECIAL ACCEPTANCE.**

See, also, "General Acceptance."

A "special acceptance" of a bill is an acceptance not according to the tenor of the bill, or on condition, or according to terms added to and not expressed in the bill. Thus, where a draft was drawn on the drawee generally, and he accepted it payable at a particular place, such acceptance was a special, and not a general, acceptance of the bill. *Rowe v. Young*, 2 Brod. & B. 180, 183.

**SPECIAL ACT.**

See "Special Law."

**SPECIAL ACTION.**

All statutory actions are in a sense "special actions." *Cutler v. Co-operative Brotherhood*, 72 Pac. 464, 465, 31 Wash. 680.

**SPECIAL ADMINISTRATION.**

"Special administration," says Blackstone, "is where only specified effects of the deceased are committed to the administrator." In re Senate Bill, 12 Colo. 188, 193, 21 Pac. 481, 482.

**SPECIAL ADMINISTRATOR.**

A "special administrator," or "collector," as he is sometimes called, takes the assets of an estate, charged with the duty of preserving them and collecting in the demands due to the testator at the time of his death, and is bound to file an inventory and account for the property received by him, and to deliver over the assets to the person or

persons entitled to the same from him. He has no authority to make investments, nor to dispose of the assets otherwise than as above specified. He is, therefore, a mere trustee for the benefit of the persons entitled, and responsible as such. *Baskin v. Baskin* (N. Y.) 4 Lans. 90, 93.

Administrators are general or special. Special administrators are of two kinds: (1) When the administration is limited to a part of the estate, as that of administrators de bonis non; and (2) when the authority of the administrator is limited at times, as administrators pendente lite, etc. *Clemens v. Walker*, 40 Ala. 189, 198.

### SPECIAL AGENCY OR AGENT.

In legal phrases, the word "special" is more frequently used as denoting something particular or limited, in contradistinction to general or permanent, as, for instance, a "special agent," whom Blackstone defines as one "whose authority is confined to a particular or individual instance." In re Senate Bill, 12 Colo. 188, 192, 21 Pac. 481.

A special agent is one authorized to act only in a special transaction. *Baldwin v. Tucker* (Ky.) 65 S. W. 841, 842, 112 Ky. 282, 57 L. R. A. 451 (citing *Mechem*, Ag. § 6); *Gibson v. Snow Hardware Co.*, 10 South. 304, 307, 94 Ala. 346; *Union Stockyard & Transit Co. v. Mallory, Son & Zimmerman Co.*, 41 N. E. 888, 891, 157 Ill. 554, 48 Am. St. Rep. 341.

A special agent is one employed for a particular purpose only. *Bryant v. Moore*, 26 Me. (13 Shep.) 84, 87, 45 Am. Dec. 96.

A special agent is one authorized to act only in a specific transaction. *South Bend Toy Mfg. Co. v. Dakota Fire & Marine Ins. Co.*, 52 N. W. 866, 867, 3 S. D. 205.

A special agent is one appointed to do a single act or several specified acts. *First Nat. Bank v. Nelson*, 38 Ga. 391, 399, 95 Am. Dec. 400.

A special agent is one employed to do a specific act or certain specific acts. 6 Bac. Abr. 560. "An agent constituted for a particular purpose and under a limited power cannot bind his principal if he exceeds his power." *Scott v. McGrath* (N. Y.) 7 Barb. 53, 55.

A special agent is one employed to do one or two special things. *Gibson v. Snow Hardware Co.*, 10 South. 304, 307, 94 Ala. 346 (citing 1 Ross, Cont. 41).

A special agent is one constituted for a specific act, under an express power, and such an agent cannot bind his principal, unless his authority be strictly pursued, and those dealing with him are chargeable with notice of its extent; and hence a special

agent, authorized to sell a horse at a fixed price, did not have authority to warrant that the horse was sound. *Cooley v. Perrine*, 41 N. J. Law (12 Vroom) 322, 325, 32 Am. Rep. 210.

A "special agent" is one authorized to do one or more specific acts, in pursuance of particular instructions, or within restrictions necessarily implied from the act to be done. *Pacific Biscuit Co. v. Dugger*, 67 Pac. 32, 40 Or. 362; *Davis v. Talbot*, 36 N. E. 1098, 1099, 137 Ind. 235; *Godshaw v. J. N. Struck & Bro.*, 58 S. W. 781, 109 Ky. 285, 51 L. R. A. 668.

A special agency exists where there is a delegation of authority to do a single act. *Great West. Min. Co. v. Woodmas of Alston Min. Co.*, 20 Pac. 771, 773, 12 Colo. 46, 13 Am. St. Rep. 204 (citing *Story*, Ag. § 70); *Gibson v. Snow Hardware Co.*, 10 South. 304, 307, 94 Ala. 346; *Keith v. Herschberg Optical Co.*, 2 S. W. 777, 779, 48 Ark. 138.

A person employed by another for a particular purpose and acting under limited and circumscribed powers is a special agent, and cannot by his principal by any act exceed the limits of his authority. *Jaques v. Todd* (N. Y.) 3 Wend. 83, 91.

A power of attorney, authorizing an agent to exchange the principal's old issues of stock for new issues, without giving the agent power to sell or mortgage the principal's property, and which concluded with the words, "and generally to manage and control, to my best interest and advantage, all of my property, and to transact all business which may be requisite to effectuate all or any of the premises," created a special agency. *Quay v. Presidio & F. R. Co.*, 22 Pac. 925, 926, 82 Cal. 1.

Where a country merchant sends his produce to a city merchant to sell, and transmits to the city merchant his orders for such goods as he may require, expecting that the articles on his order which the city merchant to whom it is directed does not keep will be purchased by such city merchant on his own account with the funds of the country merchant in his possession, a special agency is established, without the power to pledge the credit of the country merchant. *Jaques v. Todd* (N. Y.) 3 Wend. 83, 90.

An agent for a particular act or person is called a "special agent." Civ. Code Cal. 1903, § 2297.

An agent for a particular act or transaction is called a "special agent." All others are general agents. Rev. Codes N. D. 1899, § 4305; Civ. Code S. D. 1903, § 1658.

### General distinguished.

See "General Agency or Agent."



**SPECIAL APPEAL.**

A "special appeal," under Comp. Laws, § 5432, brings up for examination objections to the process, pleadings, or other proceedings, and the decision of the justices thereon, which would not be allowed to be made on the trial of the appeal, and also brings up a case for trial on the merits, in case the objections are not sustained. *Fowler v. Hyland*, 48 Mich. 179, 181, 12 N. W. 26.

**SPECIAL APPEARANCE.**

See, also, "General Appearance."

"A special appearance" is an appearance for the purpose of objecting to the jurisdiction, to the proof, or to some other specific matter, without submitting to the jurisdiction of the court as to any other matter. *National Furnace Co. v. Moline Malleable Iron Works* (U. S.) 18 Fed. 863, 864.

An appearance for the purpose of objecting to the jurisdiction of the court, and of moving to quash an attachment, is a special appearance. *Meyer v. Brooks*, 44 Pac. 281, 282, 29 Or. 203, 54 Am. St. Rep. 790.

A party who appears for the purpose of applying to have proceedings set aside for want of jurisdiction waives nothing by such appearance. *McCaslin v. Camp*, 26 Mich. 390, 391.

"A special appearance," says Mitchell, in *Gilbert v. Hall*, 115 Ind. 549, 18 N. E. 28, "may be entered for the purpose of taking advantage of any defect in the notice or summons, or to question the jurisdiction of the court over the person in any other manner; but filing a demurrer or motion pertaining to the merits of the complaint or petition constitutes a full appearance, and is hence a submission to the jurisdiction of the court." Whether an appearance is general or special does not depend upon the form of the pleading filed, but on its substance. If a defendant invoke the judgment of the court in any manner upon any question, except that of the power of the court to hear and decide the controversy, his appearance is general. *Bankers' Life Ins. Co. v. Robbins*, 80 N. W. 484, 485, 59 Neb. 170.

An appearance in an action by a defendant for any purpose other than to contest the jurisdiction of the court will not constitute a special appearance. *Nichols & Shepard Co. v. Baker*, 73 Pac. 302, 13 Okl. 1.

An appearance is special when its sole purpose is to question the jurisdiction of the court, while it is general if the party appearing invokes the power of the court on any question other than that of jurisdiction. *South Omaha Nat. Bank v. Farmers' & Merchants' Nat. Bank*, 63 N. W. 128, 129, 45 Neb. 29.

A special appearance may be entered for the purpose of taking advantage of any defects in the notice or summons, or to question the jurisdiction of the court over the persons in any other manner; but filing a demurrer or motion which pertains to the merits of the complaint or petition constitutes a full appearance. *Gilbert v. Hall*, 18 N. E. 28, 29, 115 Ind. 549.

A special appearance must be for the purpose of urging jurisdictional objections only, and it must be confined to a denial of jurisdiction. An appearance for any other purpose than to question the jurisdiction of the court is general. *Nichols v. People*, 48 N. E. 237, 165 Ill. 502.

A special appearance for the purpose of objecting to the jurisdiction becomes general, if defendant disputes the merits of the cause. *Crawford v. Foster* (U. S.) 84 Fed. 939, 941, 28 C. C. A. 576.

**SPECIAL ASSESSMENT.**

See, also, "Local Assessments."

Special assessment proceedings as suit, see "Suit (Noun)."

"Special assessments" are a peculiar species of taxation, standing apart from the general burdens imposed for state and municipal purposes, and governed by principles that do not apply generally. They are made upon the presumption that a portion of the community is to be specially and peculiarly benefited in the enhancement of the value of the property peculiarly situated as regards a contemplated expenditure of public funds. *Ittner v. Robinson*, 35 Neb. 133, 137, 52 N. W. 846, 847 (citing *Cooley, Tax'n*, 416). See, also, *Daly v. Morgan*, 16 Atl. 287, 300, 69 Md. 460, 1 L. R. A. 757; *Pettit v. Duke*, 37 Pac. 568, 569, 10 Utah, 311.

"Special assessment," as the term is used with reference to municipal corporations, are impositions in the nature of taxes levied by the city for the payment of local improvements, which attach by force of law to the abutting property benefited thereby. *City of Raleigh v. Peace*, 14 S. E. 521, 522, 110 N. C. 32, 17 L. R. A. 330.

A special assessment is an assessment to pay for an improvement for public purposes on real property which is by reason of the locality of the improvement specially benefited. *Village of Morgan Park v. Wiswall*, 40 N. E. 611, 613, 155 Ill. 262.

A "special assessment" is a tax which, owing to the direct benefit to be received by certain property, is specially levied against the property so benefited in accordance with the benefits. *Wilson v. City of Auburn*, 43 N. W. 257, 259, 27 Neb. 435.

"Special assessment" ordinarily means money ordered or levied for some municipal

purpose, to which the funds so collected are to be specifically applied in making the local improvements. *Winona & St. P. Ry. Co. v. City of Watertown*, 44 N. W. 1072, 1073, 1 S. D. 46.

A special assessment for a public improvement under the statutes in Illinois is a species of taxation, and is authorized only as an exercise of the taxing power. A special assessment should not be levied, except for the purpose of making a needed public improvement. *Crichfield v. Bermudez Asphalt Pav. Co.*, 51 N. E. 552, 556, 42 L. R. A. 347, 174 Ill. 466.

Special assessments in municipalities upon specific property specially benefited by the local public improvement, for the purpose of paying the expense of that improvement, are taxes. Such assessments are enforced proportional contributions of a somewhat special kind, made in invitum, by virtue of legislative authority conferred upon the municipality for that purpose, upon such terms and conditions as the legislature within constitutional limits sees fit to impose. *Sargent v. Tuttle*, 34 Atl. 1028, 1029, 67 Conn. 162, 32 L. R. A. 822.

"Special assessment," as used in Act April 10, 1872, art. 9, § 9, relative to the incorporation of cities and villages, and limiting the power of corporate authorities to make local improvements, by special assessments or by special taxation, to contiguous property only, means an assessment on property specially benefited, without regard to whether it is contiguous or not. *Guild v. City of Chicago*, 82 Ill. 472, 478.

#### **As a charge on the land.**

A special assessment is a charge on the specific land benefited, and not against the owner. *Hudson v. People*, 58 N. E. 964, 965, 188 Ill. 103, 80 Am. St. Rep. 166.

#### **As contract.**

See "Contract."

#### **As requiring equal benefit.**

Special assessment is taxation imposed upon property proportionate to the benefit which it has received from such improvement, the expense of which is to be defrayed by the money realized from the special assessment. The principle which underlies and sustains all special assessments is that the value of the property assessed is enhanced to an amount at least equal to the assessment, which principle cannot be departed from without there being a taking of private property for public use without compensation. *Hanscom v. City of Omaha*, 7 N. W. 739, 741, 11 Neb. 37.

"Special assessments," such as those made for street improvements, etc., are founded on the theory that a portion of the

community is to be specially benefited in the enhancement of their property by reason of the contemplated expenditure of the public fund, and is therefore, in addition to the general levy, required to make special contributions for the intended purposes. In theory, at least, the property assessed is supposed to be benefited in the amount corresponding to the assessment by its increased value on account of the improvement. *Meier v. Kelly*, 25 Pac. 73, 77, 20 Or. 86.

#### **General taxation distinguished.**

There is a fundamental distinction between the plan of special assessments and taxation. The latter is a burden imposed upon all alike, upon principles of equality and uniformity. Special assessments, such as those for improving streets, are benefits, not burdens, and are imposed upon property because the equivalent inheres in or upon the property the moment the assessment is made. *Herrman v. Town of Guttenberg*, 43 Atl. 703, 706, 62 N. J. Law, 605.

"General taxes" are levied on the ground of general public benefits, while "special assessment" is a peculiar species of taxation to pay for local improvements, which recognizes the general public interest and benefit, but rests upon the supposition that a portion of such public are specially benefited in the increase of value to their property. *Shurtleff v. City of Chicago*, 60 N. E. 870, 871, 190 Ill. 473.

Special assessments are a peculiar species of taxation, standing apart from the general burdens imposed for state and municipal purposes, and are governed by principles which do not apply generally. The general levy of taxes is understood to exact contributions in return for the general benefits of government, and it promises nothing to the persons taxed beyond what may be anticipated from an administration of the laws for individual protection and the general public good. Special assessments, on the other hand, are made on the assumption that a portion of the community is to be specially and peculiarly benefited in the enhancement of the value of their property, peculiarly situated as regards a contemplated expenditure of public funds, and a special contribution is demanded in consideration of the special benefit to the persons receiving it. *Illinois Central R. Co. v. City of Decatur*, 13 Sup. Ct. 293, 294, 147 U. S. 190, 37 L. Ed. 132 (citing *Cooley, Tax'n*, p. 416); *Peake v. City of New Orleans*, 11 Sup. Ct. 541, 544, 139 U. S. 342, 35 L. Ed. 131.

Special assessment differs from general taxation in this: that the imposition can extend only to the extent of special benefits received, while the benefits which the taxpayer receives in return for general taxation are the enforcement of the laws, protection to life and property, and such other benefits

as are shared by the public at large. The principle which underlies special assessments is that the value of the property is enhanced to an amount at least equal to the assessment. *City of Beatrice v. Brethren Church*, 59 N. W. 932, 934, 41 Neb. 358.

**As an incumbrance.**

See "Incumbrance (On Title)."

**As public dues or tax.**

See "Public Dues"; "Public Tax."

**Special taxation distinguished.**

Special taxation is based upon the supposed benefit to the contiguous property, and differs from special assessments only in the matter of ascertaining the benefits. In the case of special taxation, the imposition of the tax by the corporate authorities is of itself a determination that the benefits to the contiguous property will be as great as the burden of the expense of the improvement, and that such benefits will be so nearly limited or confined in their effect to contiguous property that no serious injustice will be done by imposing the whole expense upon the subject property. *Illinois Cent. R. Co. v. City of Decatur*, 13 Sup. Ct. 293, 297, 147 U. S. 190, 37 L. Ed. 132.

**As equivalent to special taxation.**

The words "special assessment," as used in statutes conferring powers on cities to make such assessments, refer to and mean the same as "special taxation," namely, special impositions on property to the extent of benefits received by it for improvements. *City of Beatrice v. Brethren Church*, 59 N. W. 932, 934, 41 Neb. 358.

**As tax.**

See "Tax—Taxation."

**Water frontage tax.**

A water frontage tax for the construction of water mains is a special local assessment, and not a general tax, and therefore a college is not entitled to the benefit of exemptions as an educational institution from the burdens imposed to pay for water mains laid on three sides of the college grounds. *State v. Macalester College Trustees*, 91 N. W. 484, 485, 87 Minn. 165.

**SPECIAL BAIL.**

The term "special bail" denoted at common law security taken in civil actions for appearance and surrender of the body of the debtor or defendant in satisfaction of the judgment. 3 Bl. Comm. 287. The words "special bail" in their technical sense did not import recognizance or bail in criminal cases. *Jack v. People*, 19 Ill. (9 Peck) 57, 58.

The term "special bail," as used in the judiciary act of 1789, providing that if the defendant shall, at the time of entering his appearance in the state court, file a petition for the removal of a cause into the next Circuit Court, and offer surety for his entry in such court, and also for his there appearing and entering "special bail," if special bail was originally requisite therein, it shall then be the duty of the state court to accept the surety and proceed no further, does not refer to a delivery bond, or a bond executed for the forthcoming of property attached by the sheriff in the state court, but means an undertaking for the personal appearance of a party, or refers to one who may undertake for another. *Ramsey v. Coolbaugh*, 13 Iowa, 164, 170.

**SPECIAL BAILEE.**

A special bailee is practically an insurer of the fund to the extent of the obligation of the bond. A county treasurer is not a mere bailee or trustee, but is a special bailee, subject to special obligations to fulfill the obligations of his official bond, and the law of bailment is not the proper measure of his responsibility. *Maloy v. Bernalillo County*, 62 Pac. 1106, 1112, 10 N. M. 633.

**SPECIAL BENEFITS.**

**Construction of railroad.**

The "special benefits" to a lot owner derived from the construction of an elevated railroad in the street are such as are direct and peculiar to the land. *Lake Roland El. Ry. Co. v. Frick*, 37 Atl. 650, 651, 86 Md. 259.

Within the rule that, in appraising the amount to be paid to the owner, where a portion of a tract of land is taken by the exercise of the right of eminent domain for a railroad, there may be deducted from the damages the value of the special benefits of the improvement to the remainder of the tract, but not the value of any "general benefit," a general benefit is an advantage conferred by the public work upon all property within range of its utility, while a "special benefit" is an advantage conferred upon a tract by reason of the maintenance of a public work upon it. *Rand. Em. Dom.* §§ 260, 270. As defined by Lewis, "general benefit consists of an increase of the value of land common to the neighborhood or community, generally arising from the supposed advantage which will accrue to the community by reason of the work or improvement in question." *Lewis, Em. Dom.* § 471. Switching privileges, such as are required by the statute to be provided, are only of advantage to those who own land near or within a reasonable distance of the railroad. The benefits are not common to all the land in the community generally, but are special to the land which is so situated that they can be

used. *St. Louis, O. H. & C. Ry. Co. v. Fowler*, 44 S. W. 771, 775, 142 Mo. 670.

"Special benefits," as used with reference to the benefits to be considered in assessing damages to property by reason of the construction of a railroad, meant any increase of value which plaintiff's property derived from the railroad and which was not participated in by the public generally. If the benefit be directly derived from the railroad, either by the proximity of its stations or the facility of access it affords, and be not shared by the general public, then it is a "special and peculiar benefit." *Gray v. Manhattan Ry. Co.*, 12 N. Y. Supp. 542, 543, 16 Daly, 510.

Benefits accruing from the construction of a railroad to an owner of lands through which it passes may properly and conveniently be divided into two classes, to wit: (1) General benefits, or such as accrue to the community, or the vicinage at large, such as increased facilities for transportation and travel, and the building up of towns, and consequent enhancement of the value of lands and town lots. (2) Special benefits, or such as accrue directly and solely to the owner of the lands from which the right of way is taken, as when the excavation of the railroad track has the effect to drain a morass, and thus to transform what was a worthless swamp into valuable arable land, or to open up and improve a water course. As to the first of these classes, we know from the debates of the convention which formed the Constitution, and from the discussions which preceded and followed the calling of that convention, as well as from the language of the Constitution itself, that it was the express design of the framers of the Constitution to exclude that class of benefits from the consideration of jurors in their assessment of compensation for rights of way appropriated by corporations. In adopting the language that "no right of way shall be appropriated to the use of any corporation until compensation therefor be first made in money or first secured by a deposit of money to the owner, irrespective of any benefit from any improvement proposed by such corporation" whether the second class, or special benefits, are included within such provision, has not been decided and does not arise in this case. *Little Miami R. Co. v. Collett*, 6 Ohio St. 182, 184, 185.

#### **Municipal improvements.**

Special benefits accruing to particular property by reason of the construction of an improvement or public work are such benefits flowing from the proposed public work as appreciably enhance the value of the particular tract of land alleged to be benefited. *Metropolitan West Side Elevated Ry. Co. v. Stickney*, 37 N. E. 1098, 1103, 150 Ill. 362, 26 L. R. A. 773; *Fahnestock v. City of Peoria*, 49 N. E. 496, 497, 171 Ill. 454.

"Special benefit," as used in *Gen. St. §§ 2703, 2706, 2720*, providing that, when an adjoining landowner sustains special damage or receives special benefits by change in a street grade, the municipality shall be liable for the special damage and be entitled to the value of the special benefits, is used interchangeably with "benefits." There are no benefits that can be assessed for a public improvement (unless in the ordinary way of taxation) that are not special benefits. *Platt v. Town of Milford*, 34 Atl. 82, 83, 66 Conn. 320.

The "special benefits" which may be properly set off against damages occasioned by a public improvement are such as increase the value of adjacent property, and these benefits are none the less special because an increased value has been thereby added to any adjacent private properties, other than that to which a particular litigation is pending. *Barr v. City of Omaha*, 60 N. W. 591, 593, 42 Neb. 341.

"Special benefits," as the term is used with reference to improvements by a municipality, implies benefits such as are conferred especially upon private property by public improvements, as distinguished from such benefits as the general public is entitled to receive therefrom. In common with the general public, the owner of adjacent property is entitled to travel on an improved highway, and although, by reason of the improvement, such travel may be rendered easier or more pleasant, yet the benefit is general, because it is employed by the public in common with the owners of the adjacent property. If, however, the improvement should result in an increase in the value of the adjacent property, which increase is enjoyed by other adjacent property owners, as to the property of each exclusively, that benefit is special; and it is none the less so because several adjacent lot owners derive in like manner special benefits, each to his own individual property. Such fact, if it exists, in no respect decreases the increment in value enjoyed by one of the adjacent property owners, and by way of offset such an increment should therefore be treated as a special benefit in favor of whomsoever it may arise. *Barr v. City of Omaha*, 60 N. W. 591, 593, 42 Neb. 341 (quoting *Kirkendall v. City of Omaha*, 39 Neb. 1, 57 N. W. 752).

#### **SPECIAL CARE AND DILIGENCE.**

"Special care and diligence" is required of a specialist engaged in his specialty, which is the diligence and skill of a good business man in his particular specialty, which must be commensurate with the duty to be performed and the measure of the care and the caution to be exercised, and must rise in proportion to the danger of the service. It is not merely the diligence of an ordinary person or nonspecialist. The commander of a

steam tug, engaged in the business of towing, is required to exercise "special care and diligence," because the business of towing by steam power has become a specialty. *Brady v. Jefferson* (Del.) 5 Houst. 60, 79.

### SPECIAL CASE.

Const. art. 6, § 14, declares that the county court shall have jurisdiction in cases arising in justices' courts and in "special cases" as the Legislature may prescribe. "Special" is used to designate a species or sort, meaning particular, peculiar, and something more than ordinary or uncommon. The Constitution does not refer to every species of case, but uses the word "special" to designate a particular sort, possessing certain characteristics which distinguish them from those ordinary cases which the common law had arranged and classified. The phrase "special cases," therefore, cannot be held to include any case which was one of the recognized forms of action at common law, but refers only to special proceedings or statutory actions, of which the county court is given jurisdiction by law. *Kundolf v. Thalheimer*, 12 N. Y. (2 Kern.) 593, 596.

"Special cases," as used in Const. art. 6, § 14, providing that the county court shall have jurisdiction of cases commenced in justices' courts and in certain special cases, as provided by the Legislature, does not mean "a class of cases inherently special in their nature and regarded as such by the common law, but gives the Legislature authority to determine what cases shall be regarded as special, and means only the cases so specified." *Beecher v. Allen* (N. Y.) 5 Barb. 169, 175; *Arnold v. Rees* (N. Y.) 7 Abb. Prac. 323, 329; *Benson v. Cromwell* (N. Y.) 6 Abb. Prac. 83, 88.

"Special," as used in Const. art. 6, § 15, making it the duty of certain local officers to discharge the duty of county judge and surrogate in case of their inability or of a vacancy, and to exercise such other powers in special cases as may be provided by law, is to be construed "as having been used in opposition to ordinary or common, and as denoting some legal proceeding other than a regular action at law or in equity." *People v. Main*, 20 N. Y. 434, 435.

"Special cases" are special proceedings, characteristically differing from ordinary suits at common law. They do not proceed according to the course of the common law, but give new rights and afford new remedies. *Appeal of Houghton*, 42 Cal. 35, 36.

The provision in the Constitution permitting Legislatures to confer on the county courts jurisdiction in special cases was not intended to include any class of cases by which courts of general jurisdiction have always supplied a remedy, but the special cases

must be confined to such new cases as are the creation of statutes, and the proceedings under which are unknown to courts of common law and equity. *Parsons v. Tuolumne County Water Co.*, 5 Cal. 43, 63 Am. Dec. 76.

The words "special cases," in Const. art. 6, § 9, embraces cases created by statute and the proceedings under which are unknown to the general courts of common law and equity. *Brock v. Bruce*, 5 Cal. 279, 280.

### Condemnation proceeding.

Proceedings for the condemnation of water, to supply cities with pure water, and the right of way to conduct it, are special cases, within the meaning of Const. art. 6, § 8, conferring upon the county courts original jurisdiction of all such special cases and proceedings as are not otherwise provided for. But the Legislature cannot confer jurisdiction over such a proceeding upon a judge of the county court. *Spencer Creek Water Co. v. Vallejo*, 48 Cal. 70, 73.

### Contested election proceedings.

The statutory proceeding contesting an election is a special case, within the meaning of Const. art. 6, § 9, giving the county court such jurisdiction in cases arising in justices' courts and in special cases as the Legislature may prescribe. *Dorsey v. Barry*, 24 Cal. 449, 452; *Saunders v. Haynes*, 13 Cal. 145, 152; *People v. Day*, 15 Cal. 91, 92.

### Foreclosure proceeding.

Actions to foreclose a mortgage and sell the mortgaged premises form an ordinary class of cases in equity, and cannot be construed as "special," within the true meaning of the Constitution, declaring that county courts shall have no original civil jurisdiction, except in such special cases as the Legislature may provide. *Hall v. Nelson* (N. Y.) 23 Barb. 88, 93.

### Writ of mandamus.

Under Const. art. 6, § 8, the county courts have original jurisdiction of certain specified actions, "and of all of such special cases or proceedings as are not otherwise provided for." The familiar definition of a "special case" is that it is a case unknown to the general framework of courts of law or equity. Writs of mandamus cannot be held to be special cases within this definition, and an act of the Legislature which attempts to confer power upon county courts to issue such writs was held to be not warranted by the Constitution. *People v. Kern County Sup'rs*, 45 Cal. 679, 680.

### Mechanic's lien proceedings.

Proceedings to enforce a mechanic's lien are not within the phrase "special cases" in Const. art. 6, § 9; a mechanic being entitled to receive consideration for his labor and ma-

terials, and having rights in respect thereof which are enforceable at law and in equity in courts of general jurisdiction. *Brock v. Bruce*, 5 Cal. 279, 280.

### **SPECIAL COMMISSION.**

The board of public works of a city, the members of which are appointed by the Governor, with the consent of the Senate, charged with duties relating to the expenditures of city funds and the making of public improvements, is not a "special commission," within the provision of the Constitution forbidding the delegation to any special commission of any power to make, supervise, or interfere with any municipal improvement, but is a permanent department of the city government. *In re Senate Bill*, 21 Pac. 481, 482, 12 Colo. 188.

### **SPECIAL COMMISSIONER.**

A special commissioner is a particular person appointed by competent authority to perform a particular act. *McRaven v. McGuire*, 17 Miss. (9 Smedes & M.) 34, 53.

### **SPECIAL CONTRACT.**

Contracts are divided into contracts of specialty and parol or simple contracts. Contracts of specialty are all contracts under seal. All other contracts are parol or simple contracts. *Ludwig v. Bungart*, 58 N. Y. Supp. 51, 53, 26 Misc. Rep. 247.

A special contract is one of peculiar terms and provisions. An express contract, which is defined to be one whose terms are stated in parol or writing, may or may not be special; but a special contract is always express, and not implied, as an implied contract is entirely a matter of inference or deduction. *Pence v. Beckman*, 39 N. E. 169, 170, 11 Ind. App. 263, 54 Am. St. Rep. 505.

A contract is special only as it alters general terms and conditions, so that special contract rates and schedule rates by a carrier, or rates determinable by definite and published rules, cannot be reconciled one with the other, and any contract of shipment providing that, in consideration of reduced rates, the valuation of the property shipped should not exceed \$5 per 100 pounds, and the carrier's liability should not exceed that amount, is for a special rate, and within Interstate Commerce Act, § 2, providing that any common carrier, who by any special rate collects or receives from any person a greater or less compensation for any service rendered than it charges or receives from any other person for doing a like and contemporaneous service in the transportation of a like kind of traffic, under substantially similar conditions, shall be deemed guilty of unjust discrimination. *Ward v. Missouri Pac. Ry. Co.*, 58 S. W. 28, 30, 158 Mo. 228.

### **SPECIAL COUNT.**

A "special count" is one in which the plaintiff's claim is set forth with all needed particularity. *Wertheim v. Fidelity & Casualty Co.*, 47 Atl. 1071, 72 Vt. 326.

### **SPECIAL DAMAGE.**

Special damages are those that are the natural, but not the necessary, result of the act complained of, and consequently are not implied by the law, and must be particularly stated and proven. *Lynch v. Third Ave. R. Co.*, 13 N. Y. Supp. 236, 238, 59 N. Y. Super. Ct. (27 Jones & S.) 71; *Haszlacher v. Same*, 56 N. Y. Supp. 380, 381, 26 Misc. Rep. 865; *Rembt v. Roehr Pub. Co.*, 75 N. Y. Supp. 861, 862, 71 App. Div. 459; *Woodruff v. Bradstreet Co.* (N. Y.) 35 Hun, 16, 17; *Roberts v. Breckon*, 31 App. Div. 431, 437, 52 N. Y. Supp. 638; *Bristol Mfg. Co. v. Gridley*, 28 Conn. 201, 210, 212; *Tomlinson v. Town of Derby*, 43 Conn. 562, 567; *Bateman v. Blake*, 45 N. W. 831, 833, 81 Mich. 227; *Lashus v. Chamberlain*, 24 Pac. 188, 189, 6 Utah. 385; *North Point Consol. Irr. Co. v. Utah & S. L. Canal Co.*, 63 Pac. 812, 814, 23 Utah. 199; *Nicholson v. Rogers*, 31 S. W. 260, 261, 129 Mo. 136; *State, to Use of McCracken, v. Blackman*, 51 Mo. 319, 321; *Barrett v. Western Union Telegraph Co.*, 42 Mo. App. 542, 550; *Brown v. Hannibal & St. J. R. Co.*, 99 Mo. 310, 318, 12 S. W. 655; *Lawrence v. Porter* (U. S.) 63 Fed. 62, 64, 11 C. C. A. 27, 26 L. R. A. 167; *Roberts v. Graham*, 73 U. S. (6 Wall.) 578, 579, 18 L. Ed. 791; *Fitchburg R. Co. v. Donnelly*, 87 Fed. 135, 136, 30 C. C. A. 580; *Louisville & N. R. Co. v. Ray*, 46 S. W. 554, 555, 101 Tenn. 1; *Tyler v. Salley*, 19 Atl. 107, 82 Me. 128; *Hunter v. Stewart*, 47 Me. 419, 421; *Salt River Canal Co. v. Hickey* (Ariz.) 36 Pac. 171, 173; *Thompson v. Webber*, 29 N. W. 671, 673, 4 Dak. 240; *Kircher v. Town of Larchwood*, 95 N. W. 184, 186, 120 Iowa, 578; *Louisville & N. R. Co. v. Reynolds* (Ky.) 71 S. W. 516, 518 (citing *Donnell v. Jones*, 48 Am. Dec. 59); *Oldfather v. Zent*, 14 Ind. App. 89, 100, 41 N. E. 555; *Herfort v. Cramer*, 7 Colo. 483, 492, 4 Pac. 896, 901; *Civ. Code Ga.* 1895, § 3910.

What constitutes special damage, and what is meant by "special damage" has been the subject of much adjudication. It is said: "Special damages are such as the law will not infer from the nature of the words themselves." And again: "The plaintiff must show that his character has suffered from defendant's false assertions, and he can only show this by giving evidence of some special damage." *Newell, Defam.* p. 849. "Loss of customers is special damage, and must be specifically alleged, and the customers' names stated. An indefinite loss of business is considered general damages, and can only be proved where the words are spoken of the plaintiff in the way of his trade, and

then are actionable in themselves." *Id.* p. 868, § 43; *Id.* p. 634, § 49; *Odger, Sland. & L.* \*302, \*303. As to pleadings it is held: "When a publication is not libelous per se, special damages must be alleged and proven, in order to sustain the action." *Fry v. McCord*, 33 S. W. 568, 571, 95 Tenn. (11 Pickle) 678.

The term "special damages," when applied to damages for the breach of a contract, means such damages, in addition to general damages, as are an equivalent for such loss or detriment occasioned by the breach of the contract and proximately caused thereby, or which, in the ordinary course of things, would be likely to result therefrom. It is awarded upon the theory that the parties, who contracted with a full knowledge of the facts, circumstances, and objects of the agreement, may well be supposed to have had in contemplation all the proximate and natural results flowing from its breach. *Wallace v. Ah Sam*, 12 Pac. 46, 48, 71 Cal. 197, 60 Am. Rep. 534.

The phrase "allegation of special damages," in the rule that an action for the breach of a promise of marriage does not survive against the administrator of the promisor without an allegation of special damages, undoubtedly found its way into the books because of extreme caution on the part of the learned judges who were called upon to decide a case arising for the first time. The language referred to was meant to indicate no more than this: that the court did not mean to say that the defendant in an action for breach of promise to marry might not have acquired from the plaintiff some valuable addition to his property, which, ex æquo et bono, his executor was not entitled to hold as against the true owner of it, though it went lawfully and with the owner's consent into the testator's hands. *Chase v. Fitz*, 132 Mass. 359, 364.

"Special damages," recoverable in an action against a bank for failure to pay a draft, are such as by competent evidence are directly traceable to the bank's failure to discharge its duties. *Bank of Commerce v. Goos*, 58 N. W. 84, 87, 39 Neb. 437, 23 L. R. A. 190.

Any direct damages peculiar to a lot owner are special, within the meaning of Gen. St. § 2103, authorizing an action to recover special damages caused by a change of grade. *McGar v. Borough of Bristol*, 42 Atl. 1000, 1001, 71 Conn. 652.

The term "special damage," as descriptive of the injury caused to the property of a joint landowner by the alteration of a highway as a public improvement, must include every element of any damage that can be appraised for such alteration. *Platt v. Town of Milford*, 34 Atl. 82, 83, 66 Conn. 320.

Where the other residents of a street suffer equally in kind with an abutting lot

owner by reason of an obstruction of the street, no special damage results to him from such public nuisance. *Hogan v. Central Pac. Ry. Co.*, 11 Pac. 876, 877, 71 Cal. 83.

#### **Exemplary damages distinguished.**

See "Exemplary Damages."

#### **General damages distinguished.**

See "General Damages."

#### **Libel or slander.**

Special damages are those damages which are the natural consequence of the words spoken, and not such as are occasional and accidental. *Shafer v. Ahalt*, 48 Md. 171, 174, 30 Am. Rep. 456.

Special damages are such as really took place, and are not implied by law, and are either superadded to general damages arising from an act injurious in itself, as where some particular loss arises from the uttering of slanderous words actionable in themselves, or are such as arise from an act indifferent and not actionable in itself, but injurious only in its consequences, as where words become actionable only by reason of special damages in suing. Special damages are the natural, but not the necessary, consequences of a wrongful act. *Atchison, T. & S. F. R. Co. v. Rice*, 14 Pac. 229, 234, 36 Kan. 593.

"Special damages" is the term used to designate damages consisting of particular items of damage, which must be particularly and precisely pleaded. An allegation, in a complaint for libel based on a publication that plaintiff had consumption, that by reason thereof his friends avoid him, and that he is unable to secure the position he formerly had, and that the young lady with whom he kept company avoids him, and that all the ladies upon whom the plaintiff called avoid him, and that it has caused him to be shunned by his associates, is only an allegation of general damages. It sets out no particular item of damage; that is, no loss of a particular employment, customer, contract, bargain, etc. Such damage has to be particularly alleged, giving names, dates, and particulars. *Rade v. Press Pub. Co.*, 75 N. Y. Supp. 298, 299, 37 Misc. Rep. 254.

#### **SPECIAL DEMURRER.**

A special demurrer is one which points out the particular defects or objections. *Darcey v. Lake*, 46 Miss. 109, 117; *Christmas v. Russell*, 72 U. S. (5 Wall.) 290, 303, 18 L. Ed. 475.

"Special demurrers, as known to the former practice, have no place in our present system of pleading. The Code authorizes a demurrer for specific causes, and no pleading is demurrable unless it is subject to one or more of the objections specified in the sec-

tion defining the grounds of demurrer." Code Civ. Proc. § 488; *Bottom v. Chamberlain*, 47 N. Y. Supp. 733, 734, 21 Misc. Rep. 556 (citing *Marie v. Garrison*, 83 N. Y. 14).

A special demurrer is usually interposed to test the sufficiency of the bill in point of form, and it is necessary that the particular objection to the bill and the defects therein shall be pointed out in the demurrer. *Shaw v. Chase*, 77 Mich. 430, 439, 43 N. W. 883.

A special demurrer goes merely to the structure of the pleading, and not to the substance, and it must distinctly and particularly specify wherein the defect lies. Indeed, St. 27 Eliz. and St. 4 & 5 Anne oblige the party demurring to lay, as it were, his very finger on the very point; otherwise, the demurrer may not be noticed. *Martin v. Bartow Iron Works* (U. S.) 16 Fed. Cas. 888, 889.

A general demurrer may be an issuable plea, yet a special demurrer is not, at least if it does not go to the merits of the case. *Welsh v. Blackwell*, 14 N. J. Law (2 J. S. Green) 344, 346.

### SPECIAL DEPOSIT.

A special deposit is where the whole contract is that the thing shall be safely kept and the identical thing returned to the depositor. *Koetting v. State*, 60 N. W. 822, 823, 88 Wis. 502.

A special deposit is one in which the depositor is entitled to the return of the identical thing deposited and the title remains in the depositor. *Bank of Blackwell v. Dean*, 60 Pac. 226, 9 Okl. 626.

A special deposit is created where the money is left for safekeeping and return of the identical thing to the depositor. *Officer v. Officer*, 94 N. W. 947, 948, 120 Iowa, 389, 98 Am. St. Rep. 365.

A special deposit of money in a bank is where money is intrusted to the bank, not to be used, but to be kept safely and sufficiently returned. *Catlin v. Savings Bank*, 7 Conn. 487, 492.

A special deposit in a bank is where one deposits specific goods, moneys, or valuables, which are to be kept and returned in kind when called for. *Buffin v. Com'rs of Orange County*, 69 N. C. 498, 509.

A special deposit of money is where the specific money of silver, gold, coin, or bills deposited are to be returned, and not an equivalent. The title to a special deposit remains, notwithstanding the deposit, in the depositor. *Talladega Ins. Co. v. Landers*, 43 Ala. 115, 138.

When the identical money or other thing deposited is to be restored, or is given to a bank for some specified or particular purpose, as to pay a certain note or other indebtedness, or to act as agent for the collection of

bills or notes deposited for collection, such collections to be remitted, such deposits are special or specific, and the property in the deposit remains in the depositor; the bank in such case becoming bailee, trustee, or agent for the depositor. *Collins v. State*, 15 South. 214, 217, 33 Fla. 429.

A "special deposit" is where the specific money, the very silver or gold coins or bills deposited, is to be restored, and not an equivalent. *Keene v. Collier*, 58 Ky. (1 Metc.) 415, 417.

A special deposit is the placing of something in the charge or custody of the bank, of which specific things restitution must be made. A special deposit does not enter the general funds of the bank and form a part of its disposable capital. It is to be kept by itself and to be specifically returned. Hence it follows that a bank cannot base any increase of its issues or discounts on such unavailable deposits. They are in no sense at its disposal, and it can in no manner (unless there be a special, extraordinary, and peculiar arrangement) reap any advantage or profit, direct or indirect, from the simple custody of them. They are not part of its money. *State v. Carson City Sav. Bank*, 30 Pac. 703, 704, 17 Nev. 146.

"Deposits made with bankers are either general or special. In the case of a special deposit, the bank merely assumes the charge or custody of property, without authority to use it, and the depositor is entitled to receive back the identical money or thing deposited. In such case the right of property remains in the depositor, and, if the deposit is of money, the bank may not mingle it with its own funds. The relation created is that of bailor and bailee, and not of debtor and creditor." *Alston v. State*, 9 South. 732, 92 Ala. 124, 13 L. R. A. 659.

Upon a special deposit a bank is merely a bailee, and is bound according to the terms of such special deposit. The addition of the word "clerk" to the name of a general depositor does not make the deposit a special one, nor change the liability of the bank. *McLain v. Wallace*, 5 N. E. 911, 912, 108 Ind. 562.

In the absence of any evidence of the character of the business in which the depositary was engaged, or other extrinsic facts aiding in the construction of the writing, an instrument reading, "Deposited with me for safe-keeping by W., \$805, in gold, which I am to return whenever called for," signed by the depositary, was held to show a special, and not general, deposit. It expressed a deposit of a certain sum in gold, and that the purpose is for safe-keeping, and that it is to be returned whenever called for. The promise is unconditional to return it whenever called for. There is no contingency provided by the contract in which obedience to this promise can be excused.



**Wright v. Paine**, 62 Ala. 340, 343, 34 Am. Rep. 24.

The phrase "special deposits," as used in Rev. St. § 5228 [U. S. Comp. St. 1901, p. 3506], declaring that after the failure of a national bank to pay its circulating notes, etc., it shall not be lawful for the association to pay out any of its notes, discount any notes or bills, or otherwise prosecute the business of banking, "except to receive and safely keep moneys belonging to it and to deliver special deposits," embraces the public securities of the United States. **First Nat. Bank v. Graham**, 100 U. S. 699, 703, 25 L. Ed. 750.

The term "special deposits" includes money, securities, and other valuables delivered to banks to be specially kept and redelivered. It is not confined to securities held by banks as collateral to loans. **Pattison v. Syracuse Nat. Bank**, 80 N. Y. 82, 90, 36 Am. Rep. 582.

A special deposit is the placing of something in the charge or custody of a bank, of which specific thing restitution must be made. A special deposit does not enter the general funds of the bank and form a part of its disposable capital. It is to be kept by itself and to be specifically returned. **State v. Carson City Sav. Bank**, 17 Nev. 146, 151, 30 Pac. 703.

If, before the maturity of paper held by a bank against a depositor, an arrangement is made by which the bank agrees to hold the deposit for a specific purpose and not to charge the note against it, the bank may be regarded as a trustee, and the deposit special; and in such a case, in the absence of fraud or collusion, an indorser upon such paper has no right to require the application of the deposit toward the payment of the paper upon its maturity. **Nat. Bank of Fishkill v. Speight**, 47 N. Y. 668.

All deposits made with bankers may be divided into two classes: Those in which the bank becomes bailee of the depositor, the title to the note deposited remaining with the latter; and that other kind, the deposit of money peculiar to banking business, in which the depositor for his own convenience parts with the title to his money and loans it to the banker, and the latter, in consideration of the loan of the money and the right to use it for his own profit, refunds the same amount, or any part thereof, on demand. **Marine Bank v. Fulton County Bank**, 69 U. S. (2 Wall.) 252, 256, 17 L. Ed. 785.

#### **General deposit distinguished.**

There is a wide difference between a "special deposit" and "general deposit," as those terms are understood, not only by bankers, but by the public, who are transacting business daily with banks. Thus, where money of any description is deposited in a bank, and the identical gold, silver, or bank

bills which were deposited are to be returned to the depositor, and not the equivalent, the deposit will be special; while a general deposit is one which is not to be returned to the depositor in kind. **Mutual Acc. Ass'n of the Northwest v. Jacobs**, 31 N. E. 414, 416, 141 Ill. 261, 16 L. R. A. 516, 33 Am. St. Rep. 302 (citing *And. Law Dict.* 844).

The same deposit cannot be both general and special. The distinction between a general and a special deposit is manifest and material. A special deposit in a bank is where the whole contract is that the thing shall be safely kept and the identical thing returned to the depositor. When the deposit is a general one, the bank has a right to mingle the money deposited with its own and treat it as a debt due the depositor. Consequently proof that an officer of the bank received money as a general deposit, knowing the bank to be insolvent, will not sustain a charge that he received it "on deposit for safe-keeping." **Koetting v. State**, 60 N. W. 822, 823, 88 Wis. 502.

#### **SPECIAL DEPUTY.**

A "special deputy" is not an officer in the proper sense of that word. **State v. Toland**, 15 S. E. 599, 600, 36 S. C. 515.

#### **SPECIAL ELECTION.**

See, also, "General Election."

A "special election" is an election held to supply a vacancy in office occurring before the expiration of the full term for which the incumbent was elected. **Kenfield v. Irwin**, 52 Cal. 164, 165.

"Special elections" are such as are held to supply vacancies in any offices, and are held at such times as may be designated by the proper board or officer. **Pol. Code Cal.** 1903, § 1043.

The term "special election," as used in the chapter relating to elections, shall apply to any election held for any purpose authorized or required by law, not within the definition of a general election or a city election. **Code Iowa 1897**, § 1089.

Special elections are such as are held to supply vacancies in any office, whether the same be filled by the vote of the qualified electors of the state, or any district, county, or township, and may be held at such times as may be designated by the proper officer. **Ballinger's Ann. Codes & St. Wash. 1897**, § 1333.

#### **SPECIAL ENTRY.**

See, also, "Enter—Entry (On Public Lands)."

A "special entry" is nothing more than an entry which truly describes the objects

for which it calls. *Simms' Lessee v. Dickson*, 3 Tenn. (Cooke) 137, 138.

Entry may be either vague or special. The first is so entirely defective in its description of locality as to furnish no rational ground of belief that one place more than another was intended. A special entry possesses properties reverse to those that are vague. It has some call, which according to the decisions of the courts is ascertainable by reasonable inquiry and examination. *Philip's Lessee v. Robertson*, 2 Tenn. (2 Overt.) 399, 415.

An entry is special if the calls be such as will make the place entered to be known as the land entered when the objects called for are seen, and if, furthermore, by its direction those who have been at the spot antecedently to the date of the entry are enabled by the description to go to the place, especially if the entry on its face point out who these persons are, so that inquiry can be made of them. This definition excludes the necessity for universal or general knowledge of the objects called for throughout the world, or the state or district or county or neighborhood of the place; for, if no such knowledge exists, the entry may be good, if the objects called for in it be known to a party of men who have been there, either before the entry, when the whole country was a wilderness, or to the greater part of them, or to the survivors of them. *Rogers v. Burton*, 7 Tenn. (Peck) 108, 116.

An entry is special, if it be certain to a common intent, in which case it should contain a reference to some place, natural mark, or thing from which, either singly or together, the land could be ascertained with reasonable industry by those acquainted in its neighborhood. *Barnes v. Sellars*, 34 Tenn. (2 Sneed) 33, 35.

### SPECIAL EXECUTION.

The copy of a judgment, with direction to the sheriff indorsed thereon to execute it, can properly be termed a "special execution." *Cromble v. Little*, 50 N. W. 823, 825, 47 Minn. 581.

### SPECIAL FINDING.

The "special finding," which the court is required to make in causes tried to the court, is not a mere report of the evidence, but a statement of the ultimate facts on which the law of the case must determine the acts of the parties; a finding of the propositions of fact which the evidence establishes, and not the evidence on which those ultimate facts are supposed to rest. *Rhodes v. United States Nat. Bank* (U. S.) 66 Fed. 512, 514, 13 C. C. A. 612, 34 L. R. A. 742; *Searcy County v. Thompson* (U. S.) 66 Fed. 92, 94, 13 C. C. A. 349.

The "special findings" on which the trial court based its conclusions are not a part of the judgment entry, and it is not necessary that they be incorporated therein; and where the court found such facts, but the judgment merely recited a general finding in favor of plaintiff, such finding was sufficient to support the judgment, without incorporating the special finding in the judgment entry. *Springfield Fire & Marine Ins. Co. v. Hamby*, 65 Ark. 14, 20, 45 S. W. 472.

### SPECIAL FRANCHISE.

When a right of way over a public street is granted to a street railroad company, with leave to construct and operate a street railroad thereon, the privilege is known as a "special franchise," or the right to do something in the public highway which, except for the grant, would be a trespass. *People v. State Board of Tax Com'rs*, 67 N. E. 69, 72, 174 N. Y. 417.

The term "special franchise," as applied to railroads, is defined by Laws 1899, c. 712, § 1, "as the franchise, right, or permission to construct, maintain, or operate the same in, under, above, on, or through streets, highways, or public places." A special franchise thus derives its character from the nature of the grant, to wit, the right to occupy the public ways. This right does not lose its character as a special franchise because it emanates directly from the state rather than indirectly through its political subdivisions, nor because it comes into being with the creation of a corporation rather than by subsequent action of the Legislature or its duly authorized municipal agents. The right of a domestic railroad corporation to use a highway crossing is a special franchise, subject to taxation under Laws 1899, c. 712, as amended by Laws 1900, c. 254, authorizing a taxation of special franchise. *New York, L. & W. Ry. Co. v. Roll*, 66 N. Y. Supp. 748, 749, 32 Misc. Rep. 321.

### SPECIAL GUARANTY.

A "special guaranty" is a security only for the particular person to whom it runs. *Everson v. Gere* (N. Y.) 40 Hun, 248, 250.

A special guaranty differs from a general guaranty, in that some of the terms thereof are fixed by the parties. The term applies to a guaranty under seal indorsed on a judgment note, in which the guarantor guarantees the payment of the note and all moneys due and to become due thereon, if the same cannot be recovered out of certain property. *Ritchie v. Walter*, 31 Atl. 334, 335, 166 Pa. 604.

The distinction between general and special guaranties is clearly pointed out in the case of *Evansville Nat. Bank v. Kaufmann*, 93 N. Y. 273, 45 Am. Rep. 204. "In the case

of a special guaranty," the court said, "the liberty of accepting its terms is confined to the persons to whom it is addressed, and no cause of action can arise thereon except by their action in complying with its conditions. Such a guaranty contemplates a trust in the person of the promisee, and from its very nature it is not assignable until a right of action has arisen thereon, which may, like any other cause of action arising upon contract, be then assigned." A guaranty of the debt of another, which provided that the guarantee was to collect the life insurance of the principal and discharge the guarantor in case of the death of the principal, is a "special guaranty," as it imposes a special trust in the guarantee. *Brumm v. Gilbert*, 64 N. Y. Supp. 144, 146, 50 App. Div. 430.

### **SPECIAL GUARDIAN.**

A general guardian is a guardian of the person or of all the property of the ward within the state, or both. Every other is a special guardian. *Rev. St. Okl. 1903, §§ 3811, 3812*; *Rev. Codes N. D. 1899, §§ 2810, 2811*; *Civ. Code S. D. 1903, §§ 142, 143*; *Rev. St. Utah 1898, § 3983*; *Civ. Code Cal. 1903, § 240*.

### **SPECIAL IMPROVEMENTS.**

The words "special improvements," in a city ordinance providing for the construction of the same, do not of themselves import that the owners of abutting lots shall bear the whole expense thereof. *City of Greenville v. Harvie*, 31 South. 425, 79 Miss. 754.

### **SPECIAL INDORSEMENT.**

If one or more persons indorse the note of another, it transfers the note thereby indorsed, either in blank, which makes it payable to bearer, or, when it specifies the name or names of indorsee or indorsees, as the case may be, it is what is called a "special indorsement," and the indorser or indorsers, as the case may be, are entitled to all the rights of the law merchant applying to bills of exchange, one of which is notice of dishonor. *Carolina Sav. Bank v. Florence Tobacco Co.*, 23 S. E. 139, 141, 45 S. C. 373.

An indorsement is said to be "special," or "full," when it designates the indorsee by name or otherwise. *Malone v. Garver (Neb.)* 92 N. W. 726, 727.

A "special indorsement" is one which specifies the indorsee, and may by express words to that purpose, but not otherwise, be so made as to render the instrument not negotiable. *Crocker-Woolworth Nat. Bank v. Nevada Bank*, 73 Pac. 456, 462, 139 Cal. 564, 63 L. R. A. 245, 96 Am. St. Rep. 169.

A special indorsement specifies the indorsee. *Rev. Codes N. D. 1899, § 4873*; *Civ. Code S. D. 1903, § 2188*; *Rev. St. Okl. 1903,*

*§ 3612*; *Civ. Code Cal. 1903, § 3113*; *Civ. Code Idaho 1901, § 2875*; *Rev. St. Wyo. 1899, § 2347*; *Civ. Code Mont. 1895, § 4025*.

A special indorsement specifies the person to whom or to whose order the instrument is to be payable; and the indorsement of such indorsee is necessary to the further negotiation of the instrument. *Rev. Codes N. D. 1899, § 1044* (citing *Neg. Inst. Law, § 34*); *Bates' Ann. St. Ohio 1904, § 3172f*.

### **SPECIAL INJUNCTION.**

A special injunction is one of the highest and most delicate powers which can be exercised by a judicial tribunal. When manifestly indispensable, it should be employed without hesitation or timidity. *Passenger Ry. v. Easton*, 7 Pa. Co. Ct. R. 569, 572.

A special injunction is a right granted on special grounds arising out of the circumstances of the case. *Aldrich v. Kirkland (S. C.)* 6 Rich. Law, 334, 340.

### **SPECIAL INSURANCE.**

"Special insurance," in maritime insurance, is where, in addition to the implied perils, further perils are expressed in the policy, and they may either be specified or the insurance may be against all perils. *Vandenheuvel v. United Ins. Co. (N. Y.)* 2 Johns. Cas. 127, 148, 1 Am. Dec. 180.

### **SPECIAL ISSUE.**

A special issue consists of a direct denial of some material and traversable allegation, and never advances new matter, and concludes to the country. *Kimball v. Boston, C. & M. R. Co.*, 55 Vt. 95. A plea cannot be good as a special issue, where it alleges matter of evidence merely and concludes with a verification. *Boyden v. Fitchburg R. Co.*, 39 Atl. 771, 772, 70 Vt. 125.

### **SPECIAL LAW.**

See, also, "Local Law."

A statute which relates to persons or things as a class is a general law, while a statute which relates to particular persons or things as a class is a special one. *Ewing v. Hoblitzelle*, 85 Mo. 64, 78; *Schmalz v. Wooley*, 39 Atl. 539, 542, 56 N. J. Eq. 649; *In re New York Elevated R. Co. (N. Y.)* 3 Abb. N. C. 401, 417, 422; *Gay v. Thomas*, 46 Pac. 578, 586, 5 Okl. 1; *Clark v. Finley*, 54 S. W. 343, 345, 93 Tex. 171; *Hamman v. Central Coal & Coke Co.*, 56 S. W. 1091, 1092, 156 Mo. 232; *State ex rel. Harris v. Herrmann*, 75 Mo. 340, 346; *Lynch v. Murphy*, 119 Mo. 163, 24 S. W. 774; *Sawyer v. Dooley*, 32 Pac. 437, 440, 21 Nev. 390; *Herbert v. Baltimore County Com'rs*, 55 Atl. 376, 379, 97 Md. 639.

Special laws are those made for individual cases, or for less than a class requiring laws to its peculiar conditions and circumstances. *Vermont Loan & Trust Co. v. Whithed*, 49 N. W. 318, 320, 2 N. D. 82; *Guthrie Daily Leader v. Cameron*, 41 Pac. 635, 639, 3 Okl. 677; *Maxwell v. Tillamook County*, 26 Pac. 803, 805, 20 Or. 495 (quoting *Healey v. Dudley* [N. Y.] 5 Lans. 115; *Suth. St. Const.* § 127); *Groves v. Grant County Court*, 26 S. E. 460, 463, 42 W. Va. 587 (citing 1 Bl. Comm. 186).

A special statute is one operating upon one or a portion of a class, instead of upon all of a class. *State v. Irwin*, 5 Nev. 111, 120.

"Local or special legislation," according to the well-known meaning of the words, applies exclusively to special or particular places, or special and particular persons, and is distinguished from a statute intended to be general in its operation and that relating to classes of persons or subjects. *Stone v. Wilson* (Ky.) 39 S. W. 49, 50.

"Special acts" are statutes applying to particular places or districts. A corporation organized under a charter passed for no other purpose than its creation is organized under a special act. *Sargent v. Union School Dist.*, 2 Atl. 641, 642, 63 N. H. 528.

"Private or special statutes," says Sedgwick in his work on Statutory and Constitutional Law, "relate to certain individuals or particular classes of men." In *Smith on Constitutional Construction* it is said: "The distinction between public and private statutes is this: A general or public act is a universal rule that regards the whole community, but special or private acts are rather exceptions than rules, being those which operate upon private persons and private concerns." Page 917, § 802. *People v. Wright*, 70 Ill. 388, 398.

A special act is one which only operates on particular persons and private concerns. *Town of McGregor v. Boylies*, 19 Iowa, 43, 46 (citing Bl. Comm.).

In *Earle v. Board of Education of San Francisco*, 55 Cal. 489, it is said by Myrick, J.: "A special law is one referring to a selected class, as well as to a particular object. This act refers to a selected class, viz., teachers in cities of 100,000 inhabitants." No absolute, inflexible rule has ever been formulated, and probably never will be, by which to determine what departure from uniformity is permissible, and what will be fatal. The courts must determine each case as it arises. *Bruch v. Colombet*, 38 Pac. 45, 46, 104 Cal. 347.

If a thorough and comprehensive and exact definition of the term "special law," as used in the Constitution, were required, it

would be found, perhaps, that there were some differences of opinion to be reconciled; but, whenever the question has been presented in this or any other court, it has always been agreed that a law which applies only to an individual, or a number of individuals, selected out of the class to which they belong, is a special, and not a general, law. *State v. Irwin*, 5 Nev. 111, 120, 121; *Youngs v. Hall*, 9 Nev. 217; *Ex parte Spinnery*, 10 Nev. 319. The accepted definition of a special law is that it is one which affects only individuals, and not a class; one which imposes special burdens or confers peculiar privileges upon one or more persons in no wise distinguished from others of the same category. *State v. California Min. Co.*, 15 Nev. 234, 249.

A special act is one which operates merely on one particular thing, or on a particular class of things, existing at the time of its passage. An act which excludes from the scope and operation of its provisions all private corporations, all public corporations except cities, all cities of the first class, all cities of the third class, all cities of the second class except such as have a population of 6,000 and over, all cities not obtaining the benefit of the act within 58 days after its passage, all cities not giving notice under the act within 14 days after its passage or within 10 days after its taking effect, and excluding all corporations of the state except three cities, and giving to those three cities only 14 days after its passage within which to commence action under it, and only 58 days after its passage within which to complete such action, and at the expiration of which time the law ceases to have operation, and becomes ineffectual and defunct, is a "special act." *City of Topeka v. Gillett*, 4 Pac. 800, 803, 32 Kan. 431.

A special act relates to a part, and not to the whole, as mortgages in one county, and not all mortgages; and whether it is also considered a public or private one is altogether immaterial and irrelevant. Under the Constitution of Oregon all statutes are public ones, unless otherwise declared in the body of the act. Article 9, § 27. An act may be both public and special or local, and the presence of one of these qualities in no wise implies or excludes the other. An act cannot be both public and private, but it can be either and be special. *Dundee Mortgage & Trust Inv. Co. v. School Dist. No. 1* (U. S.) 21 Fed. 151, 158.

#### As determined by effect, not form.

Whether or not an act of the Legislature is special or general, within a constitutional provision, is not to be determined by the form of the act, but by what in the ordinary course of things must necessarily be its operation and effect. If this operation and effect must necessarily be special, the act is spe-

cial, whatever may be its form; but if, on the other hand, the act has room within its terms to operate on all of a class, present and prospective, and not merely on one particular thing, or on a particular class of things, existing at the time of its passage, the act is general. *City of Topeka v. Gillett*, 4 Pac. 800, 803, 32 Kan. 431; *State v. Hunter*, 17 Pac. 177, 184, 38 Kan. 578.

A special or local act applies only to a limited part of the state. It touches but a portion of its territory, a part of its people, or a fraction of the property of its citizens. A law may be general, however, and have but a local application, and it is none the less general and uniform because it may apply to a designated class, if it operates equally upon all the subjects within the class for which the rule is adopted. In determining whether a law is general or special, the court will look to its substance and necessary operation, as well as its form and phraseology. *Ladd v. Holmes*, 66 Pac. 714, 716, 40 Or. 167, 91 Am. St. Rep. 457.

#### **As law not judicially noticed.**

Const. art. 4, § 22, provides a special act shall not be passed for the punishment of crimes and misdemeanors and regulating the practice in courts of justice. A special act, within the meaning of this provision, is such an act as at common law the courts would not have taken notice of, unless specially pleaded and proved as any other fact; so that *Liquor Law March 5, 1859, § 14*, conferring jurisdiction of cases prosecuted for the violation of the act upon both the common pleas and circuit courts, is not special legislation, within the prohibition of the Constitution. *Hingle v. State*, 24 Ind. 28, 34.

The definition of "special statute," as given in *Hingle v. State*, 24 Ind. 28, as "such as at common law the courts would not notice, unless it were pleaded and proved, like any other fact," approved. *Toledo, L. & B. Ry. Co. v. Nordyke*, 27 Ind. 95.

#### **As depending on reasonableness of classification.**

Local or special laws are all those that rest on a false or deficient classification. Their vice is that they do not embrace all the class that they naturally embrace. They create preference and establish inequality. They apply to persons, things, and places possessed of certain qualities or situations, and exclude from their effect other persons, things, or places which are not dissimilar in this respect. *Trenton Iron Co. v. Yard*, 42 N. J. Law (13 Vroom) 357, 363.

Legislation limited in its relation to particular subdivisions of the state, to be valid, must rest on some characteristic or peculiarity plainly distinguishing the places included from those excluded. This rule is formulated thus: The rule has been definitely set-

tled for this state that a law will only be declared void upon this ground when it makes arbitrary and unnatural distinctions between the objects to which it is intended to apply and others of the same kind in substantially the same situation; but if the classification be one already existing, or founded on legitimate differences in situation, population, or recognized conditions, the legislation will be valid as to those objects within its purview. *State v. Walker*, 86 N. W. 104, 105, 83 Minn. 295.

A law which should provide for one case only in a proper case should be held to be general law. It is not required that all general laws shall be equally general. A law legislating for a class is a general law, when it is for a class "requiring legislation peculiar to itself in the matter covered by the law." A law relating to particular persons or things as a class is said to be general, while a law relating to particular persons or things of a class is deemed special and private. Whether such laws are to be deemed general laws or special depends very much upon whether the classification is appropriate. Certain rules by which the propriety of the classification may be tested have been stated by courts, and have become well established. These rules are applied by the decisions with varying strictness. The main difficulty is in the application of the rules. One rule is: All classification must be based upon substantial distinctions, which make one class really different from another. *Johnson v. City of Milwaukee*, 60 N. W. 270, 271, 88 Wis. 383.

All law is special in a constitutional sense, when by force of an inherent limitation it arbitrarily separates some persons, places, or things from others, upon which, but for such limitation, it would operate. The test of a special law is the appropriateness of its provisions to the objects that it excludes. It is not, therefore, what a law includes that makes it special, but what it excludes. *Budd v. Hancock*, 48 Atl. 1023, 1024, 66 N. J. Law, 133.

A law is special or local, as contradistinguished from general, which embraces less than the entire class of persons or places to whose condition such legislation would be necessary or appropriate, having regard to the purpose for which the legislation was designed. A law which so particularizes, and by such means is restricted in its operation to persons or places which do not comprise all the objects which naturally belong to the class, is special or local. *Attorney General v. Borough of Somers Point*, 18 Atl. 694, 52 N. J. Law (23 Vroom) 32, 6 L. R. A. 57.

#### **Local law synonymous.**

Worcester defines "local" as pertaining confined, or limited to a place; as local customs. Webster defines "local" as pertaining

to a place or limited portion of space, and a special statute as a private act of the Legislature, such as affects a private person or individual. The two words, "local" and "special," are frequently used as convertible terms. Indeed Worcester gives "special" as one of the synonyms of "local," and "special" as derived from the Latin word "specialis," which means individual, not general. These definitions also agree with those of eminent jurists and legal writers. Statutes are, they say, divided into—first, public; second, private. Public statutes are further divided into general and local. These divisions are made and recognized chiefly for the convenience of determining which shall be taken cognizance of by the courts, without the necessity of pleading and proving them. *Lastro v. State*, 3 Tex. App. 363, 365.

The terms "local law" and "special law," in Const. art. 3, § 57, prohibiting the passage of special or local laws unless notice of the application therefor is given to the locality affected thereby, are synonymous, and apply to laws only applicable to a particular locality. *Smith v. Grayson County*, 44 S. W. 921, 922, 18 Tex. Civ. App. 153.

#### **Private law synonyms.**

Within the meaning of Const. art. 4, § 23, subd. 7, providing that "the legislative assembly shall not pass special or local laws in any of the following enumerated cases, viz., for laying, opening, or working on highways," an act creating a commission to survey, lay out, and construct a public road, and appropriating money for such construction, is not a private or special statute. The term "special law," as used in the Constitution, has a well-known common-law meaning. When applied to statutes, the word "special" is a technical word, and is synonymous with "private," which was formerly the more frequent term. A special or private statute is a statute which affects only certain specified individuals or private concerns. It is the opposite of a public or general law, which applies to all persons who may happen to be so situated as to fall within the general purview of its operation. *Allan v. Hirsch*, 8 Or. 412, 415 (citing 1 Bl. Comm. 1885; *Bouv. Law Dict.*).

#### **Classification of municipal corporations.**

Acts 1882, providing that, in all counties where the county clerks were then paid an annual salary, the deputy clerk should receive \$2,000 per annum, payable quarterly, is a local or special law, within the meaning of the Constitution of the state, prohibiting the passing of local or special laws, since the statute is only applicable to one county. *Gibbs v. Morgan*, 39 N. J. Eq. (12 Stew.) 126, 128.

A statute which by its terms can have application to but one county in the state,

although purporting to be a general law applicable to all counties having a certain population, there being but one county in the state of such population, is a local or special law, within the meaning of the provision of the Constitution "that the General Assembly shall not pass local or special laws" in certain enumerated cases. Giving to the words "local or special laws," as used in the Constitution, their ordinary meaning as contradistinguished from general laws, the act comes within the definition of a special or private law. *Devine v. Cook County Com'rs*, 84 Ill. 590, 594.

Sess. Laws 1901, p. 317, providing a method of holding primary elections in cities having a population of 10,000 or more for the selection of delegates to nominating conventions, though applicable to but one city at the time of its enactment, extends to all cities as they subsequently acquire the prescribed population, and operates equally upon all of a designated class founded upon a reasonable and proper classification, and hence is not a local or special, but a general law. *Ladd v. Holmes*, 66 Pac. 714, 716, 40 Or. 167, 91 Am. St. Rep. 457.

A statute providing a certain mode for the election of justices in cities of a certain population is not a special law. *Bishop v. City Council of Oakland*, 58 Cal. 572, 574.

The term "local or special law," in the clause of the Constitution prohibiting the passage of such laws, except, etc., cannot include any law which results directly or indirectly from a specific constitutional requirement. It would be a manifest absurdity to assume that the Constitution, when directing the Legislature to pass a certain law, at the same time requires a notification to the people of the locality for the purpose of enabling them to defeat the law. Act April 27, 1877, dividing the city of St. Louis into election districts, and providing that at every general election thereafter held justices of the peace shall be elected in each of them, when construed in connection with Const. art. 6, § 39, declaring that in each county there shall be appointed or elected as many justices of the peace as the public good may require, whose powers, duties, and duration of office shall be prescribed by law, is not a local or special law, within the meaning of the clause of the Constitution prohibiting the passage of such laws, unless notice of the intention to apply therefor be published in the locality where the matter or thing to be affected may be situated. *State ex rel. Monahan v. Walton*, 69 Mo. 555, 557.

#### **Creation and definition of offenses.**

An act purporting to provide a day of rest, and instead providing that certain acts, if performed by certain persons, shall constitute a crime if done on Sunday, and shall be punished, where the employé is to be pun-

ished, is special legislation. *Ex parte West-erfield*, 55 Cal. 550, 551, 36 Am. Rep. 47.

A private or special statute is one that affects only particular individuals or things; hence an act making it a misdemeanor for the proprietor or superintendent of a public house, where liquors are sold, to permit games of cards, dice, etc., to be played on his premises, is not a special statute, since it does not refer to any particular individual, but to all that class of persons who permit games of cards, etc., in their houses, where spirituous or malt liquors are sold. *Territory v. Cutinola*, 14 Pac. 809, 810, 4 N. M. (Johns.) 160.

#### **Creation and regulation of public offices.**

A special law is one that is not of force in every county in the state. Act March 9, 1896, providing that sheriffs shall receive 20 cents per diem for detaining prisoners, and declaring that the act shall be applicable to certain counties only, the population of which varies greatly, was a special law, within Const. art. 3, § 34, subd. 10, providing that the General Assembly shall not enact local or special laws concerning the amount or manner of compensation to be paid county officers, except that the laws may be made so as to grade the compensation in proportion to the population and necessary service required. *Dean v. Spartanburg County*, 37 S. E. 226, 228, 59 S. C. 110.

The term "special law," in Const. art. 4, § 54, prohibiting the passage of any local or special laws without publication of notice of intention to apply therefor, does not include a law which results directly from a specific constitutional requirement, and therefore a statute creating the office of reporter for the St. Louis Court of Appeals is neither a local nor a special act, as the Court of Appeals was created by the Constitution, which grant carried with it the power necessary to the exercise of its jurisdiction. A law creating an office and prescribing the duties of the officer, whose services are to be rendered in and form a part of the administration of the laws of the state, and affect equally all who come within their range, is neither local nor special within the meaning of the Constitution. Nor is the source from which the expenses of the office are to be paid a test by which to determine whether the act creating the office is local or special. *State ex rel. Barry v. Shields*, 4 Mo. App. 259, 265.

#### **Establishment and regulation of courts.**

A statute establishing a court at M. is not a special act, and therefore not in violation of the laws or the Constitution, prohibiting local and special legislation, except, etc. *Town of McGregor v. Baylles*, 19 Iowa, 43, 46.

Under Const. art. 6, § 24, which provides that the General Assembly may create and

establish a criminal court in each county having a population exceeding 15,000, which court may have concurrent jurisdiction with the district court in all criminal cases not capital, and article 5, § 25, prohibiting the General Assembly from passing local or special laws regulating the practice of the courts of justice, and article 6, § 28, declaring that all laws relating to courts shall be general and of uniform application, criminal courts may be created by law or special acts, but their organization, jurisdiction, and practice must be provided for by general laws of uniform operation throughout the state. *Ex parte Stout*, 5 Colo. 509, 513.

Rev. St. § 2835, giving justices of the peace jurisdiction in actions against railroads for killing the animals therein named, without regard to their value, is not a special law, and hence in violation of Const. art. 4, § 53, which provides that no special law regulating the jurisdiction of a justice shall be passed. *Dent v. St. Louis, I. M. & S. Ry. Co.*, 83 Mo. 496, 499.

#### **Regulation of cities.**

An act entitled "An act relating to the assessment and revision of taxes in cities of the state," the body of the act relating to the mode of appointing members of boards of assessment and revision in case of taxation, is unconstitutional as a special and local law regulating the internal affairs of two cities, as it appeared that it applied only to two cities, and that it never could apply to any others. *Richards v. Hammer*, 42 N. J. Law (13 Vroom) 435, 439.

#### **Regulation of civil remedies and proceedings.**

In *Van Reper v. Parsons*, 40 N. J. Law (11 Vroom) 1, "special laws" are thus described: "Interdicted special laws are those that rest upon a false or deficient classification. Their vice is that they do not embrace all the class to which they are naturally related. They create preferences and establish inequalities. They apply to persons, things, or places possessed of certain qualities or situations, and exclude from their effect other persons, things, or places which are not dissimilar in these respects." At common law all special laws or acts were required to be pleaded and proved like any other fact. Act Feb. 17, 1899, providing that in actions for death from personal injuries it shall not be necessary for the plaintiff to prove the want of contributory negligence on his part or the part of the party for whose injury or death the action is brought, is a special act, though not in violation of Const. art. 4, §§ 22, 23, since it is general in its application. *Indianapolis St. Ry. Co. v. Robinson*, 61 N. E. 197, 198, 157 Ind. 232.

The term "special laws," as used in Const. art. 4, § 25, subd. 3, prohibiting the Legislature from passing local or special

laws regulating the practice in courts of justice, means a law relating to a selected class, as well as to a particular object. *St. 1871-72*, p. 533, requiring the plaintiff, in an action for slander, to file an undertaking, with sureties, who shall annex to such undertaking an affidavit of their residence within the county, and whose qualifications shall be as required in their affidavits, is not a special law within the meaning of this constitutional provision. *Smith v. McDermott*, 93 Cal. 421, 29 Pac. 34, 35.

#### **Regulation of corporations.**

Act March 25, 1889, requiring corporations, companies, and persons engaged in the business of operating or constructing railroads and railroad bridges, and contractors and subcontractors engaged in the construction of any such road or bridge, to pay their employes on the day of discharge the unpaid wages then earned by them at the contract price, without abatement or deduction, is not "special legislation," since it is general or uniform in its operation on all persons coming within the class to which it applies. *Leep v. St. Louis, I. M. & S. Ry. Co.*, 25 S. W. 75, 85, 58 Ark. 407.

#### **Regulation of criminal prosecutions.**

There is no provision in the Constitution of California prohibiting the Legislature from enacting special laws. Legislatures, unless restrained by express provisions, have from time immemorial exercised the rights to pass such tax. This power has never been questioned. The Legislature may pass a special law, though it be in derogation of or in the nature of exception to the operation of a general statute. An act of the Legislature for the change of venue in the case of a designated person indicted for the crime of murder is a special law, and constitutional. *People v. Judge of Twelfth Dist.*, 17 Cal. 547, 552.

#### **Regulation of county or town.**

Under Const. art. 4, § 20, declaring, among other things, that "the Legislature shall not pass local or special laws regulating county and township business," any law prescribing a rule to govern business, or an order or direction for its management, is a regulation of that business, whether it be a limited and temporary law intended to secure a particular end or object, or a general and permanent law according to the provisions of which all county affairs are to be conducted. An act appropriating money, not to provide a salary for services to be thereafter performed or to make compensation for profits thereafter to accrue, but either as a gratuity or donation or in discharge of some obligation already resting upon the county or upon the state, is a special law regulating county business, and in

violation of said section. *Williams v. Bidleman*, 7 Nev. 68, 70, 71.

#### **Removal of county seat.**

A law authorizing the removal of the county seat of the county is not a local or "special law" for the benefit of an individual or corporation, in the sense in which the latter term is employed in the Constitution. It affects the whole county and relates to its political organization. *Clarke v. Jack*, 60 Ala. 271.

#### **Regulation of fire escapes.**

The term "local or special legislation" cannot be applied to Laws 1897, p. 222, requiring fire escapes on buildings four or more stories in height, except such as are used for private residence, and on buildings more than two stories in height used for manufacturing purposes, as the statute applies to all buildings falling within the designated class, and is therefore general and uniform. *Arms v. Ayer*, 61 N. E. 851, 855, 192 Ill. 601, 58 L. R. A. 277, 85 Am. St. Rep. 357.

#### **Regulation of highways.**

Act March 6, 1865, authorizing supervisors to remove fences along highways upon the banks of water courses in certain cases, is not a "special law," within the meaning of Const. art. 4, § 22, prohibiting the enactment of local or special laws for laying out, opening, and working on highways. It is true that the act relates to a particular class of cases, and applies to them alone, as do a large number of legislative enactments; but that fact does not make it a special law. *Hymes v. Aydelott*, 26 Ind. 431, 434 (citing *Hingle v. State*, 24 Ind. 28).

The term "special laws," within the meaning of a constitutional provision prohibiting the passage of special laws in any case for which provision has been made by an existing general law or laws which provide for individual cases, does not apply to a statute relating to the roads in a single county only, which is a local law and applicable to all persons, and only distinguished from public general laws in that it is confined in its operation to certain prescribed or definite territorial limits. *State v. Baltimore County Com'rs*, 29 Md. 516, 520.

#### **Regulation of interest.**

A law which deals only with a particular individual, or a particular corporation, or a particular locality, whether municipal or county, is a special law, within the meaning of the Constitution of Georgia, declaring that no special law shall be enacted in any case for which provision has been made by an existing general law. A provision in a special charter creating a banking corporation, which authorizes the making by such bank of a contract which would, under the general



law of the state regulating the rate of interest, be usurious, is a special law. *Atlanta Sav. Bank v. Spencer*, 33 S. E. 878, 879, 107 Ga. 629.

#### **Regulation of irrigation.**

Gen. Laws 1889, p. 100, providing that the unappropriated water of any river or natural stream within the arid portions of the state, "in which by reason of insufficient rainfall irrigation is necessary for agricultural purposes," may be diverted from its natural channel for irrigation, is not a special or local law, within the meaning of the Constitution. *McGhee Irrigating Ditch Co. v. Hudson (Tex.)* 22 S. W. 967, 968.

#### **Regulation of liquor traffic.**

The fact that at the time of the passage of the liquor law of 1872 there was no law under which a person residing in an incorporated town or city could obtain a license did not make the act violative of the constitutional provision prohibiting the passage of local or special laws. *Streeter v. People*, 69 Ill. 595, 599.

#### **Regulation of occupations.**

A law upon a special subject is not necessarily a "special law," within the meaning of Constitution of Louisiana prohibiting the enactment of a special law. The law of Louisiana regulating the practice of medicine is not a special law. *Allopathic State Board of Medical Examiners v. Fowler*, 24 South. 809, 814, 50 La. Ann. 1358.

A statute providing that an association of workingmen may adopt for their protection labels and trade-marks announcing that goods manufactured by members thereof are so manufactured, etc., is a special law, as it extends only to associations or unions of workingmen, not to individual workingmen, even though the latter may be members of an association or union. *Schmalz v. Wooley*, 89 Atl. 539, 542, 56 N. J. Eq. 649.

Acts 1867-68, c. 35 (Thomp. & S. St. § 1993d), giving cotton brokers, etc., a special lien for five days upon cotton sold by them, is held, inasmuch as all persons who sell cotton as merchants, factors, or brokers are embraced by the act and entitled to its benefits, not to be within the constitutional prohibition of special or partial legislation, but to be a general law. *Parks v. Parks*, 59 Tenn. (12 Heisk) 633, 634.

#### **Regulation of oyster beds.**

A statute is not special or local merely because it authorizes or prohibits the doing of a thing in a certain locality. It is, notwithstanding this fact, a general law, if it applies to all the citizens of the state and deals with a matter of general concern. Thus Act March 24, 1899, regulating the

cultivation of oysters in certain tidal water lying wholly within the counties of the state, is not special or local, within the prohibition of Const. art. 4, § 7, par. 11; the matter regulated being of general concern and applying to all citizens. *State v. Corson*, 50 Atl. 780, 785, 67 N. J. Law, 178.

#### **Regulation of race courses.**

A law is special, as contradistinguished from general, within the meaning of the Constitution, prohibiting special acts, which embraces less than the entire class of people or places to whose condition the legislation would be necessary or appropriate, having regard to the purpose for which such legislation is designed. A law which so particularizes, and by such means is restricted in its operation to persons or places which do not comprise all the objects which naturally belong to the class, is "special," or "local," within the meaning of the constitutional interdiction, so that an act regulating race courses and distinguishing between those in use prior to January 1, 1893, and those set up after that date, affords no proper classification such as will support the application to each of a distinctive system of licensing. *Alexander v. City of Elizabeth*, 28 Atl. 51, 54, 56 N. J. Law (27 Vroom) 71, 23 L. R. A. 525.

#### **Regulation of taxation.**

A statute for the assessment and collection of taxes, which applies to all incorporated cities and towns in the state, is a general and not a special law, within the meaning of the Constitution. *People v. Wallace*, 70 Ill. 680, 681.

Act March 12, 1885, which provides that, when any personal property is situated and kept in any unorganized county, it shall be subject to taxation in the nearest organized county thereto, and shall be listed and assessed by the assessor of such nearest organized county, and, when the unorganized county borders on two or more organized counties, the property shall be assessed and taxed by that organized county having the greatest extent of contiguous boundary line, is not special or local legislation, since the term "unorganized counties" is not one of place or location, but one of class. *Farris v. Vannier*, 42 N. W. 31, 35, 6 Dak. 186, 3 L. R. A. 713.

Act May 24, 1876, requiring the school directors of a certain township to assess and levy a tax upon the basis of the existing valuation for school purposes for such township to reimburse R. and N. a certain sum, with interest, and as soon as collected to pay to them such sum, is a "special act," since the tax was to be levied and collected for one specific purpose, which was to pay a certain sum of money to the persons named in the act, which could not be used for any

other or different purpose, nor be appropriated to the payment of teachers or expended in the erection of schoolhouses, nor in the payment of their indebtedness of the school district, if any such existed. *Montgomery v. Commonwealth*, 91 Pa. 125, 132.

A statute, the object of which was simply to extend the provisions of an existing law as to the assessment of railroad property for taxation to that of bridges owned by joint-stock companies, and the property and franchises owned by telegraph and express companies, is not a special law, within the meaning of Const. art. 4, § 53, providing that in all cases where a general law can be made applicable no local or special law shall be enacted. *State ex rel. Kemper v. St. Louis, K. C. & N. Ry. Co.*, 9 Mo. App. 532, 539.

The act to provide for the assessment and collection of taxes on bridges owned by joint-stock companies, and property and franchises owned by telegraph and express companies, is not a special law, within the meaning of the constitutional prohibition against the passage of local or special laws. *State ex rel. Kemper v. St. Louis, K. C. & N. Ry. Co.*, 79 Mo. 420.

#### **SPECIAL LETTER OF CREDIT.**

A special letter of credit is one addressed to a particular individual or firm by name, in contradistinction to a general letter of credit, which is one addressed to any and all persons, without naming any one in particular. *Birkhead v. Brown* (N. Y.) 5 Hill, 634, 642.

When the request for credit in a letter is addressed to specified persons by name or description, the letter is special. *Civ. Code Mont.* 1895, § 3713; *Rev. Codes N. D.* 1899, § 4667; *Civ. Code S. D.* 1903, § 2011.

#### **SPECIAL LIEN.**

A special lien is a lien upon particular property. If a lien extends to everything acquired and to be acquired, it is not special merely because it was created by a mortgage or other express contract. The reason why specific liens prevail over general legal liens is that there is something left or possible to be left for the latter after the property covered by the former is absorbed. *Green v. Coast Line R. Co.*, 24 S. E. 814, 819, 97 Ga. 15, 33 L. R. A. 806, 54 Am. St. Rep. 379.

A particular or special lien is the right to retain the property of another on account of labor bestowed or money expended on the same property, and is established by common law and by express agreement. The lien of a common carrier is a special, and not a general, lien. *Crommellin v. New York & H. R. Co.*, 23 N. Y. Super. Ct. (10 Bosw.) 77, 80.

A special lien is one which the holder thereof can enforce only as security for the performance of a particular act or obligation, and of such obligations as may be incidental thereto. *Civ. Code Cal.* 1903, § 2875; *Civ. Code Idaho* 1901, § 2788; *Rev. St. Okl.* 1903, § 3441; *Rev. Codes N. D.* 1899, § 4676; *Civ. Code S. D.* 1903, § 2020.

#### **SPECIAL LIMITATION.**

"A special limitation" says Mr. Smith in his work on *Executory Interests* (page 12), "is a qualification serving to mark out the bounds of an estate, so as to determine it ipso facto in a given event, without action, entry, or claim, before it would or might otherwise expire by force of, or according to, the general limitation." A special limitation may be created by the words "until," "so long," "if whilst," and "during," as when land is granted to another so long as he is parson of Dale, or while he continues unmarried, or until out of the rents he shall have made £500. *Henderson v. Hunter*, 59 Pa. (9 P. F. Smith) 335, 340.

#### **SPECIAL MASTER.**

A special master in chancery is a representative of the court, and a sale made by him is not a sale by either party to the litigation. *Guaranty Trust & Safe Deposit Co. v. Delta & Pine Land Co.* (U. S.) 104 Fed. 5, 9, 43 C. C. A. 396.

A special master, making a sale under direction of a court of chancery, is a representative of the court, as a marshal or sheriff is, in an action at law. He is not under the control of either party. He is not the agent of either to make the sales. *Pewabic Min. Co. v. Mason*, 145 U. S. 349, 361, 362, 12 Sup. Ct. 887, 36 L. Ed. 732.

#### **SPECIAL MEETING.**

"Special meetings" of a corporation are those called for some particular purpose, and at which nothing can be done beyond the specified objects. *Mutual Fire Ins. Co. v. Farquhar*, 39 Atl. 527, 528, 86 Md. 668.

"Special meeting," as used in the rules of a benefit building society, providing that no action should be brought or defended until the approbation of the majority of members present at a special meeting of the society should be obtained, meant that the meeting should not be convened unless the parties had notice of the meeting. A meeting may be both general and special—general for the purpose of doing general business, and special for a particular purpose. Then it becomes a special general meeting. *Cutbill v. Kingdom*, 1 Welsb. H. & G. 494, 504.

**SPECIAL MERCANTILE AGENCY.**

Special mercantile agencies are those which confine themselves to reporting a particular business, such as furniture, stationery, jewelry, and hardware. *State v. Morgan* (S. D.) 48 N. W. 314, 321.

**SPECIAL MORTGAGE.**

A special mortgage is that which binds only certain private property. *Barnard v. Erwin* (La.) 2 Rob. 407, 415.

**SPECIAL MOTION.**

Special motions are all of those applications, addressed to the chancellor, which he may or may not grant in his discretion, and which usually involve an investigation of the facts or circumstances on which the application is predicated. Special motions are subdivided into two kinds; those which may be granted *ex parte*, and those which require notice of their presentation and hearing. *Merchants' Bank v. Chrysler* (U. S.) 67 Fed. 388, 390, 14 C. C. A. 444.

**SPECIAL ORDER.**

We have been unable to find in the authorities a satisfactory definition of the term "special order," from which, under the statute, an appeal can be taken. Mr. Bouvier says that a special rule is an order of court in a particular case for a particular purpose. The decisions of California are conflicting on this question. In *Gillman v. Contra Costa Co.*, 8 Cal. 52, 57, 68 Am. Dec. 290, it is said that the term refers to cases where a court or judge grants affirmative relief and cases where relief is denied. It is also held that the order should follow the judgment in the same line of proceedings. This view is sustained in *Quivey v. Gambert*, 32 Cal. 304. These cases were reviewed in *Calderwood v. Peyser*, 42 Cal. 110, and overruled. Mr. Justice Wallace says that the order "of itself" shall be the subject of appeal. Civ. Prac. Act, § 566, provides that every direction of a court or judge, made or entered in writing, and not included in a judgment, is an order; so that a ruling refusing to stay execution is a "special order," and appealable. *Clarke v. Gouy*, 2 Mont. 538, 539.

The expression "special order made after final judgment," as used in Rev. St. § 4087, providing that an appeal may be taken to the Supreme Court from the district court from any special order made after final judgment, means the special or particular order applied for after final judgment, and does not include an appeal from an order of the district court denying a motion to dismiss an appeal to the district court from the probate court. *Connell v. Warren*, 27 Pac. 730, 3 Idaho, 117.

An order of the superior court sitting as a court of probate, denying an executor's motion to vacate an order denying his petition for an allowance for extraordinary services rendered by him and to restore the cause to the calendar, is not a special order made after final judgment, within the meaning of Code Civ. Proc. § 963, subd. 2, allowing an appeal to the Supreme Court from a special order made after final judgment. In *re Walkery's Estate*, 29 Pac. 719, 720, 94 Cal. 352.

An order for the discharge from imprisonment of a judgment debtor, made under the provisions of the act for the relief of persons imprisoned on civil process (St. 1850, p. 40), is a special order made after final judgment, within the meaning of Prac. Act, § 336, authorizing an appeal from such orders; and this is true, even though the order is made by the judge of another court, authorized by law to take jurisdiction of such proceedings. *Wells, Fargo & Co. v. Anthony*, 35 Cal. 696-698.

**SPECIAL OWNER.**

A special owner of chattels is some person holding the property with the consent and as the representative of the actual owner. *Frazier v. State*, 18 Tex. App. 434, 441.

**SPECIAL PARTNERSHIP.**

Special partnerships are those formed for a special or particular branch of business, as contradistinguished from the general business or employment of the parties, or one of them. When they extend to a single transaction or adventure only, such as the purchase and sale of a particular parcel of goods, they are more commonly called "limited partnerships"; but the appellation is indiscriminately applicable to both classes of cases. *Bigelow v. Elliot* (U. S.) 3 Fed. Cas. 349, 351.

A special partnership is in itself a proper partnership, both as to the rights of the parties to the contract and as to the world, except as it limits the liability of the special partner and restricts his control over the business of the firm. In *re Downing's Ex'rs* (N. Y.) 8 N. Y. Leg. Obs. 317, 320.

A "special partnership" may consist of one or more persons called "general partners" and one or more persons called "special partners." Civ. Code Idaho 1901, § 2750; Civ. Code Mont. 1895, § 3291.

**SPECIAL PLEA.**

A special plea, amounting to the general issue, is a plea alleging new matter which is in effect a denial of the truth of the declaration. *Allen v. New Haven & N. Co.*, 49 Conn. 243, 245.

A special plea to a note is, in general, an admission of the signing or execution of the paper, but seeking to avoid it by reason of some special matter, such as that it has been altered or changed after its delivery, and without the maker's consent was delivered as an escrow, etc. A special plea of non est factum limits the denial to some special matter, or, rather, it is an averment of some fact which defeats the operation of the paper as to the evidence. *Galbreath v. City of Knoxville (Tenn.)* 59 S. W. 178, 181.

#### **SPECIAL POLICEMAN.**

"The term 'special policeman' is ordinarily used to designate one who is not a member of a permanent and organized police force, but who merely engages to do temporary police duty in a particular place on a special occasion." *Fogarty v. York*, 60 N. Y. Supp. 352, 354, 43 App. Div. 433.

#### **SPECIAL POWER.**

A power is an authority to do some act in relation to lands, or the creation of estates therein or of charges thereon, which the owner granting or reserving such power might himself lawfully perform. A power is general when it authorizes the alienation in fee, by means of a conveyance, will, or charge of the lands embraced in the power to any alienee whatever. A power is special (1) when the persons or class of persons to whom the disposition of the land under the power is to be made are designated; (2) where the power authorizes the alienation, by means of a conveyance, will, or charge of a particular estate or interest less than a fee. A power, whether general or special, is beneficial where no person other than the grantee has by the terms of its creation any interest in its execution. *Coster v. Lorillard (N. Y.)* 14 Wend. 205, 324.

The term "special power to dispose by will," in Rev. St. c. 106, § 4, providing that a married woman may only dispose by will of estates secured to her separate use by deed or devise, or in the exercise of a special power to that effect, means a power which is specifically expressed, or at least clearly and unequivocally manifest, of disposing of some particular estate by will. A special power to dispose by will was not conferred by the clause in a conveyance by the husband and wife to a trustee for the use of the wife, directing the wife to use, sell, or exchange, or to reinvest or to otherwise dispose of, the whole or any part of the said property and effects and the proceeds thereof in any manner she may think proper. *Harris v. Harbeson*, 72 Ky. (9 Bush) 397, 404.

A power is special (1) when a person or class of persons is designated to whom the disposition of property under the power is

to be made, or (2) when it authorizes the alienation or incumbrance, by means of a grant, will, or charge, of only an estate less than a fee. Rev. St. Okl. 1903, § 4104; Rev. Codes N. D. 1899, § 3408; Civ. Code S. D. 1903, § 325.

A power is special (1) when the person or class of persons to whom the disposition of the lands under the power is to be made are designated; (2) when the power authorizes the alienation, by means of a conveyance, will, or charge, of a particular estate or interest less than a fee. Comp. Laws Mich. 1897, § 8861; Rev. St. Wis. 1899, § 2106.

#### **SPECIAL POWER IN TRUST.**

A special power is in trust (1) when the disposition or charge which it authorizes is limited to be made to any person or class of persons other than the holder of the power, or (2) when any person or class of persons, other than the holder, is designated as entitled to any benefit from the disposition or charge authorized by the power. Rev. St. Okl. 1903, § 4108.

#### **SPECIAL PRIVILEGE.**

A special privilege, in constitutional law, is a right, power, franchise, immunity, or privilege granted to or vested in a person or class of persons, to the exclusion of others and in derogation of common right. The state, it is to be presumed, has no favors to bestow, and designs to inflict no arbitrary deprivation of rights. Special privileges are therefore always obnoxious. *Guthrie Daily Leader v. Cameron*, 41 Pac. 635, 639, 3 Okl. 677.

The power of the city of Salt Lake, by its council, to pass an ordinance punishing parties who should be convicted of keeping any house for gaming purposes, is not a "special privilege," within the meaning of 14 Stat. 526, prohibiting any territorial legislative authority from granting any private charter or special privilege. *Ex parte Douglas*, 1 Utah, 108, 111.

Act Cong. March 2, 1867, providing that the legislative assemblies of the several territories shall not grant any special privileges, refers to the granting of monopolies such as ferries, trade-marks, or the exclusive right to manufacture certain articles or to carry on a certain business in a particular locality, to the exclusion of others, and does not include the granting of a public charter to a municipal corporation. *City of Elk Point v. Vaughn*, 46 N. W. 577, 578, 1 Dak. 113.

#### **SPECIAL PROCEEDING.**

The term "special proceedings" is used in the Codes of Practice in many of the states

in contradistinction to "action." It may be said generally that any proceeding in the court, which was not under the common law or a suit in chancery, is a special proceeding. In re Central Irr. Dist., 49 Pac. 354, 356, 117 Cal. 382.

A special proceeding is a prosecution by a party for the enforcement or protection of a right or for the redress or prevention of a wrong. *Reichel v. New York Cent. & H. R. R. Co.*, 18 N. Y. Civ. Proc. R. 256, 258, 9 N. Y. Supp. 415; In re Rafferty, 43 N. Y. Supp. 760, 761, 14 App. Div. 55; *Roe v. Boyle*, 81 N. Y. 305, 306; *Green v. Hauser*, 18 N. Y. Civ. Proc. R. 354, 358, 9 N. Y. Supp. 660.

The term "special proceeding," within its proper definition, is a generic term for all civil remedies in courts of justice which are not ordinary actions. Where the law confers a right and authorizes a special application to a court to enforce it, the proceeding is special, within the ordinary meaning of the term "special proceeding." *Schuster v. Schuster*, 87 N. W. 1014, 1015, 84 Minn. 403.

Any ordinary proceedings in a court of justice by which a party prosecutes another for the enforcement or protection of a right, the redress or prevention of a wrong, or punishment of a public offense, involving process and pleadings, and ending in a judgment, is an action; while every proceeding other than an action, where remedy is sought by an original application to the court for a judgment or an order, is a special proceeding. *Missionary Soc. of M. E. Church v. Ely*, 47 N. E. 537, 538, 56 Ohio St. 405.

A "special proceeding," as defined by Code, § 3334, is every prosecution by a party, other than an action. *People v. American Loan & Trust Co.*, 44 N. E. 949, 951, 150 N. Y. 117.

A special proceeding is every other remedy than an action, which is an ordinary proceeding in a court of justice, by which one party prosecutes another in the enforcement or protection of a right, or redress or prevention of a wrong, or the punishment of a public offense. Code Civ. Proc. §§ 22, 23; In re Joseph's Estate, 50 Pac. 768, 769, 118 Cal. 660.

The term "special proceedings," as used in the Code providing for appeals therefrom, has no reference to provisional remedies in actions at law or in equity, but to such proceedings as may be commenced, independently of a pending action, by petition or notice, on motion, in order to obtain a special relief. *State v. District Court of Second Judicial Dist.*, 72 Pac. 613, 615, 28 Mont. 227.

The phrase "special proceeding" has been used in the New York and other Codes of Procedure as a generic term for all civil remedies which are not ordinary actions.

Code Civ. Proc. N. Y. § 3; *Gwinn v. Melvin* (Idaho) 72 Pac. 961, 962.

An action is an ordinary proceeding in a court of justice by which a party prosecutes another party for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense. Every other remedy is a special proceeding. Rev. St. Okl. 1903, §§ 4202, 4203; Code Civ. Proc. S. C. 1902, §§ 2, 3; Rev. Codes N. D. 1899, §§ 5159, 5160; Code Civ. Proc. S. D. 1903, §§ 12, 13; Clark's Code N. O. 1900, §§ 126, 127; Rev. St. Wis. 1898, §§ 2595, 2596.

Every remedy other than an action is a special proceeding. Code Civ. Proc. Cal. 1903, § 23; Code Civ. Proc. Mont. 1895, § 3472.

Every remedy in a civil case other than a civil action is a special proceeding. Ann. St. Ind. T. 1899, § 3118.

The term "special proceeding" refers to a civil special proceeding. Code Civ. Proc. N. Y. 1899, § 3343, subd. 20.

#### As a case or cause.

See "Case"; "Cause"; "Civil Action—Case—Suit—Etc."

#### Proceeding to assess damages.

The proceeding to assess damages on the laying out of a plank road is a "special proceeding" under the Code of New York. In re Ft. Plain & C. Plank Road Co. (N. Y.) 3 Code Rep. 148.

#### Certiorari.

The writ of certiorari is a special proceeding, according to the classification of remedies contained in the Code of Procedure. *People v. Stilwell*, 19 N. Y. 531, 532.

Certiorari is a special proceeding, within the statute regulating costs in such proceedings. *People v. Pratt*, 21 N. Y. Supp. 853, 854, 66 Hun, 578.

Under the New York Code, defining actions and special proceedings, a common-law certiorari is a special proceeding. *People v. Fuller* (N. Y.) 40 How. Prac. 35, 36.

#### Application for change of venue.

A proceeding in a criminal action to change the place of trial was a special proceeding, within the definition of Code Civ. Proc. §§ 3333, 3334. It was a proceeding for the enforcement of what was claimed to be a right, and was not a civil action, because a civil action is an ordinary proceeding instituted by summons. *People v. McLaughlin*, 37 N. Y. Supp. 998, 1000, 2 App. Div. 408.

#### Disbarment proceeding.

Under the Code, defining a civil action to be a proceeding in a court of justice to

which one known as the plaintiff demands against another party known as the defendant the enforcement or protection of a private right or prevention or redress of a private wrong, and providing that it may also be brought for the recovery of a penalty or a forfeiture, and declaring that every other remedy in a civil case is a special proceeding, a proceeding upon charges preferred by a private prosecutor to disbar an attorney is a special proceeding. *State v. Clarke*, 46 Iowa, 155, 159.

#### **Application for dissolution of corporation.**

Code Civ. Proc. § 1798, authorizes the Attorney General to sue for the dissolution of a corporation, section 1801 requires the appointment of a receiver in such actions, and section 1807 authorizes the court to require all creditors to exhibit their claims against the corporation and thereby make themselves parties to the action. Code Civ. Proc. § 3333, defines an action as "an ordinary prosecution \* \* \* for the enforcement of or protection of a right or the redress or prevention of a wrong"; and section 3334 provides that every other prosecution by a party for either of the purposes specified in the last section is a special proceeding. Held, that an order, in an action by the Attorney General for the dissolution of a corporation, made on application of a judgment creditor of the corporation, directing the receiver to pay the judgment creditor's claim in preference to the claims of general creditors, was not appealable, as "an order in a special proceeding." Const. art. 6, § 9. *People v. American Loan & Trust Co.*, 44 N. E. 949, 951, 150 N. Y. 117.

#### **Proceeding to compel corporate election.**

Under a statute (Laws 1859, c. 211) authorizing the making of an order directing a corporate election to be held on the petition of any stockholder, where it is found that the directors have neglected or refused for the space of two years to call and hold such election, it is held that such a proceeding by a stockholder is a special proceeding, within the meaning of an act authorizing appeals from final orders made in special proceedings; the court observing that the relief furnished is certainly a remedy for a right of the stockholders, and that, as it is furnished by a court of justice, it must be either an action or a special proceeding, and, as it is not claimed to be the former, it must be the latter. *In re Fleming*, 16 Wis. 70, 75, 76.

#### **Condemnation proceeding.**

A proceeding to acquire title to real estate under the general railroad act is a special proceeding under the statute. *In re New York, L. & W. Ry. Co.* (N. Y.) 63 How.

Prac. 123, 126; *Id.* (N. Y.) 26 Hun, 592, 593; *Rensselaer & S. R. Co. v. Davis*, 55 N. Y. 145, 147; *Carolina & N. W. R. Co. v. Pennearden Lumber & Mfg. Co.*, 44 S. E. 358, 361, 132 N. C. 644.

A proceeding by the board of education of a city to acquire lands for public school purposes is a special proceeding, as distinguished from an action, and should therefore terminate in a final order, and not in a judgment. *In re Board of Education of the City of Brooklyn*, 11 N. Y. Supp. 780.

The appointment of commissioners to appraise damages to real estate taken for railroad purposes, under Rev. St. § 1852, is a special proceeding, and not an action; and findings of fact and conclusions of law by the court are not essential to the validity of the order appointing or refusing to appoint the commissioners under section 2863, requiring such findings and conclusions when an action is tried by the court without a jury. *Gill v. Milwaukee & L. W. R. Co.*, 45 N. W. 23, 76 Wis. 293.

The proceeding of grade crossing commissioners to condemn land for the purpose of widening a street, pursuant to Laws 1888, c. 345, is a special proceeding, defined by Code Civ. Proc. § 3334, as any proceeding other than an ordinary prosecution by one party against another. *In re Grade Crossing Com'rs*, 20 App. Div. 271, 272, 46 N. Y. Supp. 1070.

#### **Contempt proceeding.**

The term "special proceedings" includes discovery and attachments for contempt, and therefore such proceedings are within a statute giving an appeal from a final order affecting the substantial right made in special proceedings. *Witter v. Lyon*, 34 Wis. 564, 574.

An order punishing a person for contempt in disobeying an injunction, where the contempt proceeding is not and cannot be used as a remedy to enforce obedience to the injunction, or to indemnify the party injured by the contempt, is not an order made in an action or special proceeding, and is therefore not appealable. Such a contempt proceeding is not remedial in its character, but purely of a criminal nature; its object being exclusively to vindicate the authority of the court. *State v. Davis*, 51 N. W. 942, 945, 2 N. D. 461.

*In Brinkley v. Brinkley*, 47 N. Y. 40, it was held that contempt proceedings are special proceedings. *Boom v. McGucken*, 22 N. Y. Supp. 424, 426, 67 Hun, 251.

A proceeding to secure the commitment of a party for contempt in refusing to pay and discharge certain taxes and assessments on real estate sold by him as a referee is a

special proceeding. *People v. Bergen* (N. Y.) 9 Hun, 202.

A proceeding to punish for contempt is a special proceeding. *Erie R. Co. v. Ramsey*, 45 N. Y. 637, 643.

**Proceeding to compel delivery of books of public officer.**

A proceeding under Rev. St. c. 43, to compel the delivery of books and papers of a public officer to his successor, being before a judge, and not in the court, is not a special proceeding, within Rev. St. § 3069, subd. 2, and the order made therein is not appealable. *Prince v. McCarty*, 20 N. W. 655, 656, 61 Wis. 3.

**Election contest.**

The contesting of an election of a county officer under Gen. St. c. 1, providing for the contesting of elections and the introduction of testimony, etc., and giving the court power to secure attendance of witnesses, is a special proceeding, and not a civil action. *Ford v. Wright*, 13 Minn. 518, 520 (Gil. 480, 487).

**Proceeding on petition of estrays.**

A proceeding on a petition of estrays (Code Civ. Proc. §§ 3084, 3091) is a special proceeding, and not an action. It is specially regulated by statute. There are no pleadings, and it can be tried only in the manner provided by statute. In *re Rafferty*, 43 N. Y. Supp. 760, 761, 14 App. Div. 55.

**Application for examination of witnesses.**

An application of the Attorney General, under Laws 1897, c. 383, seeking to procure the examination of witnesses to obtain conviction as to violations of Anti-Monopoly Law, §§ 1, 2, is a special proceeding, under Code Civ. Proc. §§ 3333, 3334, defining a special proceeding as any prosecution, other than an ordinary prosecution, "for the enforcement or protection of a right, or redress or prevention of a wrong, or a punishment of a public offense." In *re Attorney General*, 47 N. Y. Supp. 883, 884, 22 App. Div. 285.

Section 3333 of the Code of Civil Procedure provides that the word "action" as used in the new revision of the statutes, signifies an ordinary prosecution in a court of justice by a party against another party for the enforcement of a right, the redress of a wrong, or the punishment of a public offense. Section 3334 provides that every other prosecution by a party for either of the purposes specified in the last section is a "special proceeding." Under this definition the court held that an application by the Attorney General for the examination of witnesses prior to the beginning of an action, as authorized by Laws 1897, c. 383, is not a special proceeding, and therefore an order of the Appellate Division affirming an order in rela-

tion to such examination is not appealable to the Court of Appeals. In *re Attorney General*, 50 N. E. 57, 155 N. Y. 441.

**Proceeding supplementary to execution.**

Proceedings supplementary to execution, though made special proceedings by Code Civ. Proc. § 2433, are not such within the meaning of section 3279, c. 21, tit. 3, declaring that the provisions of such title (relating to security for costs), shall apply to "a special proceeding instituted in a court of record." *First Nat. Bank v. Yates*, 47 N. Y. Supp. 484, 485, 21 Misc. Rep. 373.

**Foreclosure under power of sale.**

The phrase "special proceeding," as used in Gen. St. 1878, c. 88, § 9, providing that an attorney has authority to receive money claimed by his client in an action or special proceeding during the pendency thereof, etc., has reference to a proceeding in court which may terminate in a judgment, and it does not include a foreclosure of a mortgage under a power of sale, which is a proceeding wholly in pais. In *re Grundysen*, 55 N. W. 557, 53 Minn. 346.

**Habeas corpus proceeding.**

A writ of habeas corpus is a special proceeding, within the meaning of Code, § 3. In *re Barnett* (N. Y.) 52 How. Prac. 73, 74.

A habeas corpus proceeding by a mother against a father to obtain possession of their child is a special proceeding in the nature of an action, within the meaning of Code Civ. Proc. § 495, providing that costs shall be allowed in such proceedings to plaintiff in a judgment in his favor. *State v. Newell*, 34 Pac. 28, 29, 13 Mont. 302.

**Proceeding to investigate finances of town.**

A proceeding under the general municipal law to investigate the financial affairs of a town is a "special proceeding," under Code Civ. Proc. § 3334. In *re Town of Hempstead*, 52 N. Y. Supp. 618, 619, 32 App. Div. 6.

**Mandamus proceeding.**

The words "special proceedings," as used in Laws 1854, c. 270, authorizing an appeal from a general term in any special proceedings, includes a mandamus. *People v. Schoonmaker* (N. Y.) 19 Barb. 657, 658.

**Probate proceedings.**

A proceeding to set aside the probate of a will, under Code Civ. Proc. § 1327, providing that any interested person may, within one year after probate, contest the same, is a special proceeding. In *re Joseph's Estate*, 50 Pac. 768, 769, 118 Cal. 660.

An application to admit a will to probate is a special proceeding. *Missionary Soc. of*

*M. E. Church v. Ely*, 47 N. E. 537, 538, 56 Ohio St. 405.

**Reference to determine disputed claim.**

Under the Code, defining a civil action to be an ordinary proceeding in a court of justice by which one party prosecutes another for the enforcement or protection of a right, or for the redress or prevention of a wrong, and declaring that every other civil remedy is a special proceeding, a proceeding by reference under the statute to determine and enforce a disputed claim against an estate is not an action, but a special proceeding. *Roe v. Boyle*, 81 N. Y. 305, 306.

**Motion for retaxation of costs.**

Within Laws 1860, c. 264, § 10, subd. 2, which gives an appeal from a final order affecting a special right in special proceedings, would include such proceedings as attachment for contempt, proceedings to obtain discovery of books, etc., or proceedings supplementary to an execution, but it does not include a motion for retaxation of costs. *Ernst v. The Brooklyn*, 24 Wis. 616, 617.

**Settlement of receiver's account.**

The settlement and allowance of a receiver's account is a special proceeding in the action, within Rev. St. 1898, § 3069, subd. 2, making such a proceeding appealable. *Union Nat. Bank v. Mills*, 79 N. W. 20, 21, 103 Wis. 39.

**Application to compel specific performance by heirs.**

The term "special proceedings" includes an application by petition to the Supreme Court under the statute to compel a specific performance by infant heirs of a contract for the sale of land made by the ancestor, as the whole proceeding is peculiar and unknown to our courts, except by special statutory provision, and therefore does not fall within the statutory definition of an action, as ordinary proceedings in a court of justice. *Hyatt v. Seeley*, 11 N. Y. (1 Kern.) 52, 55.

**Proceeding to vacate assessment.**

Proceedings to vacate assessments are special proceedings. In *re Barney*, 6 N. Y. Supp. 401, 53 Hun, 480.

A proceeding to vacate an assessment for a local improvement in the city of New York, though conducted before a justice of the Supreme Court, is not a special proceeding, in the sense of the Code of Procedure providing for appeals. To be a special proceeding in the sense of the Code, there must be a litigation in a court of justice. The Legislature is perfectly competent to invoke the aid of a judicial officer for the regulation of an administrative proceeding, without organizing a special proceeding in a court of justice. In *re Dodd*, 27 N. Y. 629, 633.

A proceeding under Laws 1858, c. 338, to vacate an assessment, at least when instituted at Special Term, is a special proceeding, within Laws 1854, c. 270, authorizing the allowance of costs in such proceedings. In *re Jetter*, 78 N. Y. 601, 606.

A proceeding to vacate an assessment in the city of New York for fraud or legal irregularity is a special proceeding. *Pinckney's Case* (N. Y.) 18 Abb. Prac. 356, 357.

**SPECIAL PROMISE.**

"Special promise," as used in a statute providing that no suit in law or equity should be brought on contract or agreement, whereby to charge the defendant on any special promise, has no other effect than to show that promises in fact were referred to, and not promises implied by law; for every actual promise is particular or special. *Sage v. Wilcox*, 6 Conn. 81, 82.

**SPECIAL PROPERTY.**

Judge Story, in discussing the nature of special property, says: "When we speak of a person having property in a thing, we mean that he has some fixed interest in it (*jus in re*), or some fixed right attached to it, either equitable or legal; and when we speak of special property in a thing we mean some special fixed interest or right therein, distinct from and subordinate to the absolute property or interest in the general owner." Says Mr. Justice Lawrence: "Special property is where he who has the possession holds it subject to the claims of other persons." *Moulton v. Witherell*, 52 Me. 237, 242, 243.

The words "special property" and "general property" are "constantly used in the books to denote, not the chattel itself, but the different interests which several persons may have in it." *Stief v. Hart*, 1 N. Y. (1 Comst.) 20, 24.

"Special property," in a strict sense, may be said to consist in the lawful custody of goods with a right of detention against the general owner, but a lower degree of interest will sometimes suffice against a stranger; for a mere wrongdoer is not permitted to question the title of the person in the actual possession and custody of the goods, whose possession he has wrongfully invaded. A claim by real estate agents against the vendee of land for commissions in negotiating the purchase does not give such agents any right to or special property in a check executed by such vendee and placed in their hands for delivery to the vendors as payment on the purchase price of the land. *Eisen-drath v. Knauer*, 64 Ill. 396, 402.

"Special property," in a strict sense, has been said to consist in the lawful custody of



the goods, with right of detention against the assigned or absolute owner. *Pease v. Ditto*, 59 N. E. 983, 986, 189 Ill. 450.

"Special property" is a qualified or limited right, such as a bailee of it has. *Phelps v. People*, 72 N. Y. 334, 337.

### SPECIAL PROVISION.

"Special provision," as used in Pen. Code, § 154, making every willful omission of a public officer or any person holding a public trust to perform a duty imposed by law a misdemeanor, where no special provision shall have been made for the punishment, means special provision of law; and therefore a member of the police department who fails to perform his duty is guilty of a misdemeanor under this section, and his responsibility is not merely for a violation of the rules of the police department. *People v. Herlihy*, 72 N. Y. Supp. 389, 392, 35 Misc. Rep. 711.

In construing Const. art. 3, § 34, subd. 12, reading, "Provided, that nothing contained in this section shall prohibit the General Assembly from enacting special provisions in general laws," the court said: "It is manifest from even a casual reading of the Constitution that 'local or special laws' and 'special provisions in general laws' do not mean the same thing, and that they were intended to be construed in such a manner that neither would practically destroy the force of the other. \* \* \* In order that a law may be general, it must be of force in every county in the state, and, while it may contain special provisions making its effect different in certain counties, those counties cannot be exempt from its entire operation." *Dean v. Spartanburg County*, 37 S. E. 226, 228, 59 S. C. 110.

### SPECIAL PURPOSE.

P. & L. Laws 1870, p. 1248, § 7, subd. 7, providing that village trustees, when the interests of the village require the expenditure of money for an "extraordinary or special purpose," shall submit the question of raising it by taxation to a vote of the electors, etc., should be construed as limited to a strictly municipal purpose, and not to authorize the raising of money by taxation in aid of a railroad through the county in which the village is situated. *Perrin v. City of New London*, 30 N. W. 623, 624, 67 Wis. 416.

### SPECIAL REPLICATION.

A special replication in equity was occasioned by the defendant's introducing new matter into his plea or answer, which made it necessary for the plaintiff to put in issue some additional fact on his part in avoidance of such new matter introduced by the defendant. These, it seems, were in use in

Lord Nottingham's time. The consequence of a special replication was a rejoinder, by which the defendant asserted the truth and sufficiency of his answer, and traversed every material part of the replication, and if the parties were not then at issue, by reason of some new matter disclosed in the rejoinder which required answer, the plaintiff might file a surrejoinder, to which the defendant in his turn might put in a rebutter. Special replications have quite gone out of use, so that, if any material charge charged is omitted in the bill, although it is alleged by way of replication, it is not pertinent, nor shall it affect the defendant. *Vanbibber v. Beirne*, 6 W. Va. 168, 180.

### SPECIAL RETAINER.

A special retainer has reference to a particular case or to a particular service. It imposes obligations pro hac vice, equally binding with those enjoined by a general retainer. It forbids the acceptance of adversary employment, or the performance of adversary services. It exacts undivided loyalty and allegiance to the client, equal to that demanded by the veriest despot that ever scourged a people. In that particular service, his talents and skill are not his own. They are bought with a price. These he must bestow with all the zeal and earnestness of his nature, and in all the methods which truth and honesty can sanction. The obligation hath this extent, no greater. *Agnew v. Walden*, 4 South. 672, 673, 84 Ala. 502.

### SPECIAL RIGHTS OR PRIVILEGES.

The constitutional prohibition against legislation granting "special rights or privileges" is not invaded by an act incorporating an agricultural society, which provides that it shall be unlawful for any person to sell any liquor, tobacco, etc., within a half mile of the society's grounds during the fair week, except persons doing regular business within the prohibited territory. *State v. Stovall*, 8 S. E. 900, 901, 103 N. C. 416.

### SPECIAL SERVICES.

"Special services," as used in a will which appointed the testator's confidential clerk and bookkeeper one of the executors, and directed the coexecutors to allow him a proper compensation for his special services, etc., means something more than the ordinary services which the other executors would be required to perform personally, and does not apply to his ordinary duties as one of the executors. *Clinch v. Eckford* (N. Y.) 8 Paige, 412, 414.

### SPECIAL SKILL.

The special skill with reference to a certain unusual thing, sufficient to render the

person qualified to give expert testimony in regard to it, means such skill as arises from practical experience in the observation and use of some particular, unusual, and peculiar thing, and which renders the person familiar with its construction, use, operation, etc. *Bemis v. Central Vermont R. Co.*, 3 Atl. 531, 534, 58 Vt. 636.

### **SPECIAL STATUTE.**

See "Special Law."

### **SPECIAL STOCK.**

"Special stock" of the corporation is a peculiar kind of stock now distinctly provided for by statute, but unknown to the general laws of the commonwealth of Massachusetts until 1855. Its characteristics are that it is limited in amount to two-fifths of the actual capital. It is subject to redemption by the corporation at par after a fixed time, to be expressed in the certificates. The corporation is bound to pay a fixed, though yearly, sum or dividend on it as a debt. The holders of it are in no event liable for the debts of the corporation beyond their stock, and the issue of special stock makes all the general stockholders liable for all debts and contracts of the corporation until the special stock is fully redeemed. *American Tube Works v. Boston Mach. Co.*, 29 N. E. 63, 64, 139 Mass. 5.

### **SPECIAL SUPERINTENDENCY.**

"Special superintendencies," as used in an agreement providing different wages for general and special superintendencies, imports such temporary and occasional services as would be required in the instruction, etc., of workmen. *Pressey v. H. P. Smith Mach. Co.*, 19 Atl. 618, 620, 45 N. J. Eq. (18 Stew.) 872.

### **SPECIAL TAX.**

Mr. Desty, in his work on Taxation, defines "special taxation" as follows: "Special taxation, as distinguished from taxation for general municipal purposes, is a levy of taxes to meet a special burden, either imposed by the Legislature or authorized by the legal voters of the district to be taxed." 2 Desty, Tax'n, p. 1186. And we believe that the definition might be enlarged, so as to include, not only the tax levied by the Legislature or voted by the voters, but such as by law a municipal corporation might levy. As an instance of the special tax authorized by the voter, we mention the tax to support free schools within a city; and as an instance of that character of taxes which the Legislature might authorize without such vote, we would suggest that the Legislature might empower a city to levy a tax, not to

exceed a certain sum, for streets and other public purposes. *Higgins v. Bordages*, 31 S. W. 52, 54, 88 Tex. 458, 53 Am. St. Rep. 770.

There is a marked difference between general taxation and special assessments for local objects, and the word "tax" may be used in a contract or statute so as not to embrace within its meaning local or special taxes, although both kinds of taxation derive their authority from the general taxing power. *Newby v. Platte County*, 25 Mo. 258, 269; *Farrar v. City of St. Louis*, 80 Mo. 379, 389.

A special tax, within the meaning of Laws 1881, c. 3313, providing that it should be unlawful for any city or town to impose a special tax without due notice, is for a sum not embraced in the usual annual expenses and incurred by the city under its general powers, the purpose of the Legislature being to require the city to keep people informed in the matter of the imposition of taxes to pay particular expenses not belonging to the usual annual budget of the city; and a sum necessary to pay interest and principal of bonds authorized by the Legislature, both of which are ascertainable by reference to the municipal record, is not a special tax, within the statute. *Sullivan v. Walton*, 20 Fla. 552, 555.

### **Assessment for local improvements.**

Special taxation is based upon the supposed benefit to the contiguous property, and differs from special assessments only in the matter of ascertaining the benefits. In the case of special taxation the imposition of the tax by the corporate authorities is of itself a determination that the benefits to the contiguous property will be as great as the burden of the expense of the improvement, and that such benefits will be so nearly limited or confined in their effect to contiguous property that no serious injustice will be done by imposing the whole expense upon such property. *Illinois Cent. R. Co. v. City of Decatur*, 13 Sup. Ct. 293, 297, 147 U. S. 190, 37 L. Ed. 132.

Special taxation means the same as special assessment, and in general is used to indicate impositions of assessments made on property in cities to pay for city improvements according to the extent of the value of the property by reason of the improvement. Special taxation differs from general taxation in this: that special taxation can only be imposed to the extent of the special benefits received, while the benefits which the taxpayer receives in return for general taxation are simply the enforcement of the laws, protection to life and property, and such other benefits as he shares with the public at large. The principle, however, which underlies special taxation, is that the value of the property is enhanced to an

amount at least equal to the assessment. *City of Beatrice v. Brethren Church*, 59 N. W. 932, 934, 41 Neb. 358.

The term "special tax," as employed in *Laws 1897*, p. 162, § 58, declaring that no tax, except a special tax, shall be extended on the tax rolls until the property valuations are equalized by the State Board of Equalization, applies to such taxes as are levied in the same manner as general taxes, such as school and road taxes, and does not refer to or include assessments for municipal improvements. *McMillan v. City of Tacoma*, 67 Pac. 68, 26 Wash. 358.

The Supreme Court has definitely held that the term "special taxes," as used in *Const. art. 10, § 11*, relating to municipal taxation, and providing that the restriction as to the rate of tax shall apply to both general and special taxes, does not include special assessments for street improvements, though the ruling concedes that those assessments are sustainable only as an exercise of the taxing power. *Lamar Water & Electric Light Co. v. City of Lamar*, 31 S. W. 756, 759, 123 Mo. 188, 32 L. R. A. 157.

The term "special tax" has been, or can be and frequently has been, used with propriety to include an assessment for the reconstruction of a street. A covenant to pay "all taxes, general and special," assessed against certain property, *prima facie* includes an assessment levied on the property to pay for the reconstruction of an adjoining street. *Thomas v. Hooker-Colville Steam Pump Co.*, 22 Mo. App. 8, 10, 11.

#### SPECIAL TERM.

A special term is a separate, independent term. *In re Dossett*, 37 Pac. 1066, 1073, 2 Okl. 369.

A special term of court is a term appointed by the presiding officer or officers, held at an unusual time, for the transaction of particular business. *Wightman v. Karsner*, 20 Ala. 446, 451.

*Rev. St. 1889*, p. 2147, § 14, states that a special term is when only one judge presides, and is for the trial of causes and for the transaction of all other business not specified in the next preceding section. *State ex rel. McCaffery v. Eggers*, 54 S. W. 498, 499, 152 Mo. 485.

Under the Constitution, declaring that there shall be four justices of the Supreme Court in each district, that the general terms of said court may be holden by any three or more justices, and that special terms and circuit courts may be holden by any one or more of said justices, as the entire jurisdiction of the court may be exercised at the general term by three or more judges, it follows that the authority, subordinate in

some respects, must be administered at the special term, or there is no difference between them. The words "general" and "special" import this distinction: The meaning of "general" is that which comprehends all; the whole. "Special" means something designed for a particular purpose. Applied to jurisdiction, they indicate the difference between a legal authority extending to the whole of a particular subject and one limited to a part, and, when applied to the terms of the court, the occasions upon which these powers can be respectively exercised. *Gracie v. Freeland*, 1 N. Y. (1 Comst.) 228, 232.

#### SPECIAL TICKET.

*Act March 9, 1875, § 8*, declaring that the provisions of the act regulating the issuing and taking up of railroad tickets should not apply to "special, half-fare, or excursion tickets," applies to all special tickets, whether they are half-fare or excursion tickets, or special in any other respect. *State v. Fry*, 81 Ind. 7, 9.

#### SPECIAL TRAVERSE.

A special traverse is a mode of spreading upon the record, and submitting to the judgment of the court, a defense, consisting sometimes of new matter not appearing by the preceding pleading, which operates as an indirect denial of some fact or facts on which the case made by some preceding pleading depends; and although the matter pleaded by way of inducement does not directly answer the preceding pleading, for which purpose the *absque hoc* clause is necessary to form the perfect issue, yet it is a fundamental rule that the inducement should be such as in itself amounts to sufficient answer in substance to the last pleading. *Allen v. Stevens*, 29 N. J. Law (5 Dutch.) 509, 513.

A "special traverse" is defined by *Gould*, Pl. 377, § 4, as "one preceded by introductory, affirmative matter called the inducement to the traverse." He also says that "a special traverse begins with the words 'absque hoc' or 'et non.' A special traverse cannot be created to stand by itself. It depends on the affirmative connected with it. A defendant in replevin may plead property in himself, or in himself and plaintiff, or in himself and others, or in himself, plaintiff, and others, or in other persons; but in either case he must specially traverse by 'et non' or 'absque hoc' that the property belongs to plaintiff," etc. *Chambers v. Hunt*, 18 N. J. Law (3 Har.) 339, 352.

*In People v. Pullman's Car Co.*, 175 Ill. 125, 51 N. E. 664, 64 L. R. A. 360, the court said: "The design of a special traverse, as distinguished from common traverse, is to explain or qualify the denial. The essential parts of such plea are the inducement, the

denial, and the verification. The issuable part of the plea is the denial, which is under the *absque hoc*; and, when the denial under the *absque hoc* is sufficient, no issue of fact can be formed upon the inducement." *People v. Central Union Tel. Co.*, 61 N. E. 428, 430, 192 Ill. 307, 85 Am. St. Rep. 338.

### SPECIAL TRUST.

A special trust arises where special and particular duties are pointed out to be performed by the trustee. In such cases he is not a mere passive agent, but he has active duties to perform, as when an estate is given to a person to sell and from the proceeds to pay the debts of the settlor. *Freer v. Lake*, 4 N. E. 512, 514, 115 Ill. 662; *Cone v. Dunham*, 20 Atl. 311, 313, 59 Conn. 145, 8 L. R. A. 647.

"A special trust is where the conveyance to the trustee is to answer some immediate and particular purpose, as where a trustee is interposed for the execution of some purpose, particularly pointed out, and the trustee is bound to exert himself in the execution of the settlor's intention." *Lewin, Trusts*. "It is an obligation upon a person, arising out of the confidence imposed in him, to apply property faithfully and according to such confidence." *Willis, Trustees*. *Flagg v. Ely* (N. Y.) 1 Edm. Sel. Cas. 206, 209, 4 N. Y. Leg. Obs. 100, 101.

A simple trust is where property is vested in one person upon trust for another, and the nature of the trust, not being prescribed by the settlor, is left to the construction of the law. In this case the *cestui que trust* has *jus habendi*, or the right to be put in actual possession of the property, and *jus disponendi*, or the right to call upon the trustee to execute conveyances of the legal estate as the *cestui que trust* directs. The special trust is where the machinery of a trustee is introduced for the execution of some purpose, particularly pointed out, and the trustee is not, as before, a mere passive depository of the estate, but is called upon to exert himself actively in the execution of the settlor's intention, as where a conveyance is to trustees upon trust to sell for payment of debts. *Perkins v. Brinkley*, 45 S. E. 541, 542, 133 N. C. 154.

Trusts are simple and special. In the one the trustee is passive, performing no duty, and the trust is merely technical. In the other, he is active, executing the donor's will, and the trust is operative. A simple trust gives to the *cestui que trust* the right to the possession and disposal of the property, and the legal estate becomes executed in him, unless when it is necessary to remain in the trustee to preserve the estate for the *cestui que trust* or pass it to others. A special trust maintains the legal estate in the trustee

to perform the duties imposed by the donor, and the *cestui que trust* has but a right in equity to enforce the performance. *Dodson v. Ball*, 60 Pa. (10 P. F. Smith) 492, 496, 100 Am. Dec. 586.

### SPECIAL VENIRE.

A special venire is a writ issued by order of the court for any number of persons, not less than 36, in the discretion of the court, to serve as a jury in a particular case. Code Cr. Proc. art. 605; *Hall v. State*, 12 S. W. 739, 740, 28 Tex. App. 146.

A special venire is a writ issued by order of the district court, in a capital case, commanding the sheriff to summon such a number of persons, not less than 36, as the court in its discretion may order, to appear before the court on a day named in the writ, from whom the jury for the trial of such case is to be selected. Code Cr. Proc. Tex. 1895, art. 642.

### SPECIAL VERDICT.

A special verdict is defined by statute as that by which the jury find the facts only, leaving the judgment to the court. *Davis v. Chicago, M. & St. P. Ry. Co.*, 67 N. W. 16, 19, 93 Wis. 470, 33 L. R. A. 654, 57 Am. St. Rep. 935; *Bigelow v. Danielson*, 78 N. W. 599, 601, 102 Wis. 470; *People v. McClure*, 42 N. E. 523, 524, 148 N. Y. 95; *People v. Board of Police* (N. Y.) 14 Abb. Prac. 151, 155; *Sparrowhawk v. Sparrowhawk* (N. Y.) 11 Hun, 528, 530; *Shipp v. Snyder*, 25 S. W. 900, 901, 121 Mo. 155; *Robinson & Co. v. Berkey*, 69 N. W. 434, 436, 100 Iowa, 136, 62 Am. St. Rep. 549; *In re Keithley's Estate*, 68 Pac. 5, 134 Cal. 9; *Montgomery v. Sayre* (Cal.) 25 Pac. 552, 554; *Egan v. Estrada* (Ariz.) 56 Pac. 721, 722; *Conner v. Citizens' St. Ry. Co.*, 105 Ind. 62, 65, 4 N. E. 441, 55 Am. Rep. 177; *Maxwell v. Wright*, 67 N. E. 267, 160 Ind. 515; *Pittsburgh, C. & St. L. Ry. Co. v. Spencer*, 98 Ind. 186, 188.

A special verdict is defined by Gen. St. p. 684 (Code Civ. Proc. § 285), to be that "by which the jury finds facts only." It must present the facts as established by the evidence, and not the evidence to prove them. The facts to be found in a special verdict are the issuable facts presented by the pleadings, and there is no need of greater minuteness in the verdict than in the pleadings. *First Nat. Bank of Sturgis v. Peck*, 8 Kan. 660, 666.

A special verdict is that by which the jury find the facts only, leaving the judgment to the court. Ann. Codes & St. Or. 1901, § 152; *Ballinger's Ann. Codes & St. Wash.* 1897, § 5019; Code Civ. Proc. S. C. § 282; Code Civ. Proc. Cal. 1903, § 624; Code Civ. Proc. N. Y. 1899, § 1186.

A special verdict must present the facts as established by the evidence, and not the evidence to prove them, and they must be so presented as that nothing remains to the court but to draw conclusions of law. *Little Rock & Ft. S. Ry. v. Miles*, 40 Ark. 298, 326, 48 Am. Rep. 10; *Pen. Code Cal.* 1903, § 1152; *Rev. Codes N. D.* 1899, § 5444; *Code Civ. Proc. S. D.* 1903, § 270; *Cr. Code N. Y.* 1903, § 438; *Bates' Ann. St. Ohio* 1904, § 5200; *Rev. St. Utah* 1898, § 3162; *Code Cr. Proc. S. D.* 1903, § 402; *Ann. Codes & St. Or.* 1901, § 1414; *Rev. St. Okl.* 1903, § 4472.

A special verdict finds all the facts which are requisite to enable the court to say, upon the pleadings and verdict, which party is by law entitled to judgment without reference to the evidence. *Eisemann v. Swan*, 19 N. Y. Super. Ct. (6 Bosw.) 668, 671.

A special verdict is where the jury find the facts particularly, and then submit to the court the questions of law arising on them. *Day v. Webb*, 28 Conn. 140, 144.

A special verdict is where the jury find the facts of a case, leaving the ultimate decision of the case upon those facts to the court, concluding conditionally that if, upon the whole matter thus found, the court should be of opinion that the plaintiff has a good cause of action, they then find for plaintiff, and assess his damages; if otherwise, then for the defendant. This proceeding is entirely anomalous. It is unknown and unrecognized by the common law, or by practice under the statute of Westminster II (St. 13 Edw. I, c. 30), which in fact originated the special verdict as it now exists. There also exists another species of special verdict, as where the jury return a general verdict for plaintiff, subject, nevertheless, to the opinion of the court on a special case stated by counsel on both sides as a matter of law. 8 Bl. Comm. 378. But this proceeding has gone out of practice, and perhaps never existed in Pennsylvania. *Wallingford v. Dunlap*, 14 Pa. (2 Harris) 31, 32.

A special verdict is defined by Blackstone to be one where the jury state the naked facts as they find them to be proved, and pray the advice of the court thereon, concluding conditionally—that is, if upon the whole matter the court should be of the opinion that the plaintiff had cause of action, then they find for the plaintiff; if otherwise, for the defendant. It is well settled beyond a question that a verdict of guilty, without specifying any offense, is general and sufficient. *Statler v. United States*, 15 Sup. Ct. 616, 617, 157 U. S. 277, 39 L. Ed. 700.

A "special verdict" is one by which the facts of the case are put on the record and the law is submitted to the judges, and the judgment is but the conclusion of the law upon the facts thus found. *Sweigard v. Wilson*, 106 Pa. 207, 213.

A "special verdict" is a finding upon the material issues of fact raised by the pleadings. The object of a special verdict is solely to obtain a decision of the issues of fact raised by the pleadings, not to decide disputes between witnesses as to minor facts, even if such minor facts are essential to establish, by inference or otherwise, the main fact. *Baxter v. Chicago & N. W. R. Co.*, 80 N. W. 644, 646, 104 Wis. 307.

A special verdict professes to find all the material facts which have been proved to the satisfaction of the jury, and concludes that if upon the facts so found the court should be of opinion that the defendant is in law guilty then the jury should find him guilty, but if upon the facts thus found the court should be of opinion that the defendant is not in law guilty then they find him not guilty. A verdict finding some only of many facts necessary to constitute the offense, without negating the residue, is not a special verdict. *United States v. Watkins* (U. S.) 28 Fed. Cas. 419, 480.

A special verdict is when the jury finds the facts, leaving the ultimate decision of the cause upon those facts to the court, concluding conditionally that if, upon the whole matter thus found, the court should be of the opinion that the plaintiff has a good cause of action, they then find for the plaintiff, and assess his damages; if otherwise, they then find for the defendant. Nothing is better settled, on principle as well as authority, than that all the facts upon which the court is to pronounce judgment should be incorporated in the special verdict. It is the exclusive province of the jury in the first place to determine all disputed questions of fact, together with such undisputed facts as may be necessary to a just decision of the cause. If important undisputed facts are omitted by mistake from the special verdict, or incorrectly recited therein, the court may, upon full proof thereof, so amend and mold the verdict as to make it conform to the undisputed facts. This should be done when the verdict is rendered, or as soon as practicable thereafter. The court, in considering a special verdict and entering the judgment thereon, is necessarily confined to the facts found and embodied in the verdict. *McCormick v. Royal Ins. Co.*, 29 Atl. 747, 748, 163 Pa. 184.

The facts involved in the finding of a special verdict are divided into two classes, evidentiary facts and inferential facts, and it is the duty of the jury to consider the evidentiary facts and to find the inferential. *Louisville, N. A. & C. Ry. Co. v. Miller*, 37 N. E. 343, 348, 141 Ind. 533.

A special verdict must contain the conclusions of fact as established by the evidence to the satisfaction of the jury, and not the evidence to prove them. *People v. McClure*, 42 N. E. 523, 524, 148 N. Y. 95.

Under Code, § 408, defining a general verdict as that by which the jury pronounced generally upon all or any of the issues, either in favor of the plaintiff or defendant, and a special verdict as that by which the jury found the facts, only leaving the judgment to the court, simple responses of "Yes" or "No" to issues submitted constitute general, not special, verdicts, and in case of inconsistency between such responses the rule which requires a special verdict to prevail over a general one has no application. *Porter v. Western N. C. R. Co.*, 97 N. C. 63, 71, 2 S. E. 580.

#### **Finding in answer to interrogatories distinguished.**

There is a manifest difference between a special verdict and the finding of the facts in answer to interrogatories propounded to the jury. A special verdict is in lieu of a general verdict, and its design is to exhibit all the legitimate facts and leave the legal conclusions entirely to the court. Findings of fact in answer to interrogatories do not dispense with the general verdict. A special verdict covers all the issues in the case, while an answer to a special interrogatory may respond to but a single inquiry pertaining merely to one issue essential to the general verdict. The one method of ascertaining the facts often serves precisely the same purpose as the other. The advantage of special interrogatories is that the parties are not deprived of the benefit of the general verdict and that the ultimate facts need not be called for. The design of special interrogatories is to point out the controlling questions in the case, exact for them separate consideration, and thereby guard against misapprehension of what are the vital issues to be determined. When the answers cover all the ultimate facts, these furnish a full explanation of the general verdict and a safe test of its accuracy. Their use, however, should never be perverted to the purpose of confusing and misleading jurors, nor to that of merely satisfying the curiosity of the parties. *Morby v. Chicago N. W. R. Co.*, 89 N. W. 105, 107, 116 Iowa, 84.

Answers to special questions not disposed of by the issues in a case do not thereafter constitute a special verdict. *Montgomery v. Sayre* (Cal.) 25 Pac. 552, 554.

#### **Separate findings.**

Separate findings on separate causes of action are not special, but general, verdicts. *Robinson & Co. v. Berkey*, 69 N. W. 434, 436, 100 Iowa, 136, 62 Am. St. Rep. 549.

#### **SPECIAL WARRANTY.**

It is provided by Code, c. 72, § 14, that a covenant by which any grantor shall warrant specially the property hereby conveyed shall

have the same effect as if the grantor had covenanted that he, his heirs and personal representatives, will forever warrant and defend the said property unto the grantee, his heirs, personal representatives, and assigns, against the claims and demands of the grantor and all persons claiming or to claim by, through, or under him. *Isner v. Kelley*, 41 S. E. 158, 160, 51 W. Va. 82.

#### **SPECIALIST.**

"Specialist" is defined in the Standard Dictionary to mean more especially a physician or surgeon who applies himself to the study of some particular branch of his profession. Whether a physician is a specialist or not is not a question of law, but one of fact, primarily for his own determination. But, when he holds himself out as a specialist, it becomes his duty to use that degree of skill which such a practitioner of necessity should possess. *Baker v. Hancock*, 64 N. E. 38, 29 Ind. App. 456.

#### **SPECIALLY.**

"Specially," as used in a statute providing that animals specially imported for breeding purposes shall be admitted free, is defined to mean "particular," and applies to and qualifies the words "for breeding purposes," and not the word "imported." *United States v. One Hundred and Ninety-Six Mares* (U. S.) 29 Fed. 139, 140.

#### **SPECIALLY AUTHORIZED.**

"Specially authorized," as used in St. 1875, c. 99, § 11, providing that the mayor and aldermen of a city, or any police officer or constable specially authorized by them, may enter on the premises of any person licensed to sell liquors to ascertain the manner in which such person conducts his business, merely denotes the authority to be derived from the order of the mayor and aldermen, as distinguished from the powers vested in police officers and constables by virtue of their offices under the general laws, and does not require every order of the mayor and aldermen authorizing such an entry to state the names of the officers and to designate the particular buildings which are to be searched. *Commonwealth v. Ducey*, 126 Mass. 269, 273.

#### **SPECIALLY DISPOSED OF.**

Testator by a residuary clause of his will gave to his wife and certain children, to be taken by them, share and share alike, all the rest and residue of his property which had not been specially disposed of. It was contended that the words "specially disposed of" in such clause excluded property subsequently acquired, but it was held that the words should be construed according to their

ordinary acceptance, as showing an intention of the testator to dispose of all his estate, real and personal, which had not been bequeathed or devised by a previous clause in the will, which construction gave to the widow an estate for life or widowhood in the testator's after-acquired property. *Roberts v. Roberts*, 29 N. E. 886, 887, 140 Ill. 345.

### SPECIALLY SET UP.

The words "specially set up or claimed," as used in Rev. St. § 709 [U. S. Comp. St. 1901, p. 575], giving the right of appeal to the Supreme Court of the United States from the state courts, where rights under the federal Constitution or laws were specially set up or claimed, implies that if a party intends to invoke for the protection of his rights the Constitution, or some treaty, statute, commission, or authority, he must so declare, and unless he does so declare specially—that is, unmistakably—the Supreme Court is without authority to re-examine the final judgment of the state court. *Oxley Stave Co. v. Butler County*, 17 Sup. Ct. 709, 711, 116 U. S. 648, 41 L. Ed. 1149 (cited in *Union Mut. Life Ins. Co. v. Kirchoff*, 18 Sup. Ct. 260, 262, 169 U. S. 103, 42 L. Ed. 677).

A federal right is "specially set up or claimed" in a state court, within Rev. St. § 709, so as to confer jurisdiction on the Supreme Court of the United States on a writ of error, where a claim sufficiently appears in a motion for new trial and in the assignments of error before the Supreme Court of the state. *San José Land & Water Co. v. San José Ranch Co.*, 23 Sup. Ct. 487, 489, 189 U. S. 177, 47 L. Ed. 765 (citing *Murdock v. Memphis*, 87 U. S. [20 Wall.] 590, 633, 22 L. Ed. 429, 443; *Gross v. United States Mortg. Co.*, 108 U. S. 477, 2 Sup. Ct. 940, 27 L. Ed. 795; *Fire Ass'n of Philadelphia v. New York*, 119 U. S. 110, 115, 7 Sup. Ct. 108, 30 L. Ed. 342, 345; *Egan v. Hart*, 165 U. S. 188, 17 Sup. Ct. 300, 41 L. Ed. 680; *Sayward v. Denny*, 158 U. S. 180, 184, 15 Sup. Ct. 777, 39 L. Ed. 941, 942; *Mallett v. North Carolina*, 181 U. S. 589, 21 Sup. Ct. 730, 45 L. Ed. 1015).

### SPECIALTY.

See "Debt by Specialty."

Under the common-law rule a seal made the instrument a specialty, and removed it from that class of writings known as "simple contracts." *J. B. Streeter Co. v. Janu*, 96 N. W. 1128, 1129, 90 Minn. 393.

A specialty is a sealed instrument. *Beekman v. Hamlin*, 24 Pac. 195, 196, 19 Or. 383, 10 L. R. A. 454, 20 Am. St. Rep. 827.

The word "specialty" is understood to mean a sealed instrument, and it is undoubtedly used in that sense in Comp. St. p. 379,

limiting actions on specialty to eight years. *Brainerd v. Stewart*, 33 Vt. 402, 404.

A specialty is a writing under the hand and seal of a party. *Hainon v. Hainon*, 55 Vt. 321, 322.

Debts by specialty are such whereby a sum of money becomes or is acknowledged to be due by an instrument under seal. *Lane v. Morris*, 10 Ga. 162, 167 (citing 2 Bl. Comm. 382); *January v. Goodman* (U. S.) 1 Dall. 208, 1 L. Ed. 103; *Kimball v. Whitney*, 15 Ind. 280, 282.

Bouvier says a specialty is "a writing sealed and delivered." *Brainerd v. Stewart*, 33 Vt. 402, 404.

Tomlins, in his Law Dictionary, defines a specialty as "a writing or deed under the hand and seal of the parties," and says these are looked on as the next class of deeds after those of record, being confirmed by special evidence under seal. *Brainerd v. Stewart*, 33 Vt. 402, 404.

Parsons, in his work on Contracts, speaks of specialties as "contracts under seal." *Brainerd v. Stewart*, 33 Vt. 402, 404.

A specialty is defined by Littleton to be a bond, bill, or such like instrument, writing, or deed, under the hand and seal of the parties. *Broughton v. Badgett*, 1 Ga. (1 Kelly) 75, 77.

A specialty includes contracts under seal and obligations of record. It is the sale or record which constitutes a specialty. *Doyle v. West*, 54 N. E. 469, 470, 60 Ohio St. 438.

Sealing and delivering is the criterion of a specialty. The writing must be actually sealed, and although in the body of the writing it is said that the parties have "set their hands and seals," yet it is not a specialty unless it be actually sealed and delivered; but if a paper be actually sealed and delivered, it is a specialty, though no mention of it be made in the body of the writing. The fact, and not the assertion, fixes the nature of the instrument. *Taylor v. Glaser* (Pa.) 2 Serg. & R. 502, 503.

The word "specialty," as used in the statutes of limitation of Virginia providing that all actions of debt grounded upon any lending or contract, without specialty, shall be commenced and sued within five years and not after, is a term of art with a well-known common-law meaning, and does not include a contract which is not sealed. *Bank of United States v. Donnelly*, 33 U. S. (8 Pet.) 361, 371, 8 L. Ed. 974.

A specialty is a contract executed with the solemnity of sealing and delivery, and is emphatically still a deed. In contemplation of law it possesses the attributes of dignity and verity in a pre-eminent degree. None

but debt or covenant will lie upon it. It constitutes the basis of the action, without reference to the consideration, and defendant cannot deny the debt or demand without denying the deed which creates it. *Helm v. Eastland*, 5 Ky. (2 Bibb) 193, 194.

"Specialty" is a word which in its technical signification imports an instrument under seal for the payment of money. The term, it is true, is sometimes employed in a loose way of being invested with a more extensive meaning; but, when precision is important, the term is used with the limited force just assigned to it. *Elasser v. Haines*, 18 Atl. 1095, 1100, 52 N. J. Law (23 Vroom) 10.

A specialty is defined to be a writing, sealed and delivered, which is given as a security for the payment of a debt, in which such debt is particularly specified; and although in the body of the writing it is said that the parties have set their hands and seals, yet if the instrument be really sealed, it is a specialty, and if it be not sealed it is not a specialty, though the parties in the body of the writing make mention of a seal. The term has long been used in England and America as embracing debts on recognizances, judgments, and decrees, and in England certainly debts upon statute; but there is no case holding that a note secured by a mortgage is a specialty. *Seymour v. Street*, 5 Neb. 85, 87.

An instrument by which the defendant promises and obligates himself and his heirs to pay to the plaintiff and his assigns, concluding with the words, "as witness my hand and seal," and actually sealed, is a specialty. *January v. Goodman* (U. S.) 1 Dall. 208, 1 L. Ed. 103.

"Specialty or simple contract," within the meaning of Code Civ. Proc. § 1843, providing that the heirs of an intestate and the heirs and devisees of a testator are respectively liable for the debts of the decedent arising by simple contract or by specialty, to the extent of the estate, interest, and right in the real property which descended to them from, or was effectually devised to them by, the decedent, comprises every kind of contractual obligation, and therefore a sole devisee is liable for indebtedness of a fixed amount arising and invested by the testator as agent. *De Crano v. Moore*, 64 N. Y. Supp. 3, 6, 50 App. Div. 361.

A specialty is a contract under seal, and is considered by the law as entered into with more solemnity, and consequently of higher dignity, than ordinary simple contracts. Civ. Code Ga. 1895, § 3634.

#### As branch of a profession.

A specialty is one branch of a profession; for example, dentistry is a specialty of

the medical profession. In *re Hunter*, 60 N. C. 372, 374.

#### Judgment.

The term "specialty," as used in the statute of limitations, does not embrace a judgment. *Kimball v. Whitney*, 15 Ind. 280, 282; *Burnes v. Simpson*, 9 Kan. 658, 665.

The transcript of a judgment is to be regarded as a specialty, within the statute of limitations. *Stockwell v. Coleman*, 10 Ohio St. 33, 41.

The word "specialty," as used in the statutes of Ohio, limiting the time for the bringing of an action upon a specialty, includes a judgment of the court of a sister state. *Randolph v. King* (U. S.) 20 Fed. Cas. 260, 261.

A judgment of a court is not a "specialty," within the meaning of that term as used in the statute of limitations, which provides that actions upon the case, covenant, and debt founded upon a specialty, or any agreement, contract, or promise in writing, must be commenced within 15 years. *Tyler's Ex'rs v. Wiuslow*, 15 Ohio St. 364, 366.

The word "specialty," as used in the limitation laws of Nebraska, does not include a domestic judgment. *David v. Porter*, 1 N. W. 528, 530, 51 Iowa, 254.

A judgment for damages estimated in money is sometimes called by text writers a "specialty" or contract of record, because it establishes a legal obligation to pay the amount recovered, and by a fiction of law a promise to pay is implied where such legal obligation exists. It is on this principle that an action *ex contractu* will lie on a judgment. But this fiction cannot convert a transaction wanting the assent of the parties into one which necessarily implies it. Judgments for torts are usually the results of violent contests, and, as observed by the court below, are imposed on the losing party by a higher authority against his will or protest. *Louisiana v. New Orleans*, 109 U. S. 285, 3 Sup. Ct. 211, 27 L. Ed. 936. A liability for tort created by statute, although reduced to a judgment by a recovery of the damages suffered, did not thereby become a contract, in the sense of the Constitution of the United States. *Livingston v. Livingston*, 66 N. E. 123, 127, 173 N. Y. 377, 61 L. R. A. 800, 93 Am. St. Rep. 600.

#### SPECIALTY BY CONTRACT.

"Specialty by contract" means some right or cause of action given by statute which does not exist at common law. In such cases the nature or cause of action does not depend in any degree upon any contract relation. There is no original obligation whatever created by the act of the parties.



Wardle v. Hudson, 96 Mich. 482, 485, 55 N. W. 992

## SPECIE

"Specie," as used in an instrument payable in specie, means that the designated number of dollars should be paid in so many gold or silver dollars of the coinage of the United States. *Treblcock v. Wilson*, 79 U. S. (12 Wall.) 687, 695; *Belford v. Woodward*, 41 N. E. 1097, 1099, 158 Ill. 122, 29 L. R. A. 593.

"Specie" may well be understood to mean such coin as constitutes a legal tender. *Bryant v. Damariscotta Bank*, 18 Me. (6 Shep.) 240, 244.

The word "specie" means gold or silver. *Miller v. Lacy*, 33 Tex. 351, 353. According to commercial usage, the standard of our language, and in the popular acceptance thereof, the term means gold and silver. *Webb v. Moore*, 20 Ky. (4 T. B. Mon.) 483.

"Specie" means metallic money issued by public authority, and is generally used in contradistinction to paper money. *Walkup v. Houston*, 65 N. C. 501, 502.

The word "specie" means gold and silver, solid coin, etc.; that is, money which has an intrinsic value. *Hartley's Lessee v. McNulty* (Pa.) 4 Yeates, 95, 96.

Specie is a coin of the precious metals of a certain weight and fineness, with government's stamp thereon denoting its value as a medium of exchange or currency. *Henry v. Bank of Salina* (N. Y.) 5 Hill, 523, 536.

"Specie," as used in a note payable in specie, made after the passage of the legal tender acts, should be construed to be payable in dollars only, and not to be payable for so many dollars in gold and silver coin. *Glover v. Robbins*, 49 Ala. 219, 221, 20 Am. Rep. 272.

### Marine insurance.

The principal meaning of the word "specie" has been said by Mr. Parsons (2 Pars. Marine Law, 381), in commenting on the rule that there is not a total loss of a cargo insured if a portion of the insured articles exist "in specie," to be appearance, and therefore there is not a total loss if a portion of the articles insured retain their appearance. *Wallerstein v. Columbian Ins. Co.*, 26 N. Y. Super. Ct. (3 Rob.) 528, 538.

## SPECIE VALUE.

"Specie value," as used in a contract with the state to print the laws, etc., for so much in state paper at its specie value when the same shall become due and payable, means the market or current value of the

paper, and not an arbitrary valuation fixed by the officers of the state. *Blackwell v. Auditor of Public Accounts*, 1 Ill. (Breese) 196.

## SPECIES.

Act 1869, making it unlawful for the owner of "domestic animals of the species bull" to allow them to run at large, means bulls of all kinds and descriptions, without reference to size, age, or quality; but it does not embrace cows, heifers, or steers. The word "species" implies individuals of the same kind and all of the individuals having the same characteristics. *Oll v. Rowley*, 69 Ill. 469, 472.

## SPECIFIC.

The words "generic" and "specific" are relative words. A name, which is said by comparison with some other name to be specific, is so said because the definition given of the name alleged to be specific limits the subject under consideration more or further than the definition which is assigned to that name which is called generic. *Curie v. Beard* (U. S.) 44 Fed. 551, 553.

"Specific" is defined to mean "tending to specify or make particular, definite, limited, or precise, as a specific statement. *Peter v. Banta* (Ind.) 23 N. E. 84, 85.

The word "specifically," as defined by the lexicographers, is equivalent to the word "definitely" or "precisely." Under the mechanic's lien law of the District of Columbia, requiring that notices of lien shall "specifically set forth the amount claimed," it is necessary only to set forth the precise amount claimed, but not the items that go to make up that amount. *Emack v. Campbell* (U. S.) 14 App. Cas. 186, 190.

"Specific" means the very opposite of the word "general," and in an action on replevin to recover the possession of specific property a complaint containing only a general description of the property is insufficient. *Smith v. McCoole*, 46 Pac. 988, 989, 5 Kan. App. 713.

"Specific," as used in a statute requiring grounds of appeal to be set forth in a specific manner, is relative. The purpose of the statute is to notify the adverse party of the grounds of appeal and to enable him to be prepared to meet them at the trial. A statement in an appeal from a decree refusing to admit to probate an instrument purporting to be a will, stating as a ground of appeal that the instrument is the last will and testament of the deceased, is specific. *Liscomb v. Eldredge*, 88 Atl. 1052, 1053, 20 R. I. 335.

**In medicine.**

"A specific in medicine," says Dmgllson, "is a substance to which is attributed the property of removing directly one disease, rather than any other." *Humphrey's Specific Homeopathic Medicine Co. v. Wens* (U. S.) 14 Fed. 250, 253.

**SPECIFIC APPROPRIATION.**

"Specific appropriation," as used in Const. art. 3, § 22, declaring that no money shall be drawn from the treasury, except in pursuance of a specific appropriation made by law, means a particular, a definite, a limited, and a precise appropriation. *State v. Wallilchs*, 11 N. W. 860, 861, 12 Neb. 407; *Id.*, 21 N. W. 389, 397, 16 Neb. 679; *Id.*, 15 Neb. 609, 610, 20 N. W. 110.

"Specific appropriation," as used in Pol. Code, art. 6, § 433, subd. 17, providing that the Comptroller of State may draw warrants on the treasury for the payment of money directed by law to be paid out of the treasury, but no warrant must be drawn unless authorized by law upon an unexhausted specific appropriation provided by law to meet the same, means an act by which a named sum of money has been set apart in the treasury and devoted to the payment of a particular claim or demand. *Stratton v. Green*, 45 Cal. 149, 150.

**SPECIFIC ASSIGNMENT OF ERROR.**

That the court erred in rendering judgment is not a "specific assignment" of error, as contemplated by Rev. St. 1894, § 667. *Seisler v. Smith*, 46 N. E. 993, 994, 150 Ind. 88.

Under Rev. St. 1894, § 667, requiring on appeal a specific assignment of all the errors relied on, a specification which invites a discussion, not of a single ruling of the trial court, but of two distinct rulings, is not within the term. *May v. State*, 39 N. E. 701, 702, 140 Ind. 88.

**SPECIFIC DENIAL.**

A specific denial to each allegation of a complaint is a separate denial applicable only to the particular allegation which such denial controverts. *San Francisco Gas Co. v. City of San Francisco*, 9 Cal. 453, 470.

The term "specific denial," as used in Prac. Act Dec. 23, 1867, § 16, providing that an answer under certain circumstances should contain a specific denial, means a denial contradistinguished from a general denial, and a denial under information and belief. *Sands v. Maclay*, 2 Mont. 35, 38.

The word "specific," as used in the Code, § 144, declaring that an answer must con-

tain a specific denial of each material allegation of the complaint controverted by the defendant, requires the answer to distinctly specify the allegations controverted. An answer cannot be controverted, without mentioning by some particular mark of distinction the allegation which it is designed to controvert. An answer denying in terms specifically every material allegation of the complaint, but without particularizing the allegations, is not a specific denial, but in effect a mere general denial, and hence is insufficient under the Code. *Seward v. Miller* (N. Y.) 6 How. Prac. 312.

**SPECIFIC DEPOSIT.**

A "specific deposit" exists where money or property is given to a bank for some specific and particular purpose, as a note for collection, money to pay a particular note, or property for some specific purpose. *Officer v. Officer*, 94 N. W. 947, 948, 120 Iowa, 389, 98 Am. St. Rep. 365.

**SPECIFIC DUTY.**

A duty imposed by laws is specific when a case or state of circumstances exists proper for its discharge. A specific duty may arise in two ways. It may be imposed directly, as when a public officer is directed to execute a particular conveyance to a person by name, or it may arise out of a general duty, as where circumstances have arisen such as were in the contemplation of the law imposing such general duty as the object and occasion of its exercise. *Morton v. Comptroller General*, 4 S. O. (4 Rich.) 430, 473.

**SPECIFIC GRAVITY.**

"Specific gravity" is the ratio of the weight of a body to the weight of an equal volume of some other body taken as the standard or unit. *Louisville Public Warehouse Co. v. Collector of Customs* (U. S.) 49 Fed. 561, 568, 1 C. C. A. 371.

**SPECIFIC LEGACY.**

A "specific legacy" has been defined to be the bequest of a particular thing or money, specified and distinguished from all others of the same kind, as of a horse, a piece of plate, money in a purse, stock in the public funds, a security for money, which would immediately vest with the assent of the executor. *Morris v. Garland's Adm'r*, 78 Va. 215, 222; *Graham v. Graham's Ex'r*, 45 N. O. 291, 297; *Rexford v. Bacon*, 62 N. E. 936, 940, 195 Ill. 70; *In re Woodworth's Estate*, 31 Cal. 595, 601; *Fow's Estate*, 12 Pa. Co. Ct. R. 133, 134; *In re Walker's Estate* (Pa.) 3 Rawle, 229, 237; *Chester County Hospital v. Hayden*, 34 Atl. 877, 878, 83 Md.

104; *Kunkel v. Macgill*, 56 Md. 120, 122; *Tift v. Porter*, 8 N. Y. (4 Seld.) 516, 518; *Langdon v. Astor's Ex'rs*, 10 N. Y. Super. Ct. (3 Duer) 477, 543; *Getman v. McMahon* (N. Y.) 30 Hun, 531, 533; *Scofield v. Adams*, 12 Hun, 366, 369; *Humphrey v. Robinson*, 5 N. Y. Supp. 164, 166, 52 Hun, 200; *Hill v. Harding*, 17 S. W. 199, 201, 92 Ky. 76; *Broadwell v. Broadwell's Adm'r*, 61 Ky. (4 Metc.) 290, 291; *Lilly v. Curry's Ex'r*, 69 Ky. (6 Bush) 590, 592; *Perrine v. Perrine*, 6 N. J. Law (1 Halst.) 133, 140, 10 Am. Dec. 392; *Kelly v. Richardson*, 13 South. 785, 790, 100 Ala. 584; *Gilmer's Legatees v. Gilmer's Ex'rs*, 42 Ala. 9, 16; *Tomlinson v. Bury*, 14 N. E. 137, 140, 145 Mass. 346, 1 Am. St. Rep. 464; *New Albany Trust Co. v. Powell*, 64 N. E. 640, 641, 29 Ind. App. 494; *Adair v. Adair*, 90 N. W. 804, 806, 11 N. D. 175; *Cooch's Ex'r v. Cooch's Adm'r* (Del.) 5 Houst. 540, 566, 1 Am. St. Rep. 161; *In re Ludeam's Estate* (Pa.) 1 Pars. Eq. Cas. 116, 117; *Osborne v. McAlpine* (N. Y.) 4 Redf. Sur. 1, 4; *Pell v. Ball* (S. C.) Speers, Eq. 48, 51, 55.

"A 'specific legacy,' as the term imports, is a gift or bequest of some definite, specific thing—something which is capable of being designated and identified. A clause in a will giving to certain persons 'all moneys or legacies coming to me from any source' does not create a specific legacy." *Dean v. Rounds*, 27 Atl. 515, 18 R. I. 436.

A bequest of a sum of money to be paid out of another sum willed to the wife of testator, which sum is not to be paid from any particular sum, is not a specific legacy. *Adair v. Adair*, 90 N. W. 804, 806, 11 N. D. 175.

It has been said that "specific legacies" are of two kinds: The first is that where a certain chattel is particularly described and distinguished from all others of the same species, as, "I give the diamond ring presented to me by A." This legacy can be satisfied only by the delivery of the identical ring. The second is where a chattel of a certain kind is bequeathed, without any designation of it as an individual chattel, as, "I give a diamond ring." This may be fulfilled by a delivery of anything of the same kind. But this distinction no longer prevails, and the only kind now recognized is that first mentioned. *In re Hadden*, 1 Con. Sur. 306, 308, 9 N. Y. Supp. 453.

A legacy is specific where it is a bequest of a specific part of testator's effects, so distinguished from the rest thereof that upon the consent of the executor the property or the thing bequeathed vests in the legatee; an individual legacy, which cannot be satisfied but by the delivery of the identical subject. *Everitt v. Lane*, 37 N. C. 548, 551.

A specific legacy is a gift of a specific part of the testator's estate, identified and distinguished from all other things of the

same kind, and which could only be satisfied by the delivery of the particular thing. The gift is specific, if the specific things are so enumerated as to distinguish them from the residue. It is no longer necessary that it should be shown by express words. It may be implied from the whole will, taken together. *Dauel v. Arnold*, 66 N. E. 846, 850, 201 Ill. 570.

A "specific legacy," as the term imports, is a gift or bequest of some definite, specific thing, something which is capable of being designated and identified. *Dean v. Rounds*, 18 R. I. 436, 27 Atl. 515, 28 Atl. 802. Gifts of stated sums of money, without specifying any distinctive money, in contradistinction to any other money of like amount, are not specific legacies, but are general pecuniary legacies. *In re Martin* (R. I.) 54 Atl. 589, 594.

A legacy is specific when it can be satisfied only by the transfer or delivery of some particular portion of or article belonging to the estate, which the testator intended should be transferred to the legatee in specie. *Roquet v. Eldridge*, 20 N. E. 733, 734, 118 Ind. 147.

"A legacy is specific when the thing bequeathed is personal property specified and so designated that that particular thing, and no other in its stead, must pass to the legatee." *Starbuck v. Starbuck*, 93 N. C. 183, 185.

A legacy is specific when it is the intention of the testator that the legacy should be the very thing bequeathed, and not merely a corresponding amount in value. *Wallace v. Wallace*, 23 N. H. (3 Fost.) 149, 154.

A specific legacy is a gift of a severed or distinguished part of a testator's estate. *Theobald, Wills*, 104. It is the bequest of a particular thing or money, specified and distinguished from all others of the same kind. *Roper, Leg.* 192. A gift of all the money in a bag, all the money in a purse, or all the money in a bank, would be a specific legacy, and a bequest of all uninvested moneys in a bank, or in the hands of agents, or in the personal custody of the testator at the time of his decease, is specific. *In re Fow's Estate*, 1 Pa. Dist. R. 483.

A bequest of money, afterwards described by the testator as property "specifically disposed of," is a "specific legacy." *Witherspoon v. Watts*, 18 S. C. 396, 424.

A specific legacy ordinarily entitles the legatee to income, profits, or proceeds of the article on the death of the testator, because such legacies are considered separate from the general estate, and appropriated from the time of the death of the testator. *Wethered v. Safe Deposit & Trust Co.*, 28 Atl. 812, 813, 79 Md. 153.

A designation of a general legacy as a specific one in a residuary clause of a will will not change its character, where the term "specific" is evidently used by the testator with reference to the fact that it was a legacy of a specified sum of money. *Parker's Ex'rs v. Moore*, 25 N. J. Eq. (10 C. E. Green) 228, 233.

"Specific," as used in Rev. St. c. 65, § 31, authorizing the legatee of a specific legacy to recover the same in a suit at law, means definite, special, or particular. *Holt v. Libby*, 14 Atl. 201, 202, 80 Me. 329.

A bequest by an iron manufacturer to his children of certain amounts of iron and iron castings, when at the time of his death he did not own a quantity of iron and iron castings sufficient to pay all such legacies, and he did not specify any particular iron or iron castings, or say "my iron and castings," was held not to be a specific legacy, but to partake of the nature of both a general and a specific legacy. *Graham v. Graham's Ex'r*, 45 N. C. 291, 297.

To make a legacy specific the will must mark out some identical thing given, as a house or other individual thing, or, if it be of stock, it may be described as "my stock," etc., or "stock standing in my name." If it be of money, it may be identified as money in a certain bank; but a bequest of a specified amount of some particular kind of stock is not specific. So a bequest of a specified amount of gold and silver, to be kept on investment by a trustee, is not a specific legacy, but is a pecuniary legacy. *Mathis v. Mathis*, 18 N. J. Law (3 Har.) 59, 66.

A legacy of a particular thing, specified and distinguished from all others of the same kind belonging to the testator, is specific. Civ. Code Cal. 1903, § 1357, subd. 1; Civ. Code Mont. 1895, § 1820; Rev. St. Utah 1898, § 2802; Civ. Code S. D. 1903, § 1071.

#### **As subject to ademption.**

The principal characteristics of a specific legacy are that it is a part of the testator's property itself, that it is a severed or distinguished part of the whole of his property, and that it is liable to ademption. *Morriss v. Garland's Adm'r*, 78 Va. 215, 222.

A specific legacy can only be satisfied by the thing bequeathed. If that has no existence when the will becomes operative, the legacy has no effect. *Tomlinson v. Bury*, 14 N. E. 137, 140, 145 Mass. 346, 1 Am. St. Rep. 464.

A specific legacy is one which expresses and distinguishes the property bequeathed from the other property of the testator, so that it can be identified. It can only be satisfied by the thing bequeathed. If that has no existence when the bequest would other-

wise become operative, the legacy has no effect. If the testator subsequently parts with the property, even if he exchanges it for other property, or purchases other property with the proceeds, the legatee has no claim on the estate for the value of his legacy. The legacy is adeemed by the act of the testator. *Tomlinson v. Bury*, 145 Mass. 347, 14 N. E. 140, 1 Am. St. Rep. 464. A provision in a will reciting that the testator is entitled, or may be entitled, to a certain interest in the estate of a deceased person, and defining the entire interest, constitutes a specific devise, though the cash value thereof is indefinite. In *re Tillinghamst*, 49 Atl. 634, 635, 23 R. I. 121.

If at the time of a testator's death the subject of a specific legacy is found among the assets of the testator, it must be paid to the legatee by the executor in preference to the general legacies, and is not liable to contribution for the payment of debts due from the estate, if there should not be a sufficiency of assets for that purpose, and for the payment of other legacies in full; and, moreover, such legacy is payable at once, and, where it is a money legacy, with interest from the death of the testator. On the other hand, if the property so specifically bequeathed is not in the possession of the testator at the time of his death, by reason of its previous payment, sale, or destruction, it is adeemed, and the gift fails. A bequest of \$2,000 of the "South Ward loan of Chester, Pa.," by a person owning \$10,000 worth of bonds known by that designation, is a demonstrative, and not a specific, legacy, and is therefore not adeemed by the payment of the bonds before the testator's death. *Ives v. Candby* (U. S.) 48 Fed. 718, 719.

#### **Demonstrative or general legacy distinguished.**

One of the attributes of a specific, as distinguished from a general, legacy, or a demonstrative legacy, is that, if the property given in specie does not exist at the death of the testator, there is nothing upon which the gift can take effect, and the legacy is necessarily lost. A general legacy is payable out of any personalty, or, if properly charged, out of the real estate, of the deceased. In this respect a demonstrative legacy has the quality of a general legacy. It differs from a specific legacy in this respect: That the former bequeaths certain property in specie, while the latter gives generally a sum of money to be primarily raised out of certain specified property. If there is none of the property existing out of which it is to be raised, it becomes a general legacy, payable out of the general estate. If a part of the property is existing, but such part is insufficient to pay all of the demonstrative legacy, the remainder becomes a general legacy. *Johnson v. Conover*, 35 Atl. 291, 293, 54 N. J. Eq. 333.

A specific legacy is a bequest of a particular chattel distinguished from all others of the same kind, as contradistinguished from a general legacy which is one payable out of a general fund. *Perrine v. Perrine*, 6 N. J. Law (1 Halst.) 133, 139, 10 Am. Dec. 392; *Tift v. Porter*, 8 N. Y. (4 Seld.) 516, 518 (citing *Williams, Ex'rs*, 838).

If a legacy is made payable primarily out of a specified fund, it is called demonstrative. A specific legacy is a bequest of a specified part of the testator's estate, which is so distinguished. Thus, where a legacy is bequeathed out of a debt, if the debt be not in existence at the testator's death, or sufficient to pay the legacy, the legatee will be entitled to satisfaction out of the general estate. On the other hand, where the legacy is so connected with the fund out of which it is payable that the legacy and the fund are the same, it is specific, as if one bequeathed to B. the money now owing to him from A., or in the hands of A. Under these definitions, the giving to each of two sons of a certain portion of the fund and to both the whole is indicative of a specific legacy; and where the testator added, "providing the said amount and interest is collected" from the fund designated, there can be no doubt that the legacies were specific, and not demonstrative. *Appeal of Smith*, 103 Pa. 559, 561.

A legacy is said to be "general," when it is not answered by any particular portion of or article belonging to the estate, the delivery of which will alone fulfill the intent of the testator; and when it is so answered it is said to be a specific legacy, because it consists of some specific thing belonging to the estate, which is by the legacy intended to be transferred in specie to the legatee. A will providing that "I have and own in my own right the sum of \$2,000, received from the estate of my father, which I will and bequeath to my daughters, in equal shares," is a specific legacy. *Smith v. McKitterick*, 2 N. W. 390, 392, 51 Iowa, 548.

A specific legacy differs from a general legacy or pecuniary legacy in this respect: that if the thing secured or money bequeathed is lost, paid, or destroyed in the lifetime of the testator, the legatee will not be entitled to any recompense or satisfaction out of his personal estate; whereas, a general legacy is to be paid out of the assets of the testator when converted into money, if the same is sufficient for that purpose, and in the order prescribed in the will. *Humphrey v. Robinson*, 5 N. Y. Supp. 164, 166, 52 Hun, 200.

A specific legacy differs from a general or pecuniary legacy in this respect: that if there be a deficiency of assets, the specific legacy will not be liable to abate with the general legacies. Where a will provided, "I

give unto my nephew one thousand dollars on the books of the loan office, Pennsylvania, as per certificate No. 267," but previous to the death of the testator, and after the making of the will, the government paid off the loan, and the testator received the \$1,000 standing in his name, the legacy was specific, and was adeemed by the receipt of the money by the testator. *In re Ludlam's Estate* (Pa.) 1 Pars. Eq. Cas. 116, 117.

#### **All money deposited in bank.**

The term "specific legacy" includes a bequest of money deposited in a bank, the bequest being all of testator's money deposited in such bank. *In re Bell's Estate*, 8 Pa. Co. Ct. R. 454.

#### **All personality.**

A bequest of all testator's personality, with certain specific exceptions, is a general, and not a specific, legacy. *Kelly v. Richardson*, 13 South. 785, 790, 100 Ala. 584.

A specific legacy is a bequest of specified goods, distinguished from all other goods or property of the testator, which the legatee could point to and claim as his own. A mere bequest of "all my personal property," or a fractional part thereof, is not a specific legacy. The bequest of all the personal estate generally is not specific. A gift to a widow of one-third part of the personal estate of the testator in lieu of dower is not specific. *Appeal of Crone*, 103 Pa. 571, 576.

#### **All property.**

A bequest of "all my property" is not a specific bequest. *In re Woodworth's Estate*, 31 Cal. 595, 601.

#### **Particular debt.**

The gift of a particular debt, as where a bequest is made of the "money now owing to me from A.," is a specific legacy. *Hayes v. Hayes*, 17 Atl. 634, 45 N. J. Eq. 461.

Wherever the testator specifically describes the chattel, and distinguishes it from all others of the same kind, it is a specific legacy. When he bequeaths money in a particular chest or a particular debt, it comes within this description; and a devise of "all the money due on a bond against P." is a specific legacy. *Stout v. Hart*, 7 N. J. Law (2 Halst.) 414, 423.

#### **Real estate.**

A specific legacy is a bequest of a particular article or articles capable of being designated and identified; and the devise of real estate, to be specific, must designate the particular estate intended to be devised, or must be in such terms that it can be ascertained what particular estate is in view by the testator. *Bradford v. Haynes*, 20 Me. (2 App.) 106, 107.

**Stock or bonds.**

Specific legacies are considered as separated by the testator from the general estate, and as appropriated at the time of the death, and consequently from that time whatever accrues from them belongs to the legatee, and therefore, when there is a specific legacy of stock, the dividends belong to the legatee from the death of the testator. *In re Blackmer's Estate*, 28 Atl. 419, 420, 66 Vt. 46.

A gift of a certain number of shares of certain stock to a grandchild, made when the testator possessed that number of shares, though at the time of his death he did not possess such number, is a specific legacy. *New Albany Trust Co. v. Powell*, 64 N. E. 640, 641, 29 Ind. App. 494.

A legacy is specific when it is a bequest of a specified part of the testator's personal estate. A legacy given by a bequest of "the sum of \$50,000 of the capital stock of \* \* \*, or, in case I shall not hold that amount of such stock, \* \* \* I direct them [the executors] to take from my other personal property to an amount sufficient to equal said sum," other clauses of the will giving to various legatees each a specified number of shares of the capital stock of the same company, and others, is not a specific legacy, but a pecuniary one. *In re Anderson*, 43 N. Y. Supp. 1146, 1148, 19 Misc. Rep. 210.

A specific legacy is a disposition of a certain thing, which may be known and distinguished from any other thing of the same kind, so that the legatee may say, "I have a right to this very thing." A donation in these words: "I give to H. my East Haddam Bank stock. The notes secured upon such stock are to be paid by my executor or administrator, so far as may be consistent with my will, and such stock to be in payment and discharge of my indebtedness to her, if enough for that purpose; and, if such stock exceed such indebtedness, then the use of all such stock to go to the said H. for life, and after her decease to go with the residuum of my property"—was held to be a specific legacy of the bank stock. *Brainerd v. Cowdrey*, 16 Conn. 1, 7.

According to well-settled rules of construction, in order to constitute a specific legacy, it is necessary for the testator to distinguish or identify the stock or thing given, by saying "stock now in my possession," or "now standing in my name," or some other equivalent expression, marking the corpus of the stock bequeathed, and showing the testator meant that that identical stock, and no other, should pass to the legatee. In case of a bequest general of stocks, or of a sum of money in stocks, without further explanation, and without more particularly referring to or marking the corpus of the identical stock, the fact that the testator possesses

such stock at the time of the execution of the will is not sufficient to justify the court in declaring the legacy to be specific. *Dryden v. Owings*, 49 Md. 356, 365.

The bequest of a certain sum "in Confederate state bonds" is not specific, but general. The words do not designate any particular bonds, specified and distinguished from all others. Had the legacy been of a certain sum of money "in my Confederate state bonds," it would have been specific; but the fact that the testator at the time of making his will had that which was given in quantity equal to or greater than the bequest was not of itself sufficient to change the class of legacy from general to specific. *Gilmer's Legatees v. Gilmer's Ex'rs*, 42 Ala. 9, 16.

**SPECIFIC LIEN.**

A specific lien is a charge upon a particular piece of property, by which it is held for the payment or discharge of some particular debt or duty, in priority to the general debts or duties of the owner. *Rohrbach v. Germania Fire Ins. Co.*, 62 N. Y. 47, 56, 20 Am. Rep. 451.

A specific lien is one that attaches to certain property, or to some particular piece of property, as contradistinguished from a general lien, such as a factor has for his general balance. *Cross, Liens*, pp. 246, 315. The lien of a mechanic or materialman, given by statute, is a specific lien, as it attaches to a particular piece of property, as the building and lot on which it stands. *Gross v. Daly* (N. Y.) 5 Daly, 540, 546.

A specific or particular lien can arise only, first, by an express contract; second, by usage or custom of trade; third, by implication of law; fourth, by statute. *Pease v. Ditto*, 59 N. E. 983, 986, 189 Ill. 456.

**SPECIFIC MACHINE.**

Act 1839, § 7, providing that every person or corporation, who has or shall have purchased or constructed any newly invented machine, manufacture, or composition of matter prior to the application of the inventor or discoverer for a patent, shall be held to possess the right to use and vend to others to be used "the specific machine, manufacture, or composition of matter" so made or purchased, means "the thing invented, the right to which has been secured by patent." *Andrews v. Hovey*, 8 Sup. Ct. 676, 677, 124 U. S. 694, 31 L. Ed. 557.

**SPECIFIC PERFORMANCE.**

See "Bill for Specific Performance."

"Specific performance" is a remedy for enforcing the equitable duties growing out of an alleged agreement, and when the agree-

ment is oral it must be of such a nature that the court would have had jurisdiction in respect to it in case it had been in writing. A contract will not be specifically enforced, unless it is certain in its terms, or can be made certain by reference to such extrinsic facts as may be within the rule of law referred to, to ascertain its meaning. *Smith v. Bradhurst*, 41 N. Y. Supp. 1002, 1004, 18 Misc. Rep. 546.

The equity to compel specific performance of contracts arises where an agreement binding at law has been infringed and the remedy at law by damages is inadequate. *Adams*, Eq. 77. But the inadequacy of a compensatory suit on a broken contract does not always depend on the breach being financially injurious to the plaintiff. A breach that would be peculiarly beneficial to him may be of such a nature in other respects that nothing short of prevention will be just. If the price fixed by written executory agreement for the sale of a farm is more than the value, that fact is not an answer to a bill brought by the purchaser against the vendor for specific performance of the agreement. The purchaser, financially benefited by the violation of his legal right, would be financially injured by resorting to the remedy of a suit for nominal damages. *Dow v. Northern R. R.*, 36 Atl. 510, 543, 67 N. H. 1.

"Specific performance" is an equitable remedy, which compels the performance of a contract in the precise terms agreed on, or such a substantial performance as will do justice between the parties under the circumstances of the case. *Rison v. Newberry*, 18 S. E. 916, 919, 90 Va. 513.

Specific performance is not an absolute right. It rests in judicial discretion, exercised according to the principles of equity and with reference to the facts in the case. *Gen. Dig. U. S.* 1710, and authorities cited; *Wolf v. Great Falls Water Power & Town Site Co.*, 38 Pac. 115, 117, 15 Mont. 49.

Specific performance is not a matter of right in the litigant, but is one of sound judicial discretion, controlled by established principles of equity, and will be granted or withheld by the court upon a consideration of all the circumstances of each particular case. The contract sought to be enforced must be certain and definite in all its provisions, and fair and mutual in its terms, and must be so clearly proven as to satisfy the court that it constitutes the actual agreement between the parties. If any of these ingredients are wanting, the specific performance will not be decreed. *Horner v. Woodland*, 41 Atl. 1079, 1080, 88 Md. 511 (citing *Geiger v. Green* [Md.] 4 Gill, 472).

Specific performance has been defined as the actual accomplishment of a contract by the party bound to fulfill it; performance of a contract in the precise terms agreed on;

strict performance. *Diamond State Iron Co. v. Todd* (Del.) 14 Atl. 27, 34, 6 Del. Ch. 163.

"Specific performance," as applied to contracts, has been defined to be the actual accomplishment of the contract by the party bound to fulfill it; performance of the contract agreed on; strict performance. *Burton v. Vessels*, 5 Del. Ch. 568, 572.

The specific performance of contracts for sale or exchange and conveyance of land is never a matter of right, but always of grace. *Appeal of Alexander* (Pa.) 4 Montg. Co. Law Rep'r, 35, 36.

### SPECIFIC POLICY.

Specific policies are policies of insurance covering several different articles, but limiting the insurer's liability to a fixed sum on each separate article. *American Cent. Ins. Co. v. Landau*, 49 Atl. 738, 750, 62 N. J. Eq. 73.

### SPECIFIC QUESTION.

*Gen. St. c. 66, § 199*, providing that specific questions of fact may be tried by a jury or referred, means a question specified; that is, distinctly stated. *Cummings v. Taylor*, 21 Minn. 366, 369.

### SPECIFIC TAX.

Chief Justice Grant, in *Pingree v. Auditor General*, 78 N. W. 1025, 120 Mich. 95, 44 L. R. A. 679, said: "A tax based on the assessed cash value of property assessed is not a specific tax. It is an ad valorem tax, and any enactment by a Legislature that it is a specific tax does not make it so; otherwise, the Legislature could determine what was meant by use of terms in the Constitution which have a well-defined meaning. The fact that, in imposing a specific tax, the value of the thing taxed is taken into consideration in determining the amount of it, does not change the nature of the tax." Mr. Justice Montgomery in his opinion begins with the statement: "I think it cannot be maintained that a tax on property based on assessments is a specific tax. The definition of 'specific tax' stated by Judge Cooley is a tax which imposes a specific sum by the head or number, or some standard of weight or measure, which requires no assessment beyond a listing and specification of the objects to be taxed." *Union Trust Co. v. Wayne Probate Judge*, 84 N. W. 1101, 1102, 125 Mich. 487.

The term "specific taxation" in Const. art. 14, §§ 11, 12, requiring a uniform rule of taxation, except on property paying specific taxes, does not include water rates paid by consumers under the statute incorporating the Water Commission of Detroit. *Jones v. Board of Water Com'rs*, 34 Mich. 273, 276.

**SPECIFICALLY CHARGED.**

As used in the opinion of the court that, where a wife signed a note as surety for her husband, had the debt been specifically charged with the consent of her trustee, the court would have enforced its payment, the words "specifically charged" are used as synonymous with "expressly charged," and do not mean that the charge must be on specific property. *Flaum v. Wallace*, 9 S. E. 567, 571, 103 N. C. 296.

**SPECIFICALLY DEVISED.**

Testator, whose heirs at law were one son and two married daughters, in the first clause of his will devised and bequeathed to his son, subject to the limitations afterwards made in the will, one equal one-third part of all his estate, to wit, certain real estate particularly described and so much of his other property, not specifically devised, as, with advancements to the son, should amount to such third part. In a subsequent clause he devised and bequeathed the general residuum of his estate, not before specifically devised, equally to be divided among his three children, their heirs and assigns. Held, that by the words "specifically devised" testator did not mean, as technically construed, a specific legacy, as the gift of a particular chattel, but meant his real estate. *Homer v. Shelton*, 43 Mass. (2 Metc.) 194, 208.

**SPECIFICALLY DISPOSED OF.**

The residuary clause of a will, giving the property not therein before "specifically disposed of," means particularly disposed of. *Roberts v. Cooke*, 16 Ves. 451, 453.

**SPECIFICALLY INSURED.**

Plaintiff was engaged in the cold storage business, keeping in store eggs, poultry, etc., which were constantly changing. The policy insured the merchandise contained in the warehouse, "not specifically insured." Plaintiff held another policy on the poultry. Held, that the poultry was "specifically insured," and therefore not covered by the second policy, notwithstanding the fact that the poultry was not designated such as "one hundred packages of poultry, marked 'X,'" etc. *Firemen's Fund Ins. Co. v. Western Refrigerating Co.*, 44 N. E. 746, 747, 162 Ill. 322.

**SPECIFICATION.**

Right by specification can only be acquired when, without the accession of any other material, that of another person, which has been used by the operator innocently, has been converted by him into something specifically different in the inherent and characteristic qualities which identify it. Such is the

conversion of corn into meal, of grapes into wine, etc. Here, although the meal possesses no quality which the corn did not, yet it not only does not possess all the same qualities, but there is difference in the name, the character, the solidity, and every attribute which distinguishes one species from another. Meal and corn are as different as lime and rock, or rye and whisky. In such a case the rule as laid down in the books is indefinite, and in some of the cases cited for illustration seems to be twofold: (1) That there must be a change of the species; (2) that the thing changed must be insusceptible of reduction to the original quality and kind. The universal application of the latter branch of the rule seems to be irreconcilable with the principle. The reason why the material of one which has been changed into a different species by another is not to be restored to the original owner is that it cannot be returned in kind. It is not the specific thing which belonged to him, and therefore is not his, and cannot be his, though it may by some chemical or mechanical process be resolved into its original elementary qualities, unless the original material can be restored without any intrinsic change. Therefore, as long as it remains a new and essentially different species, it cannot be recovered by suit from the person who effected the change in it. *Lampton's Ex'rs v. Preston's Ex'rs*, 24 Ky. (1 J. J. Marsh.) 454, 462, 19 Am. Dec. 104.

A statement in a demurrer that the bill does not set forth any case for equitable relief is a "specification," within a rule of court requiring every demurrer to distinctly specify the ground or subject of demurrer. *Demarest v. Terhune*, 50 Atl. 664, 665, 62 N. J. Eq. 663.

A distinct "specification of error," under the rules of the Court of Civil Appeals, must point out that part of the proceedings contained in the record in which the error is complained of in a particular manner, so as to identify it, whether it be the rulings of the court upon a motion, or on the particular part of the pleadings, or on any other matter relating to the cause or its trial, or the portion of the charge given or refused, with such reasonable certainty as may be practicable in a clear statement, considering the matter referred to. *St. Louis & S. W. Ry. Co. of Texas v. McArthur*, 70 S. W. 317, 318, 96 Tex. 65.

The "specifications of the grounds of opposition to a bankrupt's discharge" are an answer to the bankrupt's petition for discharge, and therefore a pleading in almost any sense, even the most technical, or else it is an independent petition, though not such in form, asking the court to deny to the bankrupt his discharge; and in either case, by all the analogies of any practice, and by the very terms of the bankrupt statute, it re-



quires verification. *In re Glass* (U. S.) 119 Fed. 509, 514.

#### In architecture.

"Specifications," in architecture, embrace, as understood by the profession, not only the dimensions and mode of construction, but a description of every piece of material, its kind, length, breadth, and thickness, and the manner of joining the separate parts together. Bouvier defines them as "a particular and detailed account of a thing." Gwilt: "They are an accurate description of the materials and work to be used and performed in the execution of a building." Worcester Dict.: "A written instrument containing an exact and minute description, account, or enumeration of particulars." *Gilbert v. United States* (U. S.) 1 Ct. Cl. 28, 34 (citing *Enc. Arch.* p. 595, § 19).

"The word 'specifications,' when applied to a building, means a specific and detailed statement of the materials to be used in the building and the manner of performing the work." *State v. Kendall*, 18 N. W. 85, 90, 15 Neb. 262.

"Specifications" denotes a detailed statement of the various elements involved in the plan of the building or structure. *Jenney v. City of Des Moines*, 72 N. W. 550, 551, 103 Iowa, 347.

Where by a contract in writing a painter agreed with the owner to do all the painting agreeably to specifications signed by the parties and annexed to the contract, and furnish materials mentioned in the specifications, and when the contract was executed there was annexed thereto a letter signed by the painter, showing the kind and quality of materials to be used and how they were to be applied, such a letter was a "specification" within the meaning of the contract. *McGeragle v. Broemel*, 20 Atl. 857, 858, 53 N. J. Law, 59.

#### In military law.

According to military usage and practice, a "charge" before a court-martial is in effect divided into two parts; the first technically called a "charge," and the second a "specification." The charge proper designates the military offense of which the accused is alleged to be guilty; and the specification sets forth the acts or omissions which form the legal constituents of the offense. *Carter v. McClaughry*, 22 Sup. Ct. 181, 189, 183 U. S. 865, 46 L. Ed. 236.

#### In patents.

"Specification," as used in Rev. St. § 4916 [U. S. Comp. St. 1901, p. 3393], providing that, whenever any patent is inoperative or invalid by reason of a defective or insufficient specification, the Commissioner shall, on the surrender of such patent, cause a new patent for the same invention in accordance

with the correct specification, being used without the word "claim," means the description and claim. *Wilson v. Coon* (U. S.) 6 Fed. 611, 614.

The purpose of the drawings and the specifications of a patent is to plainly describe the machine or combination invented, so that one skilled in the art can construct and operate it. *Brammer v. Schroeder* (U. S.) 106 Fed. 918, 930, 46 C. C. A. 41.

### SPECIFY.

"Specify" means to point out, to particularize, or to designate by words one thing from another; and a mortgage which described the property included therein as "one bay mare, two mare mules, one horse mule," did not sufficiently specify the property, so as to put one, who bona fide purchased from the mortgagor one black horse mule nine years old and one black mare mule four years old, on notice by its record that the mules mortgaged were the same as those purchased. *Stewart v. Jaques*, 77 Ga. 365, 368, 3 S. E. 283, 4 Am. St. Rep. 86.

"Specified," as used in a statute requiring the party to swear that a mortgage is made to secure the debt specified in the condition, means, according to Webster, "specially named." The intention of the act must have been to require that the debts designed to be secured should be specifically named, so that those who have occasion to consult the record may be able to ascertain the debt and amount of the demands designed to be secured. *Page v. Ordway*, 40 N. H. 253, 256.

### SPECIMEN.

"Specimens," as used in an indictment charging the stealing of a quantity of specimens of gold and silver ores, has a meaning well understood, particularly in the mining country. When we speak of specimens of quartz, it is as fully understood there what is meant as if you would speak of a horse. Webster defines the word thus: "A part or small portion of anything; a sample." A cabinet of minerals consists of specimens. *People v. Freeman*, 1 Idaho, 322.

A marble statue is a "specimen of sculpture," within the meaning of Tariff Act July 24, 1897, c. 11, § 2, Free List, par. 649, 30 Stat. 201 [U. S. Comp. St. 1901, p. 1687], covering "specimens or casts of sculpture." *Sibel v. United States* (U. S.) 124 Fed. 105.

### SPECULATION.

As gaming, see "Gambling—Gaming."

The statement of a person that in purchasing property sold at a sale under a decree of court he was making a "speculation" means that he was getting the property for

much less than it was worth. *Maxwell v. Burns* (Tenn.) 59 S. W. 1067, 1071.

The fact that a lumber company lent money without security to persons to enable them to enter and pay for land under the timber and stone act, in the expectation that when the entrymen obtained title it would be enabled to buy the timber from such lands by reason of the fact that it had the only mill in the vicinity, does not render the entries invalid for fraud, where there was no agreement for the sale prior to the entries, but each man was free to keep the timber or to sell it to others; nor are such entries invalid as made on "speculation," because the persons making them did so with the intention of selling the timber for their own benefit. *United States v. Detroit Timber & Lumber Co.* (U. S.) 124 Fed. 393.

### **SPECULATIVE DAMAGES.**

The term "speculative damages" is used to designate damages in excess of compensatory damages, which are allowed as a punishment of the wrongdoer. It is synonymous with the term "exemplary," "vindictive," and "punitive" damages. *Murphy v. Hobbs*, 5 Pac. 119, 123, 7 Colo. 541, 49 Am. Rep. 366.

### **SPECULATIVE VALUE.**

The "speculative value" of corporate stock is based on calculation of future prospects and contingencies. *Commonwealth v. Edgerton Coal Co.*, 30 Atl. 125, 164 Pa. 284.

### **SPECULATOR.**

As trader, see "Trader—Tradesman."

### **SPEECH.**

See "Articulate Speech."

### **SPEEDILY.**

See "As Speedily As Can Be."

In an instruction in an action against a city for injuries by reason of a defective sidewalk, declaring that the city was obliged to repair speedily, "speedily" is not synonymous with "in a reasonable time," which more clearly expresses the city's obligation, and therefore the instruction was misleading and erroneous; the term "speedily" requiring a lesser time than the jury might find was a reasonable time within which the city was bound to repair. *Hembling v. City of Grand Rapids*, 58 N. W. 310, 99 Mich. 292.

### **SPEEDY TRIAL**

The term "speedy trial," as used in the Constitution, guarantying to every one ac-

cused of crime the right to a speedy trial, is difficult of definition. It is very clear that one so accused has not a right to demand a trial immediately upon the accusation or arrest being made. He must wait until the regular term of the court having jurisdiction of the offense with which he is charged, until an indictment is found and presented, and until the prosecution has had a reasonable time to prepare for the trial. Nor does a "speedy trial" mean a trial immediately on presentation of the indictment or the arrest upon it. It simply means that the trial shall take place as soon as possible after the indictment is found, without depriving the prosecution of a reasonable time for preparation. *Ex parte Stanley*, 4 Nev. 113, 116.

"Speedy," as used in Const. art. 1, § 10, providing "that in all capital or criminal prosecution a man hath a right to \* \* \* a speedy trial by an impartial jury," does not mean "immediate." *Brown v. Epps*, 21 S. E. 119, 120, 91 Va. 726, 27 L. R. A. 676.

What constitutes a "speedy trial," as used in Code Cr. Proc. § 8, subd. 1, entitling defendant in a criminal action to a speedy and public trial, depends upon the circumstances of each particular case. It is left with the court to determine whether that important right has been denied to the defendant. *People v. Hall*, 64 N. Y. Supp. 433, 436, 51 App. Div. 57.

The guaranty of a speedy trial, provided by Const. art. 1, § 7, in favor of the accused in a criminal prosecution, does not preclude the state from a reasonable opportunity to examine and prosecute the charge. *Ex parte Jefferson*, 62 Miss. 223, 227.

By the words "speedy trial" in the Constitution is meant a trial regulated and conducted by fixed rules of law, and any delay created by the operation of those rules is not included in the meaning of the constitutional provision. *Nixon v. State*, 10 Miss. (2 Smedes & M.) 497, 507, 41 Am. Dec. 601.

Gen. St. § 1609 (habeas corpus act), provides that if any person shall be committed for a criminal or supposed criminal matter, and not admitted to bail, and shall not be tried on or before the second term of the court having jurisdiction of the offense, the prisoner shall be set at liberty by the court, unless the delay shall happen on the application of the prisoner. This is undoubtedly a statutory definition of the constitutional provision which exists in all our state Constitutions, as well as in the federal organic law, to wit, that the defendant in a criminal case shall be entitled to a speedy trial. This speedy trial was undoubtedly analogous to the right which obtained to the defendant at the common law, and which was recognized by the judges who held court under the commission of both oyer and terminer and gaol delivery. Under these commis-

sions, it was the custom of the judges to proceed against the prisoners who were in confinement, and, except upon occasion shown, to clear the jail of all offenders two or three times a year. *Cummins v. People*, 34 Pac. 734, 736, 4 Colo. App. 71 (citing 4 Bl. Comm. c. 19).

What is meant by a "speedy trial," guaranteed by the Constitution, has been determined by the Legislature in the enactment of a statute that every person against whom an indictment is found charging a felony and held in any court for trial shall be forever discharged from the prosecution for the offense if there be three regular terms of the circuit, or four of the county, corporation, or hustings court in which the case is pending after he is so held without a trial. *Benton v. Commonwealth*, 91 Va. 782, 786, 21 S. E. 495.

## SPENDTHRIFT.

A person may be considered a "spendthrift" in the sense that he is extravagant, but may not have reached a point in his expenditures at which a court would be justified in treating him as a spendthrift in the legal meaning of the word. In *re Coleman's Estate*, 40 Atl. 69, 72, 185 Pa. 437.

The word "spendthrift" shall include every person who is liable to be put under guardianship on account of excessive drinking, gaming, idleness, or debauchery. *Hurd's Rev. St. Ill.* 1901, p. 1719, c. 131, § 1, subd. 6; *Cobbeys Ann. St. Neb.* 1903, § 5410; *Ann. Codes & St. Or.* 1901, § 5290; *V. S.* 1894, 2750; *Comp. Laws Mich.* 1897, § 8735; *Gen. St. Minn.* 1894, § 255, subd. 6; *Rev. Laws Mass.* 1902, p. 89, c. 8, § 5, subd. 20; *Pub. St. N. H.* 1901, p. 64, c. 2, § 19; *Appeal of Morey*, 57 N. H. 54.

## SPENDTHRIFT TRUST.

A "spendthrift trust" is the term commonly applied to those trusts which are created with a view of providing a fund for the maintenance of another, and at the same time securing it against his improvidence or incapacity for his protection. Provisions against alienation of the trust fund by the voluntary act of the beneficiary or by his creditors are the usual incidents. *Bennett v. Bennett*, 66 Ill. App. 28, 37, 38.

A provision in a will which gave the rents and profits of the realty to the husband during his life, and the remainder in the property to his sisters, and exempted the interest of the husband in the property, or, rather, its rents and profits, from liability for the husband's debts, created what is called a "spendthrift trust." *Guernsey v. Lazear*, 41 S. E. 405, 406, 51 W. Va. 328.

## SPINSTER OR UNMARRIED NIECE.

Where a will gave testator's residuary estate to his "spinster or unmarried nieces," six of his nieces never having been married, and two of them being widows at the time of his death, it was held that as then all stood in the same relation to testator, and their actual condition was that of single or unmarried women, the widows, as well as the spinsters, were included. In *re Conway's Estate*, 37 Atl. 204, 181 Pa. 156, 40 Wkly. Notes Cas. 193, 194.

## SPIRIT—SPIRITS.

See "Distilled Spirits"; "Wine Spirits."

The word "spirit" is derived from the Latin word "spiritus," one meaning of which is "life." *Caswell v. State*, 21 Tenn. (2 Humph.) 402, 403.

"Spirit" is defined by Webster as a strong, pungent, stimulating liquor, obtained by distillation, as rum, brandy, gin, whisky. The word "spirit" is derived from the Latin "spiritus," meaning life. The discovery of the art of distillation belongs to the alchemists, who made it in the course of their investigations after what they called the "elixir vitæ," a liquid the discovery of which was to render man immortal. When by distillation they had procured pure alcohol, judging from its effects, they for a time were deluded by the hope that the grand secret had been discovered, and called it "aqua vitæ," water of life. Brandy is still so called by the French, "eau de vie." The English, in adopting the name, have taken the word "spiritus" as the root from which to form it, instead of the more common word "vitæ." *Caswell v. State*, 21 Tenn. (2 Humph.) 402, 403.

"Spirit," or "spirits," has a general meaning, as applied to fluids, mostly of a lighter character than ordinary water, obtained, but not produced, by distillation; but, as applied particularly to liquors, they signify the essence, the extract, the purest solution, the highly rectified spirit—the pure alcohol contained in them. The spirit of liquors is really the alcohol in them. It is this characteristic, this essential element, that makes them spirituous. *State v. Giersch*, 4 S. E. 193, 194, 98 N. C. 720.

Spirits are the product of a double process, by the application of heat to a still containing the material. The product of the first distillation is known as "low wines" or "singlings," which are subsequently subjected to a second process, in order to produce spirits. *United States v. Tenbroek*, 15 U. S. (2 Wheat.) 248, 258, 4 L. Ed. 231.

"Spirits" are liquors manufactured by distillation. The class does not include ale,

as it is produced by fermentation. *People v. Crilley* (N. Y.) 20 Barb. 246, 248.

"Spirits" is the name of an inflammable liquor produced by distillation. The term cannot be applied to wine, which is the product of fermentation; and therefore the sale of wine is not the sale of a spirituous liquor, within the meaning of a statute prohibiting the sale of such liquors. *State v. Moore* (Ind.) 5 Blackf. 118.

"Spirits," as used in St. 6 Geo. IV, c. 80, § 132, providing a penalty for the sale of any quantity of "spirits" to any person to the end that the same may be unlawfully retailed or consumed, signifies an inflammable liquid produced by distillation, either pure or mixed only with ingredients which do not convert it into some article of commerce not known in common parlance under the general appellation of "spirits," and does not include sweet spirits of niter. *Attorney General v. Bailey*, 1 Welsb. H. & G. 281.

Absinthe is within the phrase "brandies and other spirits" in the French reciprocity agreement, providing for reduced duties on brandies and other spirits. *United States v. Luyties* (U. S.) 124 Fed. 977.

By the word "spirit," in statutes, shall be intended all spirituous or intoxicating liquor, and all mixed liquor, any part of which is spirituous or intoxicating, unless otherwise expressly declared. Pub. St. N. H. 1901, p. 65, c. 2, § 33.

#### SPIRIT GAS.

"Spirit gas" is a mixture of camphene and alcohol in different proportions than are employed of the same ingredients in making "burning fluid." *Putman v. Commonwealth Ins. Co.* (U. S.) 4 Fed. 753, 764.

It cannot be said as a matter of law that the term "camphene" or "spirit gas," within the meaning of a fire policy prohibiting the lighting of the insured premises with camphene or spirit gas, includes burning fluid. *Stettiner v. Granite Ins. Co.*, 12 N. Y. Super. Ct. (5 Duer) 594, 596.

#### SPIRITOUS LIQUORS.

See, also, "Spirituous Liquors."

A complaint reciting that an offense was against an act concerning the sale of "spiritous" liquors, while the word in the title of the act was "spirituous," was not defective. In *Worcester's Dictionary* it is said that "spirituous" and "spiritous" have the same meaning, and Webster says that "spirituous" might as well be written "spiritous." *Commonwealth v. Burke*, 81 Mass. (15 Gray) 408, 409.

An allegation in an indictment charging the sale of "spiritous liquors" is equivalent to a charge that the defendant sold "spirituous liquors," as the word used in the indictment is idem sonans with the word as correctly spelled. *Brumley v. State*, 11 Tex. App. 114, 116.

#### SPIRITUAL

"Spiritual," as used in an indictment charging the defendant with the unlawful sale of "spiritual liquor," means "spirituous." *State v. Clark*, 8 Ind. 451, 452.

#### SPIRITUALISM.

A belief that the spirits of the dead can communicate with the living through the agency of persons called "mediums," who possess qualities or gifts not possessed by mankind in general. *Middleditch v. Williams*, 17 Atl. 826, 828, 45 N. J. Eq. 723, 4 L. R. A. 738.

#### SPIRITUOUS LIQUORS.

Spirituous liquors technically and strictly include all liquors which contain alcohol in appreciable quantities. In this sense vinous and malt liquors are also spirituous, in that each contains spirits of alcohol; but in ordinary acceptation the term "spirituous liquors" imports distilled liquors, and in a statute requiring a license to sell spirituous, vinous, or malt liquors the term is employed in its ordinary sense, as indicated from the use of the superadded terms "vinous" and "malt," which have no office to perform unless the phrase "spirituous liquors" is confined to the definition which it has in common parlance, denoting liquids which are the results of distillation. *Blankenship v. State*, 21 S. E. 130, 93 Ga. 814.

Spirituous liquors imply such liquors as contain alcohol, and thus have spirit, no matter by what particular name denominated, or in what legal form or combination they may appear. Hence distilled liquors, fermented liquors, and vinous liquors are all spirituous liquors. "Spirituous" means containing or partaking of spirit; having the refined, strong, ardent quality of alcohol in greater or less degree. *State v. Giersch*, 4 S. E. 193, 194, 98 N. C. 720.

An indictment charging the unlawful sale of "spirituous liquors" is sufficiently certain, without specifying the kind of liquor sold. *State v. Witt*, 39 Ark. 216, 218. The use of the words "spirituous liquor" in an indictment charging a violation of the statute prohibiting the sale without license of any wine or spirituous liquors is a sufficient description of the liquor sold, without averring what particular kind of liquor was sold. *State v. Blaisdell*, 33 N. H. 388, 394.

The use of the words "spirituous liquors," in an indictment charging a violation of the statute prohibiting a sale without license of brandy, rum, or other spirituous liquors, is sufficient to describe a sale of brandy, although the indictment does not attempt to designate the particular kind of spirituous liquors sold. *Commonwealth v. Odin*, 40 Mass. (23 Pick.) 275, 279.

Spirituous, vinous, and malt liquors are commonly known to contain a considerable portion of alcohol, and alcohol is commonly known to be intoxicating. Hence an allegation in an indictment for the sale of spirituous, vinous, and malt liquors contrary to law is equivalent to alleging the sale of intoxicating liquors contrary to law. *State v. Reilly*, 52 Atl. 1005, 1006, 66 N. J. Law, 399.

The fact that alcohol is discovered in liquor alleged to have been sold in violation of St. 1869, c. 415, prohibiting the sale of spirituous liquors, does not necessarily prove that the liquor is spirituous, within the meaning of the statute. *Commonwealth v. Bloss*, 116 Mass. 58, 59.

The term "spirituous liquors" includes rum, brandy, and gin, which are different species of spirituous liquors; and an indictment charging the sale of rum, brandy, and gin is not invalid because it fails to charge that such liquors are spirituous. *State v. Munger*, 15 Vt. 290, 293.

The term "spirituous and intoxicating liquors," as used in the title relating to intoxicating liquors, shall be held to include all spirituous and intoxicating liquors, all mixed liquors, all mixed liquor of which a part is spirituous and intoxicating, all distilled spirits, all wines, ale, and porter, all beer manufactured from hops and malt, or from hops and barley, and all beer on the receptacle containing which the laws of the United States require a revenue stamp to be affixed, and all fermented cider sold to be drunk on the premises, or sold in quantities less than one gallon to be delivered at one time in towns where licenses to sell intoxicating liquors are granted, or in quantities less than five gallons to be delivered at one time in towns where licenses are not granted. *Gen. St. Conn. 1902*, § 2636.

By the words "spirit," "spirituous liquor," or "intoxicating liquor," in statutes, shall be intended all spirituous or intoxicating liquor, and all mixed liquor, any part of which is spirituous or intoxicating, unless otherwise expressly declared. *Pub. St. N. H. 1901*, p. 65, c. 2, § 33.

#### **Intoxicating liquor synonyms.**

"Spirituous liquors," as used in Code, § 629, requiring a license for engaging in the business of selling "spirituous liquors," is not synonymous with "intoxicating liquors."

Spirituous liquors technically and strictly include all liquors which contain alcohol in appreciable quantities. In this sense vinous and malt liquors are also spirituous, in that they contain spirits of alcohol; but in ordinary acceptance the term "spirituous liquors" imports distilled liquors, and such is the sense in which it is used in the statute. Spirituous liquors may be intoxicating, but the term does not include all intoxicating liquors, beverages, or bitters. A given liquor may be in a high degree intoxicating, and yet not be "spirituous liquor" within the sense of the statute. Fermented or hard cider is an illustration. Cane beer is another. *Allred v. State*, 8 South. 56, 57, 89 Ala. 112.

In Code, § 4861, providing that no person shall retail "spirituous liquors" on Sunday, the words were employed in a general sense, and intended to comprehend all alcoholic or intoxicating liquors, whether the alcoholic principle is separated by distillation or developed by fermentation. *State v. Sharrer*, 42 Tenn. (2 Cold.) 323, 324.

The terms "spirituous liquors" and "intoxicating liquors," when used in a license law, are synonymous. *State v. Jefferson County Com'rs*, 20 Fla. 425, 429.

"Spirituous liquors," as used in a complaint charging that the defendant did sell, deal, or traffic in, and give away for the purpose of evading a certain act, spirituous, ardent, or intoxicating liquors, is not synonymous with "intoxicating liquor," and the word "intoxicating" is not used in mere explanation of the word "spirituous," but is intended to signify something different. All spirituous liquor is intoxicating, yet all intoxicating liquor is not spirituous. In common parlance spirituous liquor means distilled liquor. Fermented liquor, though intoxicating, is not spirituous. Hence the complaint is bad for uncertainty. *Clifford v. State*, 29 Wis. 327, 329.

"Spirituous liquors" are included within the term "intoxicating liquors." The word "intoxicating" includes a larger class of cases than "spirituous." They bear the relation to each other of genus and species. All spirituous liquors are intoxicating, but all intoxicating liquors are not spirituous. *Commonwealth v. Herrick*, 60 Mass. (6 Cush.) 465, 467; *Same v. Grey*, 68 Mass. (2 Gray) 501, 502, 61 Am. Dec. 476.

The words "spirituous liquors" construed not to be synonymous in meaning with the words "intoxicating liquors." There are intoxicating liquors which are not spirituous. *Commonwealth v. Livermore*, 70 Mass. (4 Gray) 18, 20; *Same v. Grey*, 68 Mass. (2 Gray) 501, 502, 61 Am. Dec. 476.

#### **Alcohol.**

The term "spirituous liquors" in common parlance does not include pure alcohol, al-

though it is the basis of all spirituous liquors. We are not prepared to say, however, that selling pure alcohol is not selling spirituous liquors. *Bennett v. People*, 30 Ill. (20 Peck) 389, 395.

Act Feb. 22, 1842, providing that the sale of "vinous and spirituous liquors" may be licensed, etc., should not be construed to include alcohol. There is a marked distinction between the specific thing known as "alcohol" and the liquors, commonly used as beverages, which contain more or less alcohol, but are not alcohol, though they may be alcoholic. The words "vinous or spirituous liquors," as used in the statute, refer to alcoholic beverages. *Lemly v. State*, 12 South. 22, 70 Miss. 241, 20 L. R. A. 645.

The term "spirituous liquors," in Acts 1877, c. 107, § 1, prohibiting the sale of "intoxicating liquors," etc., does not include alcohol in which gum camphor is dissolved. *State v. Haymond*, 20 W. Va. 18, 20, 43 Am. Rep. 787.

#### Ale or beer.

Proof that ale was sold does not justify a conviction for selling "spirituous liquors." *Fleming v. City of New Brunswick*, 47 N. J. Law (18 Vroom) 231, 232.

"Spirituous liquors," as used in Pamph. Laws, c. 846, relating to sale of spirituous liquors, refers to liquors produced by distillation. The term would not include ale produced by fermentation; but what is sold as ale may be so mixed with spirituous liquor as to fall within the meaning of the statute. *Walker v. Prescott*, 44 N. H. 511, 512.

"Spirituous liquor," as used in Rev. St. § 2139, prohibiting the selling of spirituous liquor and wine to Indians, should not be construed to include beer. The words "spirituous liquor" refer to liquids produced by distillation. In *re McDonough* (U. S.) 49 Fed. 360.

"Spirituous liquor," as used in Rev. St. § 2139, providing that no ardent spirits shall be introduced into the Indian country, and that every person who introduces or attempts to introduce any spirituous liquors or wines into such country shall be punishable, etc., is synonymous with the words "ardent spirits" as there used. The term includes lager beer. *United States v. Ellis* (U. S.) 51 Fed. 808.

Where the term "spirituous liquors" is used alone in a statute, it may, with some plausibility, be contended that the Legislature meant to signify all intoxicating liquors; but the case is quite different when wines are added to the articles prohibited. In that case it is evident that the Legislature did not think that all intoxicating drinks were included in the term "spirituous liquors," or they would not have named wines. Beer is not included in either of the terms "spirit-

ous liquors" or "wine," under Rev. St. § 2139, prohibiting the introduction of spirituous liquor into the Indian country. *Sarlis v. United States*, 14 Sup. Ct. 720, 722, 152 U. S. 570, 38 L. Ed. 556.

The term "spirituous liquors," in Code, § 4861, prohibiting the sale of spirituous liquors on Sunday, includes distilled, but not fermented, liquors, and therefore the sale of beer is not in violation of the statute. *Fritz v. State*, 60 Tenn. (1 Baxt.) 15, 16. See, also, *State v. Quinlan*, 41 N. W. 299, 300, 40 Minn. 55.

The prohibition against the sale on Sunday of "spirituous and strong liquors" includes lager beer if it is proved to be intoxicating. *Dillman v. People* (N. Y.) 4 Wkly. Dig. 251, 252.

Beer is not a "spirituous liquor," within the meaning of the statute against keeping a tippling house, which provides a penalty for selling without license wine or spirituous liquors, or the mixture of either, to be drunk on the premises where sold or adjacent premises. "Spirit" is the name of an inflammable liquor produced by distillation. By common and approved usage, as well as by that of makers and distillers, the word "spirituous," as applied to liquors, means such only as are produced by distillation, as distinguished from those which are produced by fermentation alone. *Gnadinger v. Commonwealth*, 4 Ky. Law Rep. 514; *King v. Commonwealth*, id. 623.

A complaint alleging that defendant did sell and deliver "spirituous liquor, to wit, beer," without a license therefor, is equivalent to an allegation that the beer sold is of such a character as to fall within the term "spirituous liquor." *State v. Brown*, 51 Conn. 1.

Ale and strong beer are "strong and spirituous liquors," within the meaning of a statute prohibiting the sale of strong and spirituous liquors without a license. *Cayuga County v. Frecoff* (N. Y.) 17 How. Prac. 442, 443. 1 Rev. St. p. 680, § 15, providing for a forfeiture by any person who shall sell any "strong or spirituous liquors" in any quantity less than five gallons at a time without having a license therefor, should be construed to include ale and strong beer. *Nevin v. Ladue* (N. Y.) 3 Denio, 43, 44. As used in Laws 1857, c. 628, § 13, providing that whoever shall sell any "strong or spirituous liquors" in less than a certain quantity at a time without having a license therefor shall forfeit a certain amount, should be construed to include ale or strong beer. *Tompkins County v. Taylor* (N. Y.) 19 How. Prac. 259, 264. It was held in the case of *Tompkins County v. Taylor*, 21 N. Y. 173, that the terms "strong or spirituous liquors" included strong beer. *Schwab v. People* (N. Y.) 4 Hun, 520, 524.

**Brandy.**

The word "brandy" of itself imports a spirituous liquor, so that an indictment charging the sale of brandy is not defective in failing to charge that such liquor is spirituous. *State v. Munger*, 15 Vt. 290, 293.

**Cider.**

Cider is not included within the term "spirituous liquor." *State v. Oliver*, 26 W. Va. 422, 426, 53 Am. Rep. 79; *Allred v. State*, 8 South. 56, 57, 89 Ala. 112.

The question whether "spirituous liquors," within the meaning of a statute prohibiting the sale thereof without a license, includes cider, is a question for the jury. "Certainly in common acceptation cider is not understood to be either a vinous or a spirituous beverage, yet it may, when mixed with spirituous liquor and sold in that condition under the name of 'cider,' be regarded as spirituous within the meaning of the prohibition." *Commonwealth v. Keyburg*, 16 Atl. 351, 352, 122 Pa. 299, 2 L. R. A. 415.

**Compounded or diluted beverage.**

Where spirituous liquor was one of the constituent parts of an article sold, but it was modified to make it more palatable, being mixed with water and sugar, it was nevertheless "spirituous liquor," within the meaning of a statute against selling such liquors without a license. *Commonwealth v. White*, 51 Mass. (10 Metc.) 14, 16.

The sale of peppermint essence containing 50 per cent. of alcohol, which is used almost wholly as a carminative, but may be used as a beverage, with knowledge by the seller that it is purchased as a beverage, or of facts sufficient to charge an ordinary man with such knowledge, is a violation of V. S. 4460, prohibiting the sale of spirituous or intoxicating liquor, or mixed liquor a part of which is spirituous or intoxicating. *State v. Kezer*, 52 Atl. 116, 117, 74 Vt. 50.

"Spirituous liquors," as used in Code, § 4205, forbidding the selling of spirituous liquors to persons of known intemperate habits, means not only liquors in the usual sense of the word, but liquors when mixed or compounded with another article or ingredient; and hence a conviction might be had for selling spirituous liquors to a person of known intemperate habits on proof of a sale of peaches and cherries put up in bottles and preserved in brandy liquor. *Ryall v. State*, 78 Ala. 410, 411.

The term "spirituous liquor" is broad enough to embrace any beverage or decoction which contains whisky, even though it be adulterated with water or other fluid, if this is not done to an extent which impairs its stimulative and intoxicating quality. If spirituous or vinous liquor be present as a pre-

dominant element, it is immaterial that the beverage may be qualified by other ingredients, disguising it as a tonic or medicine. *Wall v. State*, 78 Ala. 417, 418.

**Cordial.**

Cordial is a spirituous liquor. *State v. Bennet* (Del.) 3 Har. 565, 566.

"Common store cordial is sweetened whisky sold as spirituous liquor. Godfrey's cordial is a very different thing, known for and sold as medicine. The sale of the former is in violation of a statute prohibiting the sale of spirituous liquors, but the sale of the latter is not within the prohibition of the statute." *State v. Bennett* (Del.) 3 Har. 565, 567.

**Fermented liquors in general.**

The term "spirituous liquors" does not include fermented liquors. *Klare v. State*, 43 Ind. 483, 485 (citing *State v. Moore* [Ind.] 5 Blackf. 118).

"Spirituous liquors" are distilled liquors, and not fermented ones. This distinction exists, not only in common parlance, but is recognized by chemists and philologists. *Caswell v. State*, 21 Tenn. (2 Humph.) 402, 403.

The term "spirituous liquors," as used in Code, §§ 3110, 3116, relating to the prohibition of the sale of spirituous liquors, includes fermented liquors, such as wine and beer, as well as distilled liquors. *State v. Giesch*, 4 S. E. 193, 98 N. C. 720.

One who has a license only to sell wine, beer, ale, cider, and other fermented liquors cannot sell "spirituous liquors" thereunder. *Commonwealth v. Thayer*, 46 Mass. (5 Metc.) 246, 247.

The term "spirituous liquors" is popularly used to designate distilled liquors, as distinguished from fermented liquors. It implies that the beverage is composed in part or wholly of alcohol extracted by distillation, and it does not apply to a liquid the alcoholic properties of which are latent and exist substantially in the same form as in the original material from which the liquid was made. It does not include within its meaning fermented liquors. *State v. Adams*, 51 N. H. 568, 569.

The phrase "spirituous liquors" in its ordinary sense means liquors composed in part or entirely of alcohol, produced by distillation, as distinguished from fermented and malt liquors, and in this sense it never includes porter, ale, beer, or wines. *State v. Thompson*, 20 W. Va. 674, 678.

"Spirituous liquor" in its extended meaning may include all liquors composed in whole or in part of alcohol, for such liquor partakes of a spirituous quality, and the particular phraseology of the statute may show

the Legislature intended to use it in this extended meaning. In most of the states, and in this state, "spirituous liquor" means that which in whole or in part is composed of alcohol extracted by distillation. It is used in the latter sense in Act March 19, 1875, prohibiting within certain limits the sale or giving of "spirituous liquors," and hence the statute does not prohibit the sale of malt liquors. *Tinker v. State*, 8 South. 855, 90 Ala. 647.

#### Gin.

The term "gin" imports a spirituous liquor, so that an indictment charging the sale of gin is not defective in failing to charge that such liquor is spirituous. *State v. Munger*, 15 Vt. 290, 293.

#### Medicinal preparation.

A medicinal preparation capable of being used as a beverage, and which contains such a percentage of alcohol as, if drunk to excess, will produce intoxication, is within the meaning of an act prohibiting the sale of "spirituous, malt, or intoxicating liquors" without taking out a specified license; and this is true, though the same may contain certain other constituents which, either separately or in conjunction with alcohol, possess useful medicinal properties. *Chapman v. State*, 27 S. E. 789, 100 Ga. 311.

Under Gen. St. § 3048, relative to the sale of intoxicating liquors, providing that the term "spirituous and intoxicating liquors" shall include, not only all mixed liquors, but also all mixed liquor of which a part is spirituous and intoxicating, liquors, spirituous and intoxicating in their nature, do not lose their identity when compounded with drugs or chemicals for use as medicine or in commerce or the arts. *State v. Gray*, 22 Atl. 675, 676, 61 Conn. 39.

Under an indictment charging the sale of spirituous and vinous liquors, a defendant may be convicted for the sale of medicated bitters capable of producing intoxication. *Prinzel v. State*, 33 S. W. 350, 351, 35 Tex. Cr. R. 274.

"Spirituous liquors," within the meaning of the statute prohibiting the sale thereof, will not be construed to mean medicines, and prohibit the sale thereof; but the question will always be whether it is a sale of medicine or of liquors. If an apothecary sell brandy as such, it would be a violation of the law. If the brandy is made up into laudanum or other medicines, it is not a violation of the statute prohibiting the sale of spirituous liquors. *State v. Bennett* (Del.) 3 Har. 565, 566.

#### Rum.

The words "rum," "brandy," etc., in the statute prohibiting the sale of brandy,

rum, etc., or other spirituous liquors, without a license, are not used to constitute a distinct offense or class of offenses; but they are put in the statute by way of instance, so connected with the larger term "spirituous liquors" as to give efficiency to the rule of construction ejusdem generis, and qualify those more general words. It is not necessary, in an indictment for the violation of the statute, to charge the particular kind of liquors sold. *Commonwealth v. Odlin*, 40 Mass. (23 Pick.) 275, 279.

Rum, brandy, and gin are different species of spirituous liquors, and the words in and of themselves import them to be spirituous liquors. Thus an indictment charging the sale of rum, brandy, and gin is not defective in failing to charge that such liquors are spirituous. *State v. Munger*, 15 Vt. 290, 293.

#### Whisky.

The term "spirituous liquor," in a statute requiring the sellers of wine, brandy, rum, or other spirituous liquors to be licensed, includes whisky. *People v. Webster* (Mich.) 2 Doug. 92. See, also, *Frese v. State*, 2 South. 1, 4, 23 Fla. 267.

The court will take notice that whisky is a spirituous liquor. *Wall v. State*, 78 Ala. 417, 418; *State v. Murphy*, 48 Pac. 628, 629, 23 Nev. 390.

#### Wine.

The question whether the term "spirituous liquors," in the statute prohibiting the sale thereof, includes blackberry wine, prepared from the juice of the berry, without the addition of any brandy or whisky, is for the jury. "We may be allowed to assume as a matter of common knowledge that, when first pressed from the berries, it contains no alcohol; but it will undergo a fermentation by which alcohol is generated, so that whether at any given time alcohol is present is a question of fact, to be determined by some of the tests known to scientific men, or by evidence of its effects in producing intoxication and the like. We do not think the Legislature intended to include in spirituous liquors every liquor which contains the least alcohol, for that would include cider which has begun to get hard, and many extracts usually sold by druggists as perfumes and medicines, which have not been usually considered as spirituous liquors, so as to require the druggist to take out a retailer's license before selling them. The phrase "spirituous liquors" is not a technical term, but must receive the meaning usually given to it among people in general. *State v. Lowry*, 74 N. C. 121, 123.

It cannot be said as a matter of law that wine is not a spirituous liquor, but such question is for the jury in a prosecution for



an illegal sale. *State v. Stewart*, 31 Me. 515-516.

"Spirituuous liquors" do not include wines or other fermented liquors; for they imply that the beverage is composed in part or fully of alcohol extracted by distillation. *State v. Oliver*, 26 W. Va. 422, 426, 53 Am. Rep. 79.

Acts 1837, c. 120, making it a misdemeanor to retail "spirituous liquors," etc., embraces all those which are procured by distillation, but not those procured by fermentation, and hence does not include wine. *Caswell v. State*, 21 Tenn. (2 Humph.) 402, 403.

The term "spirituous liquors" does not include wine, which is a product of fermentation, and therefore the sale of wine is not in violation of a statute prohibiting the sale of spirituous liquors. *State v. Moore* (Ind.) 5 Blackf. 118.

Wines manufactured within the state from fruits raised in the state is by express provisions of the act not included in the term "spirituous liquors," as used in Code, § 3116, which makes the sale of any "spirituous liquors" in prohibited districts a misdemeanor. *State v. Nash*, 2 S. E. 645, 646, 97 N. C. 514.

"Spirituous liquor," as used in Gen. Laws, c. 109, § 13, prohibiting the sale of spirituous liquor, should be construed to include intoxicating wines. *Jones v. Surprise*, 9 Atl. 384, 385, 64 N. H. 243.

## SPLITTING OF BLOOD.

"Spitting of blood" literally means to spit blood, without regard to the source from whence the blood comes, but, as used in an application for a life insurance policy, requiring the applicant to state whether he had had, since childhood, "spitting of blood," it evidently has a different meaning, as, for instance, its meaning as a medical term, applying to the spitting of blood coming from the lungs; and parol evidence was admissible to explain the sense in which it was used. *Singleton v. St. Louis Mut. Ins. Co.*, 66 Mo. 63, 76, 27 Am. Rep. 321.

By the expression "spitting of blood," used in an application for a life insurance policy, is no doubt meant the disorder so called, whether proceeding from the lungs, the stomach, or any other part of the body. Still, however, one act of spitting blood would be sufficient to put the insurers on inquiry as to the cause of it, and ought, therefore, to be stated. *Rolfe, B.*, said: "I have no doubt that, if a man had spit blood from his lungs, no matter in how small a quantity, or even had spit blood from an ulcerated sore throat, he would be bound to state it." *Mutual Ben. Life Ins. Co. v. Miller*, 39 Ind. 475, 485.

## SPLITTOON.

The word "cuspidor" is derived from the Portugese "cuspo," to spit; "cuspidore," a spitter. The difference between a spittoon and cuspidor is one of form only, so the fact that one patent was for a cuspidor and the other for a spittoon was of no importance in determining their validity. *Ingersoll v. Turner* (U. S.) 7 Fed. 859.

## SPLIT BAMBOO.

See "Bamboo."

## SPOILED LUMBER.

"Spoiled lumber," as used in a contract requiring a person to saw all the clean stuff, select box, that could be cut out of logs, he to keep "spoiled lumber" and allow a specified price, means, in its known and acknowledged signification, only such as was rendered unfit for market, and not lumber which was not sawed according to the specifications. *Harris v. Rathbun*, \*41 N. Y. (2 Keyes) 312, 313.

## SPOILIATION.

The term "spoliation," as used in reference to instruments, denotes the act of a stranger to the instrument in changing the instrument without the participation of the party interested therein. It is distinguished from "alteration," which is an act of a party interested therein in changing the instrument in such a manner as to change the legal effect thereof. *Medlin v. Platt County*, 8 Mo. 235, 239, 40 Am. Dec. 135.

The mutilation of instruments by a stranger is termed "spoliation," as contradistinguished from "alteration," and is very different in its consequences and effects. If by such a method an instrument is so defaced or changed as to lose its identity, it will be merely the destruction of the primary evidence, as in the case of a loss of a paper, compelling the party to resort to secondary evidence. *Crockett v. Thomason*, 37 Tenn. (5 Sneed) 342, 344.

The rule that, while assessments for public improvements rest upon the basis of benefits or presumed benefits to the property assessed, it is not essential to their validity that actual enhancement in value or other benefits to each owner should be shown. On the other hand, it is held that when, owing to the extraordinary facts, the presumption on which the rule rests does not apply, and to force the owner to make the improvement is to confiscate his property without compensation, this is "spoliation," and will not be enforced. *Duker v. Barber Asphalt Pav. Co.* (Ky.) 74 S. W. 744, 745.

Where the result of the course of a public improvement to the owner of a lot is that his lot has been entirely taken for the improving of an adjacent public way, that is "spoliation," if anything is. If the tax imposed is equal to the value of the property taxed after the improvement for which the tax is laid, it is not material to the lot owner whether it is more, or how much more; for he loses interest at the point where the proposed tax consumes the property taxed. *Pfadtger v. Kremer* (Ky.) 74 S. W. 238, 240.

## SPORT.

Webster defines "sport" as "to play, to frolic, to represent by any kind of play"; and baseball is a sport, within Cr. Code, § 241, providing that, if any person of the age of 14 years or upwards shall be found on Sunday sporting, hunting, fishing, or shooting, he shall be fined or imprisoned. *State v. O'Rourke*, 53 N. W. 591, 592, 35 Neb. 614, 17 L. R. A. 830.

"Sport" is a very general term, covering field sports and other means of recreation, and includes the game of billiards. *State v. Miller*, 36 Atl. 795, 796, 68 Conn. 373.

Comp. St. c. 110, § 12, relating to money lost at a "game or sport," does not apply to money lost on a wager. The statute refers to gaming only, and the word "sport" is added to "game," so as to show that game was intended to be used in its utmost extension, but yet it was only intended to include money lost at some game or play, either of skill or chance. *West v. Holmes*, 26 Vt. 530, 534.

In *Hickman v. Littlepage*, 32 Ky. (2 Dana) 344, in construing a statute authorizing a person betting money on any game, sport, or pastime to maintain an action for restitution against a depositor for money staked and unpaid to the winner, it was held that neither of the words "game," "sport," or "pastime" applied to money staked on the event of an election. *Graves v. Ford*, 42 Ky. (3 B. Mon.) 113, 114.

## SPORTING.

"Sporting," as used in Cr. Code, § 241, providing for the punishment of any person found sporting on Sunday, cannot be construed to include furnishing a performance consisting of music, dancing, and feats of contortion. "Sport" is defined by Webster as follows: "To divert; to make merry; to represent by any kind of play; to exhibit or bring out in public, as to sport a new equipage; to play; to frolic; to wanton; to practice the diversions of the field; to trifle." According to the same lexicographer, "sporting" means "indulging in sport; practicing the diversions of the field." The term as

used in the statute means practicing the diversions of the field, and also includes outdoor sports, which from their nature are forced upon the attention of the young, and whose religious sensibilities are thereby offended. *Wirth v. Calhoun*, 89 N. W. 785, 786, 64 Neb. 316.

"Sporting," as used in Act March 30, 1864 (Swan & S. St. 289), making it unlawful for any person of 14 years or upward to be found on Sunday sporting, rioting, quarreling, hunting, fishing, or shooting, does not mean the quiet, peaceful, and invigorating exercise of either walking or riding on the Sabbath day, although no urgent need or charity may prompt the exercise. *Nagle v. Brown*, 37 Ohio St. 7, 9.

Playing at the game of baseball is "sporting," within the meaning of the statute concerning the observance of Sunday. *Seay v. Shrader* (Neb.) 95 N. W. 690, 692.

## SPORTING HOUSE.

A "sporting house" is defined in the Century Dictionary as a house frequented by sportsmen, betting men, gamblers, and the like. The term does not necessarily mean a house kept or used for unlawful sports or practices. *White v. Western Assur. Co. of Toronto*, 54 N. W. 195, 196, 52 Minn. 352.

## SPORTSMEN.

"Sportsman" is defined in the Century Dictionary as "one who sports, specifically a man who practices field sports, especially hunting or fishing, usually for pleasure, and in a legitimate manner." *White v. Western Assur. Co. of Toronto*, 54 N. W. 195, 196, 52 Minn. 352.

## SPOTTER.

On a prosecution for maintaining a liquor nuisance, witnesses called by the government testified that they were employed at so much compensation a day in the case and other cases, and that they made it their business to procure illegal sales of intoxicating liquors for the purpose of prosecuting the seller. The court was not bound to instruct the jury that the testimony of these witnesses, commonly called "spotters," was to be received with great caution and distrust; the credibility of witnesses being for the jury, and counsel being permitted to argue the question to them, and a spotter not being, in contemplation of law, an accomplice. *State v. Hoxsle*, 22 Atl. 1059, 1061, 15 R. I. 1, 2 Am. St. Rep. 838.

## SPRAIN.

To sprain means to weaken, as a joint, ligament, or muscle, by a sudden and excess-

ive exertion, as by wrenching; to overstrain or stretch injuriously, but without laxation, as to sprain one's ankle. In an action for personal injuries, it was held that an allegation that plaintiff sprained his back was not sufficient to render evidence of injuries to the kidney and bladder admissible; such injuries not arising from injuries to the joints, ligaments, or muscles of the back, and apparently not being regarded as included in the term "sprain." *Ft. Worth & D. C. Ry. Co. v. Rogers*, 53 S. W. 366, 21 Tex. Civ. App. 605.

## SPRATS.

"Sprats" are the young of the herring, a family distinct from that to which the sardines belong, but, where known to the retail trade as sardines, were properly classified as sardines for tariff purposes. In *re Wieland* (U. S.) 98 Fed. 99, 100.

## SPREADING.

The words "contriving, propagating, and spreading," in an indictment charging the defendants with conspiring to occasion a fall and decline in the market price of certain stock, by contriving, propagating, and spreading divers false and injurious rumors, statements, imputations, etc., regarding and impugning the management and financial condition of the corporation, are equivalent to the word "circulating," as used in Pen. Code, § 435, making it criminal for any one, with intent to affect the market price of stocks, to knowingly circulate any false statement, rumor, or intelligence; and they further charge motive, intent, and guilty knowledge. *People v. Goslin*, 73 N. Y. Supp. 520, 523, 67 App. Div. 16.

## SPRING.

The word "spring," when applied to water, means the formation of water that naturally gushes out of the earth's surface. A spring is a place where water issues from the ground by natural forces. *Furner v. Seabury*, 13 N. Y. Supp. 12, 16, 59 Hun. 272 (citing *Magoon v. Harris*, 46 Vt. 264; *Bloodgood v. Ayers*, 108 N. Y. 405, 15 N. E. 433, 2 Am. St. Rep. 443).

"Spring," as used in a deed reserving to the grantor "the spring of water on said premises," means a small stream of water which had its rise in a spring on adjoining land, but flowed onto the premises conveyed, where it finally lost itself in the ground, where there was no other spring or water on the premises. *Peck v. Clark*, 8 N. E. 335, 837, 142 Mass. 436.

Acts 1886, c. 269, § 2, authorizing a corporation to take the waters from a certain pond, and the waters of any spring, and "the

water rights connected therewith," means waters issuing from the earth, or found therein by digging or otherwise opening it, and bubbling up or flowing therefrom, and does not include the waters of a pond. *Proprietors of Mills on Monaquot River v. Braintree Water Supply Co.*, 21 N. E. 761, 762, 149 Mass. 478, 4 L. R. A. 272.

### Well distinguished.

"Springs," as used in a deed granting the privilege of taking water from springs, means a place where water by natural forces usually issues from the ground, and does not include places where the grantor reached water by orifices in the ground, and where the water did not flow to the surface. *Magoon v. Harris*, 46 Vt. 264, 271.

A spring is water issuing by natural forces out of the earth at a particular place. It is not a mere place or hole in the ground, nor is it all the water that can be gathered or caused to flow at a particular place. A well is not necessarily a spring, nor is water which by the expenditure of labor can be gathered into a reservoir. *Furner v. Seabury*, 31 N. E. 1004, 1007, 135 N. Y. 50.

### SPRING SHIPMENT.

The expression "spring shipment," where no time was fixed in an agreement for the delivery of timber, the seller to have it ready for spring shipment, might be held to mean just what the calendar named as the spring months, viz., March, April, and May, or there might be given to it a somewhat more popular meaning, as the period when vegetation began to put forth, and extending in this latitude from about the middle of March to about the middle of June. But there is no meaning which can be given to it which as a matter of law would make it extend beyond the 1st of July. *Parker v. Selden*, 69 Conn. 544, 551, 552, 38 Atl. 212, 213.

## SPRINGING USE.

A springing use is one which arises from the seisin of the grantor, and where there is no estate going before it, and is distinguished from a shifting use, which is always in derogation of a preceding estate. *Smith v. Brisson*, 90 N. C. 284, 288.

## SPURIOUS BILL.

A spurious bill may be a legitimate impression from the genuine plate, but it must have the signatures of persons who are not the officers of the bank by which it purports to have been issued, or else the names of fictitious persons. A spurious bill may be an illegitimate impression from a genuine plate, or an impression from a counterfeit plate. A bill may be both counterfeit and forged, or

both counterfeit and spurious, but it cannot be both forged and spurious. *Kirby v. State*, 1 Ohio St. 185, 187.

## SQUANDERED.

An allegation in an answer that mortgaged property was "squandered and disposed of" to defendant's injury necessarily implies that the property was sold, or an interest in it transferred to others. *Burr v. Boyer*, 2 Neb. 265, 267.

## SQUARE.

See "Church Square"; "College Square"; "Courthouse Square"; "Garden Square"; "Market Square"; "Public Square"; "Seminary Square."  
See, also, "Block."

Each subdivision of territory bounded on all sides by principal streets should be deemed a "square," within the meaning of Louisville City Charter, § 12, providing that street improvements shall be made at the exclusive cost of the owners of lots in each fourth of a "square." *Caldwell v. Rupert*, 73 Ky. (10 Bush) 179, 183; *Broadway Baptist Church v. McAtee*, 71 Ky. (8 Bush) 508, 8 Am. Rep. 480.

Each subdivision of the territory bounded on all sides by principal streets shall be deemed the square. *Ky. St. 1903*, § 2833.

An "aperture so many inches square" within the meaning of a contract selling the right to the amount of water which will pass through such an aperture, means a rectilinear aperture, for till the quadrature of the circle be discovered, the diameter of a circle equal in contents to a given square will not be found. *Schuykill Nav. Co. v. Moore (Pa.)* 2 Whart. 477, 491.

The terms "park" and "square," as used in the statutory provisions relating to the use of bicycles and tricycles, shall not include any spaces under the control of park commissioners, or of a park board, or a park department of a city or town having power to make regulations relative to such spaces. *Rev. Laws Mass. 1902*, p. 531, c. 52, § 12.

### As synonymous with block.

"Square," as employed in New Orleans City Ordinance No. 4798, prohibiting private markets within a radius of six squares of any public market, is synonymous with "block," as used in city ordinance No. 4145, providing that no private market shall be established within a walking distance of six blocks of any public market. *State v. Natal*, 7 South. 781, 782, 42 La. Ann. 612.

### As honest.

"Square," as used in the statement that one must do the square thing in a business transaction, means "rendering equal justice;

exact; fair; honest." *Webst. Dict.* A statement in a letter that a certain charge made by an abstractor of titles amounted to petit larceny, and that the addressee must make the abstractor do the square thing, is libelous per se; the declaration that the party must be compelled to do the square thing implying, in the connection in which it was used, that he had been dishonest. *Ivey v. Pioneer Savings & Loan Co.*, 21 South. 531, 533, 113 Ala. 349.

### As measure of distance includes streets.

"Squares," as used in Acts 1878, No. 100, prohibiting the keeping of private markets within "a radius of six squares" of a public market in New Orleans, means a space termed and designated as "squares," including the streets, which would be 2,100 feet, and not 1,800 feet, which would be exclusive of the street. *State v. Berard*, 3 South. 463, 464, 40 La. Ann. 172.

### As measure in printing.

A "square" in legal advertisements shall be considered and held to be a space occupied by 240 ems of the type used in printing advertisements. *Bates' Ann. St. Ohio 1904*, § 4369.

A "square" in state advertisements shall be considered to be a space occupied by 300 ems of plain, solid matter. *Bates' Ann. St. Ohio 1904*, § 316.

### As indicating public use.

"Square," as used to designate a certain portion of ground within the limits of a city or village, indicates a public use, either for purposes of a free passage or to be ornamented for grounds of pleasure, amusement, recreation, or health. This is said to be the proper and settled meaning of the term in its ordinary and usual signification. *Rowzee v. Pierce*, 23 South. 307, 309, 75 Miss. 846, 40 L. R. A. 402, 65 Am. St. Rep. 625.

The word "square," when used as a term of dedication, imports a complete and unrestricted abandonment to public uses for purposes of free passage, or to be ornamented and improved for grounds of pleasure, recreation, or health. *Methodist Episcopal Church v. City of Hoboken*, 83 N. J. Law (4 Vroom) 13, 17.

## SQUARE INCH OF WATER.

A "square inch of water" is a stream of water with a cross-section area of one square inch moving with a velocity due to the given head. This meaning is a technical meaning among water engineers, and is not the same as the practical square inch of water, which is an amount of water which will be discharged through the aperture in a flume of the given number of square inches, the center of which aperture is at the given distance below the surface of the water in the flume.

The theoretical inch is certain and unvarying in amount. The practical inch varies in amount according to the construction of the aperture. The practical inch discharged through an aperture with thin edges will measure about 62 per cent. in amount of the theoretical inch; but if the aperture be trumpet shaped, or furnished with proper adjustment inside the reservoir, it may be made to equal the theoretical inch, and even to discharge as much as 240 per cent. of the theoretical inch. The theoretical inch is founded on a theory merely, namely, the theory that water spouting from a side of a flume with a certain head, say four feet, will have the same velocity as if it fell the same distance through the air, and, as this velocity is fixed and certain, the amount of water referred to in the theoretical inch is fixed and certain. When used in conveyances of water power made previous to 1860 the term did not have the defined technical meaning of a stream of water with a cross-section area of one square inch moving with the velocity due to a given head, but will have the theoretical meaning when the parties have so treated it. *Janesville Cotton Mills v. Ford*, 52 N. W. 764, 766, 82 Wis. 416, 17 L. R. A. 564, 567. See, also, *Jackson Milling Co. v. Chandos*, 52 N. W. 759, 762, 82 Wis. 437.

### SQUARE LEAGUE.

A "square league" is 5,000 varas square, and its area is 25,000,000 varas. *United States v. De Rodriguez* (U. S.) 25 Fed. Cas. 821, 822.

### SQUARE YARD.

"Square yard," as used in a contract for the cutting and grading of a street preparatory to paving, the payment to be at a certain sum per square yard for cutting, grading, and removing the dirt, is synonymous with cubic yard—a square yard, or a yard every way of the solid contents of the excavated ground. A square yard, when applied to a surface, means, of course, superficial measure; but, when applied to a solid, it might, and generally would, import solid measure, or a yard every way according to the subject of mensuration. *City of Louisville v. Hyatt*, 41 Ky. (2 B. Mon.) 177, 181, 36 Am. Dec. 594.

### SQUATTER.

A squatter is one who has actual possession of the land of another and who makes no claim to own it, being merely an intruder; and, no matter how long he may continue there, the statute of limitations will confer no right upon him, because he makes no claim against the true owner, and his possession, therefore, is not adversary. *Parkersburg Industrial Co. v. Schultz*, 27 S. E. 255, 43 W. Va. 470 (citing *Creekmur v. Creekmur*, 75 Va. 430; *Nowlin v. Reynolds* [Va.] 25 Grat. 137, 141; *Hudson v. Putney*, 14 W. Va. 561; *Kincheloe v. Tracewells* [Va.] 11 Grat. 587, 588).

A squatter, according to Webster, is one who settles on new land, particularly on public land, without a title. According to Bouvier he is one who settles on lands of others without any legal authority. This term is particularly applicable to persons who settle on public land. According to McAdam, Landl. & Ten. 283, a squatter may be defined to be a person who settles or locates on land without obtaining a legal title. The words "squatter or intruder," in Code Civ. Proc. § 2232, authorizing summary proceedings to remove squatters or intruders, do not include persons entering under a tax deed and remaining in possession after it has been adjudged void for invalidity of the assessment tax, and for the reason that he did not enter without title or legal authority. *O'Donnell v. McIntyre* (N. Y.) 16 Abb. N. C. 84, 87.

### SQUATTER RIOTS.

Judicial notice will be taken in California that the term "squatter riots" has reference to riots occurring by reason of conflicting claims to land growing out of the uncertainty in the early land titles. A charge that one has been engaged in squatter riots is not libelous per se. *Clarke v. Fitch*, 41 Cal. 472, 477.

### SQUEEZE.

In mining parlance "squeeze" is the settling of the base of the columns or partitions left to support the roof into the softer material of the floor, thereby causing the floor in the space to heave, and masses of rock and coal to fall from the top and sides, rendering them more or less dangerous. *Reddon v. Union Pac. Ry. Co.*, 15 Pac. 262, 263, 5 Utah, 344.

### SR.

The suffix "Sr." is no part of a name, and an instruction that, if a father adopted the suffix "Sr." to distinguish himself from the son, the law presumed the deed of the property owned by the father, executed without the suffix, to be the deed of the son, and that it devolved on plaintiffs, claiming it was the father's, to establish their claim, was incorrect. *Hunt v. Searcy*, 67 S. W. 206, 208, 167 Mo. 158.

### STAB.

Cut synonymous, see "Cut."

The term "stabbing" means "properly wounding with a pointed instrument." State

v. Cody, 23 Pac. 891, 894, 18 Or. 506; State v. Putza, 3 La. Ann. 512, 514; State v. Lowry, 33 La. Ann. 1224.

To constitute "stabbing," the knife need not enter further than to penetrate the skin and draw blood. Ward v. State, 56 Ga. 408, 410.

"Stab," as used in an indictment, will not be construed as a technical term, but in its ordinary acceptation, and to include a wound made with a knife. Ruby v. State, 7 Mo. 206, 208.

## STABLE.

As building, see "Building"; "Building (In Criminal Law)."

In an indictment for barn burning, alleging the offense to have been committed by burning a barn and stable, "stable" is used interchangeably with the word "barn." Primarily a barn is a building for the storage of grain and fodder, and a stable is a building for the lodging and feeding of horses and other domestic animals. It is stated in Webster's International Dictionary that in the United States a part of a barn is often used for a stable. Saylor v. Commonwealth (Ky.) 57 S. W. 614, 615.

A stable is a house, shed, or building for beasts to lodge and feed in; and to call a building a stable is sufficient to indicate the purpose for which it is, or is intended to be, used. Dugle v. State, 100 Ind. 259, 260.

The word "stable," in 2 Hill's Code, p. 662, § 46, which defines burglary as an unlawful entry, with intent to commit a felony, of an office, shop, store, warehouse, malt-house, stillhouse, mill, factory, bank, church, schoolhouse, railroad car, barn, stable, ship, steamboat, and water craft, or any building in which goods, merchandise, or valuable things are kept for use, sale, or deposit, means any "stable," without regard as to whether any valuable things are kept therein or not, as the latter clause of the statute only refers to buildings not specifically designated. State v. Sufferin, 32 Pac. 1021, 6 Wash. 107.

"Stable," as used in Cr. St. § 140, defining arson as the willful and malicious setting fire to or burning any "barn, stable, coach house, gin house, storehouse, or warehouse," does not include a fodder house and corncrib. State v. Jeter, 24 S. E. 889, 891, 47 S. C. 2.

## STACK.

See "Straw Stack."

The term "stack," as used in an insurance policy covering grain in a stack, has a well-defined meaning, including grain in conical piles out of doors, so built as to be able

to shed the water and protect the grain from the elements by reason of their own construction, and cannot be said to include grain in a mow in a barn. Benton v. Farmers' Mut. Fire Ins. Co., 60 N. W. 691, 693, 102 Mich. 281, 26 L. R. A. 237.

In common parlance the terms "shock of wheat" and "stack of wheat" have a totally distinct and different signification. "Shock" is the term applied to the small collection and arrangement of a few sheaves together in the field, in such manner as to protect them against the weather for a few days, until the farmer has time to gather them into his barn, or place them in the large conical pile, called a "stack." Denbow v. State, 18 Ohio, 11, 12.

## STAGE.

A stage is a carriage devoted to public use, built and used for the transportation of passengers. Talcott Mountain Turnpike Co. v. Marshall, 11 Conn. 185, 199.

"A stage is any carriage that travels by set stages." Middlesex Turnpike Co. v. Wentworth, 9 Conn. 371, 373.

## STAGE DRIVER.

"Stage driver," as used in the United States militia law, exempting all stage drivers who are employed in the care and conveyance of mail of the United States from the performance of military duty, is to be construed as only including persons whose general or stated employment is that of driver of a stage carrying the mail, and not to include a person only temporarily connected therewith as hostler employed in the barns of the mail contractor. Littlefield v. Leland, 8 Me. (8 Greenl.) 185, 186.

## STAGE OF PROSECUTION.

Rev. St. § 880, punishes the attempt by persuasion to prevent a witness in a criminal case in any "stage of the prosecution" from appearing or testifying. Held, that the stages of the prosecution include the investigation by the grand jury, which results in finding the bill. State v. Desforges, 17 South. 811, 820, 47 La. Ann. 1167.

## STAGECOACH.

"Johnson defines a stagecoach as a coach that regularly carries passengers from town to town." Cincinnati, L. & S. Turnpike Co. v. Neil, 9 Ohio, 11, 13.

"Stagecoach," as used in St. 4 Geo. IV, c. 94, § 30, excepting from the exemptions from toll all horses drawing "any stagecoach, van, caravan, or stage wagon, or other stage carriage conveying passengers or goods for pay or reward," means a vehicle

that starts from some one point at certain stated intervals, as an errand cart, and did not apply to the horses and wagons of a wharfinger, who carried goods from his wharf to persons in the neighborhood, and brought goods from the neighborhood to his wharf, but whose wagons went out and returned at different hours, according to circumstances, and on some days made more journeys than others. Dr. Johnson defines a stage carriage as one that "keeps its stages." Reg. v. Ruscoe, 8 Adol. & El. 388, 388.

## STAGNUM.

"In Co. Litt. 5, it is laid down that 'stagnum'—in English, a pool—consists of water and land; and therefore by the name of stagnum or a pool the water and land shall pass also. In the same manner gorges, a deep pit of water, consisteth of water and land; and therefore by the grant thereof by that name the soil doth pass." Johnson v. Rayner, 72 Mass. (6 Gray) 107, 110.

## STAKE.

### In boundaries.

It is a settled rule of construction that when "stakes" are mentioned in a deed simply, or with no other added description than that of course and distance, they are intended by the parties, and so understood, to designate imaginary points. Massey v. Bellisle, 24 N. C. 170, 177.

In considering the description in a grant of lands, "beginning at a stake, running thence north 500 chains, thence west 250 chains, thence south 500 chains, thence east 250 chains, to the first station," the court said: "A stake is an imaginary point. There is no telling where it is. So the grant has no beginning; its description being void on account of its vagueness." Mann v. Taylor, 49 N. C. 272, 273, 69 Am. Dec. 750.

### In gaming.

Where several parties contribute money for some valuable things to a fund, on understanding that each one is to have a chance to gain a portion or all of the fund, dependent on the happening of some uncertain event, such fund or pool is a stake. Harris v. White, 81 N. Y. 532, 539.

The term "stakes" is usually given to the money or other things which are wagered. Jordan v. Kent (N. Y.) 44 How. Prac. 206, 207; Porter v. Day, 87 N. W. 259, 261, 71 Wis. 296.

"Stake," as used in reference to trotting horses for a "purse or stake," is not synonymous with "wager," as used in Rev. Laws, § 4305, as amended by Acts 1888, No. 156,

prohibiting the trotting of horses for a wager. A wager is a bet, which is a pledge as of money to be paid to another in a certain event; the other pledging to pay a forfeit in the contrary event. Trotting for a purse or stake is not a transaction of that kind, but more properly belongs to the class of "no cure, no pay, cases." Ballard v. Brown, 32 Atl. 485, 67 Vt. 586.

Money paid for lottery tickets is money "laid, staked, or bet," within the meaning of Code, § 4029, providing that all promises, agreements, notes, etc., when the whole or any part of the consideration thereof is for money or other valuable thing won or lost, "laid, staked, or bet," at or upon any game of any kind or in any wager, are absolutely void and of no effect. One of the definitions of the word "lay" is to risk, and money paid for lottery tickets is risked on the chances of success at the drawing. To stake money is to put it at hazard on the issue of competition, or upon a future contingency, and money paid for lottery tickets is staked on a game of chance. Koster v. Seney, 68 N. W. 824, 825, 99 Iowa, 584.

The word "stake," as used with reference to dealings in futures, is the amount of the margin required to cover differences in values; and according to the price of a commodity on a future day the parties to the contract must respectively gain or lose. Mohr v. Miesen, 47 Minn. 228, 231, 49 N. W. 862.

## STAKE OFF.

As used in an act defining mining claims and regulating title thereto, and enacting that any claim, if abandoned for 10 consecutive days after being staked off, shall be forfeited to any person who may take up the same, and that no claim shall be regarded good and valid unless staked off with the owner's name, giving the date when the same was made, the phrase "staked off" evidently refers to marked boundaries of claims by stakes, or at least with the posting of stakes along the vein or its croppings, so as to indicate to other prospectors the ground intended to be appropriated, and could hardly be intended to mean simply the erection of a single stake, with a notice somewhat similar to that required on what is known as the "discovery stake." Becker v. Pugh, 13 Pac. 906, 907, 9 Colo. 589.

## STAKE OUT.

The words "staked out," with reference to an act by which the selectmen of a town staked out for the town's use a highway, describes only the act of the finding of the line of the highway, and are as consistent with a mere easement for that purpose as with a title in fee. City of Boston v. Rich-

ardson, 95 Mass. (13 Allen) 161. And these words have no greater effect as to so much of the highway as was below high-water mark. *Id.*, 105 Mass. 351, 369.

### STAKE RACE.

A free handicap sweepstake, by an entry for which, under the racing rules, liability was not incurred absolutely, but only on condition that a horse should not be declared out, is not a "stake race," within the meaning of a proposal for a race for winners of stake races. *Stone v. Clay*, 61 Fed. 889, 892, 10 C. C. A. 147.

### STAKEHOLDER.

A stakeholder, in equity, is defined to be "one who has in his hands money or other property claimed by several others." *Bouv. Law Dict.* A debtor may occupy the situation of a stakeholder, in equity, when he acknowledges that he owes the debt, that it is due to one or the other of several claimants, but he is not advised to which of them, and when he deposits the money in court and asks that the contesting claimants may litigate their claims between themselves. *Wabash R. Co. v. Flannigan*, 75 S. W. 691, 693, 95 Mo. App. 477.

A stakeholder is a mere depository of both parties for the money deposited by them, respectively, with a naked authority to deliver it over on the proposed contingency. He cannot be regarded as a party to the illegal contract, or in *pari delicto*, so as not to be held amenable to any party for the money received; but, if the authority is actually revoked before the money is paid over, it remains a naked deposit to the use of the depositor. *Ball v. Gilbert*, 53 Mass. (12 Metc.) 397, 402; *Turner v. Thompson*, 55 S. W. 210, 211, 107 Ky. 647. He cannot avoid his responsibility to the loser by afterwards paying the whole of it to the winner. *Fisher v. Hildreth*, 117 Mass. 558, 562.

A stakeholder is one who has received the funds of another or others in special deposit for a given purpose, to be paid to one party, or divided between both or among all the parties, on the happening or not happening of some anticipated event, of which the stakeholder is often the judge; and such property he is bound to hold separately from his other funds. *Oriental Bank v. Tremont Ins. Co.*, 45 Mass. (4 Metc.) 1, 10.

### STALE.

A stale claim is not susceptible of a precise definition of uniform application. It is predicable of the particular circumstances of a particular case. It does not operate to discharge the debt, but to deny to the creditor the enforcement of some security or

form of liability which the law holds him to have lost by laches. Simple forbearance does not constitute it; but the reason on which it rests is that the creditor has unreasonably delayed the collection of his debt, so that some special equity or interest would be injuriously affected by the allowance of his claim. Hence it is that it has been generally interposed to protect a purchaser of a vessel, or a person who shall have a like equity, against the debts previously existing, the collection of which had been so long delayed, under the presumption that they had been paid, or, at least, that the privileged hypothecation of the vessel for their security had been waived. Where there has been no change of ownership of a vessel, forbearance by a seaman in enforcing his lien on it for wages due, until after 21 months' continuous service, does not render the claim stale. *The Galloway C. Morris* (U. S.) 9 Fed. Cas. 1111, 1112.

What lapse of time shall make a claim of seamen for wages "stale" must depend so greatly upon the facts of the case that no general rule can be laid down which can be applied in all cases; but wages for the years 1869 and 1870 must be deemed stale claims against a vessel when first urged in 1873. *The Harriet Ann* (U. S.) 11 Fed. Cas. 597.

The idea involved in stale demand seems to be the great lapse of time, and not mere changes in condition apart from such lapse of time, which renders the enforcement of the demand equitable. *Ashurst v. Peck*, 14 South. 541, 544, 101 Ala. 499.

What constitutes a stale equity is a vexed question, hardly susceptible of an accurate definition. Length of time alone is not a test of staleness. The question must be determined by the facts and circumstances of each case, and according to right and justice. The relations of the parties to each other often throw great light upon the question. A delay between parties occupying the relation to each other of parent and child, or husband and wife, or the like, might not give rise to staleness, when the same delay between parties not occupying such relations to each other might present such a case as to justify the application of the doctrine. *King v. White*, 63 Vt. 158, 21 Atl. 535, 25 Am. St. Rep. 752. It has been doubtful whether the defense of staleness can be invoked in a case to enforce a trust against an express trustee. *Drake v. Wild*, 27 Atl. 427, 429, 65 Vt. 611.

### STALL

Shop distinguished, see "Shop."

An ordinance prohibiting liquor dealers from constructing or maintaining any "stall, booth, or other inclosure" in any room or building where liquor is sold will be limited



to inclosures which are or may be used as lounging or drinking places, or for any immoral purpose, and not such as are innocent and necessary inclosures. *State v. Barge*, 84 N. W. 911, 913, 82 Minn. 256, 53 L. R. A. 428.

### STALLAGE.

As toll, see "Toll."

### STALLION.

A stallion is an uncastrated male horse. *State v. Royster*, 65 N. C. 539.

"Webster defines the word 'stallion' as a horse not castrated; a stock horse. Taking the word 'stallion' according to the common understanding, also, it would not include an uncastrated horse colt under the age and condition at which it is troublesome to mares or dangerous to be at large." *Aylesworth v. Chicago, R. I. & P. R. Co.*, 30 Iowa, 459, 460.

### STAND.

Where a railroad company's rule stated that passengers are not allowed to stand on the platform of cars, a person stood thereon, within the meaning of the regulation, by going upon the platform while the train was in motion and some time before it arrived at the regular stopping place, and by standing with his feet upon the step and holding the railing by his hands, while awaiting either the slowing up of the train or its arrival at the passenger platform, that he might alight. *Bon v. Ry. Passenger Assur. Co.*, 10 N. W. 225, 226, 56 Iowa, 864, 41 Am. Rep. 127.

Where a person had his left foot only on the footboard of a car, and the right hanging outside and below the footboard, he would still be "standing on the footboard," in the common acceptation and understanding of that term. *City of Omaha v. Doty*, 89 N. W. 992, 993, 2 Neb. (Unof.) 726.

"Standing or walking on the roadbed of any railway," within the meaning of an accident policy exempting the company from liability for injuries while standing or walking on the roadbed of any railway, does not include the mere crossing of railroad tracks for the purpose of reaching the railroad station. To stand or walk on a roadbed implies some sensible duration of the act, and does not describe a mere crossing, made for a justifiable purpose, such as reaching the station. Common language distinguishes between standing, walking, and crossing. *Duncan v. Preferred Mut. Acc. Ass'n of New York*, 13 N. Y. Supp. 620, 621, 59 N. Y. Super. Ct. 145.

A city ordinance provided that no person should stand on any street for the sale

of any article, unless duly licensed. On a complaint for standing on a street and selling newspapers in violation of the ordinance, a witness for the prosecution testified that the defendant on the day named in the complaint came into a certain street and sold newspapers; that he would stand for about five minutes, and then move a little, moving backwards and forwards within a space of 15 feet. It was held that a ruling that if the defendant stopped in the manner described he would be guilty of standing in violation of the ordinance was erroneous, and that the case should have been submitted to the jury, upon all the evidence, with proper instructions. *Commonwealth v. Elliott*, 121 Mass. 367, 369.

"Stand," as used in a party wall agreement, which provides that the rights of the parties shall continue so "long as the wall shall stand," does not mean as long as any portion of the wall itself shall remain, but so long as the wall shall remain fit for use as a party wall, and therefore it does not violate a provision in the agreement that no perpetual right or easement shall be thereby acquired. *Odd Fellows' Hall Ass'n of Portland v. Hegele*, 32 Pac. 679, 681, 24 Or. 18.

### STAND CASKS.

"Stand casks" are large ornamental casks, holding more than five gallons, and forming part of the fixtures of a retail liquor store. *United States v. Cask of Gin (U. S.)* 8 Fed. 20, 21.

### STAND THE CLIMATE.

A contract for the sale of lamp oil, warranted to "stand the climate" of Vermont without chilling, should not be construed as meaning that the oil would not chill in any possible exposure, but only that it would not chill in any reasonable exposure. This involves every reasonable exposure, whether used in lighting a dwelling house, a gristmill, a livery stable, or the public streets. If the oil would stand the climate of Vermont without chilling when exposed, as it must in its use in the various businesses of life in which it becomes necessary that it should be used, this is all that the plaintiff has a right to claim under the warranty. *Hart v. Hammett*, 18 Vt. 127, 130.

### STAND COMMITTED.

An order directing that a defendant "stand committed" was equivalent to the statutory phrase that he "be committed"; the difference of phraseology being unimportant. *Young v. Makepeace*, 103 Mass. 50, 57.

### STAND FOR.

Where defendant told plaintiff that, if plaintiff would let the third person have

goods to a certain value, he (defendant) would "stand for them," he meant that he would become guarantor or security to plaintiff for that amount. *Pake v. Wilson*, 28 South. 665, 666, 127 Ala. 240.

### STAND GOOD.

#### As a guaranty.

A finding that the defendant agreed to "stand good" to the plaintiff for the board of her son is not to be construed as showing a guaranty or suretyship, as one may stand good for a debt of his own, or for goods which he may purchase for another, and yet be the original and only obligor. *McNabb v. Clipp*, 31 N. E. 858, 859, 5 Ind. App. 204.

Where a person, in order to induce a purchaser of property held in common to take a deed to the property, said, "I will stand good for all judgments against" the co-owner, there is not a promise to pay the debt of another; but it is essentially an original undertaking to indemnify, based on a sufficient consideration. *Elkin v. Timlin*, 25 Atl. 139, 151 Pa. 491.

#### As creating a mortgage.

An oral contract of sale of personalty, where it was agreed that, the purchase price not being paid in full, the property should "stand good" for itself, was an attempt to create a chattel mortgage by parol. *Barnhill v. Howard*, 16 South. 1, 2, 104 Ala. 412.

A parol agreement by a debtor that certain personal property belonging to him "should stand good for his indebtedness" should be construed as the same in effect as a verbal hypothecation of the property as a security for the debt. The words created an equitable lien merely. *Jackson Morris & Co. v. Rutherford*, 73 Ala. 155, 156.

### STAND TO.

A condition in an arbitration bond that the party shall well and truly "submit, stand to, and abide by" the decision and award of the arbitrators is construed to extend to the performance by the principal of the award after it is made; the court remarking, in the course of discussion, that to speak of submitting to and abiding by a law, an order, or a decision means in common parlance to obey it, to comply with it, to act in accordance with it, and perform its requirements. *Washburne v. Lufkin*, 4 Minn. 466, 470 (Gil. 362, 364).

### STANDING.

"Loss of standing in society" is a very vague and uncertain element of damage in a battery. If by it was meant circumstances of outrage and insult, which wound the feelings and tend to lower the party aggrieved

in the estimation of his fellow citizens, it is well enough; but if it were intended that the jury might give compensation for any public odium which might arise from an exposure at the trial of domestic quarrels, then it is clearly wrong. *Barnes v. Martin*, 15 Wis. 240, 246, 82 Am. Dec. 670.

*St. Lim. Md.* 1715, c. 23, § 6, providing that "no bill, bond, judgment, recognizance, statute merchant, or of the staple, or other specialty whatsoever, \* \* \* shall be good or pleadable, or admitted in evidence," after the debt or thing in action has "above 12 years' standing," means 12 years' standing without any proceeding toward enforcing payment, and not merely 12 years from the date of the judgment. *Digges v. Eliason* (U. S.) 7 Fed. Cas. 691.

### STANDING ACROSS.

*Rev. St.* 1881, § 2170, providing that any one in charge of a freight train, suffering it to remain "standing across" a highway, street, or alley, should be fined, does not mean for an instant merely; but it means that such standing shall continue or remain long enough to become an obstruction and prevent the free enjoyment of the highway by the citizens of the state who may have occasion to use the same. The standing across contemplated is one of a transient character. *State v. Malone*, 35 N. E. 198, 199, 8 Ind. App. 8.

### STANDING ASIDE.

"Standing aside jurors" is the practice allowed the commonwealth of rejecting jurors without immediately showing cause of challenge. This is an ancient practice, and in 2 Bac. Abr. 764, it is stated: "It hath also been agreed, and is now the established practice of the courts, that if the king challenge a juror before the panel is exhausted, he need not show any cause of his challenge until the whole panel be gone through, and it appear that there will not be a full jury without the persons so challenged." *Warren v. Commonwealth*, 37 Pa. (1 Wright) 45, 54.

The practice of "standing aside jurors" is ancient, has come to us from England, like most of our customs and laws, and is not changed by the allowance of peremptory challenges. *Warren v. Commonwealth*, 37 Pa. (1 Wright) 45. The mere passing of the juror over to the court or to the opposite party is not an absolute waiver of the right to challenge, if good cause be shown afterwards. The power to permit standing aside of a juror, and afterwards to allow a challenge by the commonwealth, is essential to the due administration of justice. *Zell v. Commonwealth*, 94 Pa. 258, 272.

The practice of "standing aside jurors" had its origin in the construction given by

the courts to a statute (St. 33 Edw. I) enacted in 1305. Like many other customs, it descended to us whence most of our laws and customs were derived. The right of the prosecuting officer for the commonwealth in Pennsylvania to stand aside jurors during the impanelling of a jury, without assigning the cause, exists in cases of misdemeanor, as well as in felonies. *Haines v. Commonwealth*, 100 Pa. 317, 322.

The words "stand aside" are the usual formula, used in impanelling a jury, for rejecting a juror. *State v. Hultz*, 16 S. W. 940, 942, 108 Mo. 41.

### STANDING BY.

The term "standing by," as used with reference to one holding an interest in property and standing by while another without notice attempts to secure such interest, does not mean the actual presence or meeting face to face of both vendor and purchaser at the final consummation of the bargain. The application to him for information is equivalent to bringing him to the treaty ground and making him witness it, and, if at any stage of the negotiation he is present and fails to apprise the purchaser of his right, his silence is treated as an assurance that the vendor has the right, or, at least, that he himself has none. *Morrison v. Morrison's Widow*, 32 Ky. (2 Dana) 13, 16.

The term "standing by," so often used in the books and reports in discussing cases of estoppel, does not mean actual presence or actual participation in the transaction; but it means silence where there is knowledge and a duty to make a disclosure. *Anderson v. Hubble*, 93 Ind. 570, 573, 47 Am. Rep. 394; *Kuriger v. Joest*, 52 N. E. 764, 769, 22 Ind. App. 633.

The term "standing by" implies knowledge under such circumstances as render it the duty of the possessor to communicate it. *Anderson v. Hubble*, 93 Ind. 570, 573, 47 Am. Rep. 394; *Kuriger v. Joest*, 52 N. E. 764, 769, 22 Ind. App. 633; *Gatling v. Rodman*, 6 Ind. 289, 292; *Richardson v. Chickering*, 41 N. H. 380, 384, 386, 75 Am. Dec. 769; *State v. Holoway* (Ind.) 8 Blackf. 45, 47.

### STANDING DETACHED.

See "Detached."

### STANDING GRAIN.

An indictment charging that the defendant cut and destroyed a quantity of "standing corn" meant corn attached to the land and not cut. Such corn is not personal property, but savors of, or rather is, a part of the realty. It is true that to certain purposes and to a certain extent "standing corn" is considered by the common law as personal-

ty. It is liable to be taken and sold under execution, and as between the executor and heir it belongs to the executor; but in no other case does the common law view it as personalty. *State v. Helmes*, 27 N. C. 364, 365.

A mortgage of oats, describing the grain as "now standing," does not cover oats which are cut and partially thrashed. "Trees are standing when they are erect and supported by their roots." *Ford v. Sutherland*, 2 Mont. 440, 442.

### STANDING IN MY NAME.

A bequest of stock or bonds "standing in my name" is sufficient to render the bequest specific, and to show that testator intended to devise the specific property, and not a quantity or species of the thing bequeathed. *Norris v. Thompson's Ex'rs*, 16 N. J. Eq. (1 C. E. Green) 218, 222; *Kunkel v. Macgill*, 56 Md. 120, 123.

In holding that the word "the" in a legacy of 10 shares of the stock of a certain railroad company did not make the legacy specific, the court say that if the word "my" was used, instead of the word "the," the legacy would be specific, and that the same principle applies upon equally strong grounds when a testator, after giving legacies of stock generally, gives the rest of the stock "standing in my name." *Harvard Unitarian Soc. v. Tufts*, 23 N. E. 1006, 1007, 151 Mass. 76, 7 L. R. A. 390.

### STANDING TIMBER.

Standing timber is realty. *Balkcom v. Empire Lumber Co.*, 17 S. E. 1020, 1021, 91 Ga. 651, 44 Am. St. Rep. 58.

Standing trees are, ordinarily, at least, to be regarded, as between co-tenants, as part of the real estate, and severing and removing them without consent of other co-tenants is a destruction to that extent of the realty. After the severance they are the property of the co-tenants, and by a conversion of them the tenant converting them becomes liable to his co-tenants as in case of other personal property. *Nevels v. Kentucky Lumber Co.*, 56 S. W. 969, 970, 108 Ky. 550, 49 L. R. A. 416, 94 Am. St. Rep. 388 (quoting *Shepard v. Pettit*, 30 Minn. 119, 14 N. W. 511).

A deed reserving all the standing wood on the lot will be construed to include trees suitable for timber, as well as trees suitable for fuel, where there is nothing in the context or any other part of the deed to indicate that the term "standing wood" was used in a more limited sense. *Strout v. Harper*, 72 Me. 270, 273.

Standing timber, annexed to a freehold, passes with it, and often constitutes a great

part of its value. *Erskine v. Plummer*, 7 Me. (7 Greenl.) 447, 450, 22 Am. Dec. 216.

Standing trees are a part of the realty, and therefore not the subject of a parol conveyance. *Drake v. Howell*, 45 S. E. 539, 133 N. C. 162.

### STANDPIPE

Reserving only the right to dictate to a water company the location of the source of water supply does not authorize a city to determine the location of a standpipe; the source of water supply being the point from which the water is supplied, while a standpipe is a place from which it is distributed. *Carlyle Water, Light & Power Co. v. Carlyle*, 31 Ill. App. 325, 338.

### STANDARD.

"Standard" *ex vi termini* implies a measure or test which has the general concurrence and recognition of the class of persons engaged in the particular business or trade under consideration. *Penn Steel Casting & Machine Co. v. Wilmington Malleable Iron Co.* (Del.) 41 Atl. 236, 238, 1 Pennewill, 337.

The word "standard," as applied to scales, is descriptive, and cannot be appropriated as an exclusive trade-mark to designate a scale of a particular make, either alone or in connection with the word "computing." *Computing Scale Co. v. Standard Computing Co.* (U. S.) 118 Fed. 965, 971, 55 C. C. A. 459.

"Standard," as used in the name of a certain tea, calling it "Standard He-No," implies that there are various grades of it, and that this is the "standard" or best article of the kind. *Kenny v. Gillet*, 17 Atl. 499, 500, 70 Md. 574.

### STANDARD TIME.

What is known as "simple standard time"—"central time"—is merely the solar time of the ninetieth meridian west of Greenwich. The difference between standard time and sun time is exactly the same over each meridian. There is a difference of four minutes for each degree between true sun time, which is obtained by the means of a dial, and standard or mean sun time. *Ex parte Parker*, 29 S. W. 480, 481, 35 Tex. Cr. R. 12.

Formerly "standard time" meant the average or standard sun time, as distinguished from local sun time, as shown by a sun dial, which, of course, varies with every change of longitude, and which was never in use in this state, and since the day of railroads is practically obsolete in every civilized country. In 1883 the railroads of the United States and Canada adopted four kinds of

standard time, viz., eastern, central, mountain, and Pacific, each applicable to an area covering approximately 15 degrees of longitude in each case; the standard being actually sun time at the central degree of longitude of the region to which the particular standard was applicable. The state of Minnesota fell wholly within "central time," which was actually sun time at ninetieth meridian of longitude. All standard mean times were based on sun times, but for the sake of uniformity sun time at some particular point is adopted as the standard. The only substantial difference between the standard time now in use and that in 1878 is that, as the former embraced more degrees of longitude than the latter, it necessarily follows that at places the difference between it and local sun time is greater than it was under the standard time formerly in use. The standard times adopted by the railroads in 1883 were since adopted by the people, in some parts of the country sooner than in others, and have long since become the sole standard time throughout the United States. In Minnesota central time was promptly adopted, and long before 1889 was in universal use and established as the sole standard of time in both public and private business; hence, under Gen. St. 1894, § 2012, being Gen. Laws 1878, c. 75, re-enacted in its present amended form in Gen. Laws 1889, c. 87, providing for the closing of saloons at 11 o'clock at night, standard time as now understood will be used. *State v. Johnson*, 77 N. W. 293, 294, 74 Minn. 381.

The "standard time" throughout this state is that of the seventy-fifth meridian of longitude west from Greenwich, and all courts and public officers and legal and official proceedings shall be regulated thereby. *Laws N. Y. 1892, c. 677, § 28.*

### STAPLE CROPS.

"Staple crops" or productions are such productions of the soil as have a special or defined character in the commerce of the country, such as wheat, rye, oats, buckwheat, beans, corn, barley, etc. *Keeran v. Griffith*, 34 Cal. 580, 581.

### STARBOARD TACK.

Where a vessel is under way with a wind on her starboard bow, she is necessarily on the starboard tack. *Burrows v. Gower* (U. S.) 119 Fed. 616, 617.

### STARCH.

Arrowroot in the form of starch, produced from arrowroot tubers by a process of manufacture, is subject to duty as starch, under Tariff Act July 24, 1897, c. 11, § 2, par. 285, 30 Stat. 173 [U. S. Comp. St. 1901,

p. 1653]. Leaycraft & Co. v. United States (U. S.) 124 Fed. 999.

## STARCH FACTORY.

"Starch factory," as used in a representation as to insurance on a starch factory, substantially includes the fixtures and machinery necessary to the process of such manufacture. *Pittsburg, V. & C. Ry. Co. v. Commonwealth*, 101 Pa. 192, 196.

## STARE DECISIS.

"There is not, in the common law, a maxim more eminently just and promotive of the public convenience than that of 'stare decisis.' \* \* \* If law, well established, may be annulled by an opinion, a foundation is laid for the most restless instability. The decisions of one court may be overruled by another court, and those of the latter will have only a transient efficacy, until some future court, dissatisfied with them, shall substitute new principles in their place. No system of inflexible adherence to established law can be as pernicious as such ceaseless and interminable fluctuations." *Palmer's Adm'rs v. Mead*, 7 Conn. 149, 157, 158.

When a question of law has been settled in England, the courts in this country are in the habit of adhering to such decision. It is undoubtedly correct that such should, as a general rule, be the case; but to adhere blindly to English decisions, when no good reason can be assigned for them, or when no other reason can be assigned than that it has been thus decided, to do this without inquiring what influenced the courts to make such decision, or to do it without inquiring whether the same reasons exist in this country as that would be foolish in the extreme. In England the sheriff is made liable for an escape; for the sheriff in that country is the keeper of the jail, and if the public prison is insufficient he can make all necessary repairs or alterations, and for the expense incurred he will be indemnified. In such a situation it is proper that, if the prisoner escapes, he should be liable; but a county in this country is liable to a sheriff for not providing a jail, where the sheriff has been subjected to an action for an escape. *Brown County Com'rs v. Butt*, 2 Ohio (2 Ham.) 348, 351.

The rule of stare decisis means in general that, when a point has been once settled by judicial decision, it forms a precedent for the guidance of courts in similar cases. It expresses the principle upon which rests the authority of judicial decisions as precedents in subsequent litigations, and adherence to it is necessary to preserve the certainty, stability, and symmetry of our jurisprudence. *Menge v. The Madrid* (U. S.) 40 Fed. 677, 679.

"Stare decisis" is a name given to the doctrine that, when the court has once laid down a principle of law as applicable to a certain state of facts, it will adhere to that principle, and apply it to all future cases where the facts are substantially the same. *Moore v. City of Albany*, 98 N. Y. 396, 410; *Hart v. Metropolitan St. Ry. Co.*, 72 N. Y. Supp. 797, 798, 65 App. Div. 493.

Without the observance of stare decisis the law is divested of one of its most important attributes, becomes fluctuating and capricious, and, instead of being a steady light to guide or shield to protect, becomes an ignis fatuus to mislead or a snare to entrap the citizen. *Perkins v. Clements* (Va.) 1 Pat. & H. 141, 153.

An adherence to the doctrine of stare decisis is undoubtedly necessary to preserve certainty and uniformity in the stability and symmetry of our jurisprudence. When the courts of last resort have announced principles affecting the acquisition of title to real estate, and the principles thus announced have been long established, frequently recognized, and conformed to, and property rights have been acquired thereunder, it has generally been held that such decisions should not be overturned, although the principles announced therein might otherwise be questioned. *American Mortg. Co. v. Hopper*, 64 Fed. 553, 554, 12 C. C. A. 293.

The maxim "stare decisis" is founded on reason, and it should not be so applied as to banish reason from the law. Its effect should be conclusive when former decisions have recognized and defined rules of interpretation with reference to which parties have entered into contractual relations. An act of the General Assembly to authorize a municipality to issue bonds for the construction of a public improvement having been adjudged by the Supreme Court to be constitutionally valid, and the bonds having been thereafter sold and the improvement made, the Supreme Court will follow the former decision as to the validity of supplementary acts relating to the renewal or extension of such bonds. *Cincinnati v. Taft*, 63 Ohio St. 141, 58 N. E. 63, 65.

Rules governing commercial transactions should remain settled and uniform among a people so much inclined and so often compelled to engage in traffic and to deal in bills of exchange as are the people of the United States. *Treon v. Brown*, 14 Ohio, 482, 488.

The doctrine of "stare decisis" is based on the assumption that the rules of law to which this doctrine applies have previously been determined by a court having final jurisdiction of the questions involved. For this reason, where the decision of a tribunal is subject to review by one having superior authority over it for that purpose, or the

question determined may be passed upon by such tribunal in another case, the doctrine does not apply with full force until the same questions have been determined by the court of last resort. *Calhoun Gold Min. Co. v. Ajax Gold Min. Co.*, 59 Pac. 607, 612, 27 Colo. 1, 50 L. R. A. 209, 83 Am. St. Rep. 17.

"Infallibility is to be conceded to no tribunal. A legal principle, to be well settled, must be founded on sound reason. \* \* \* Precedents are to be regarded as the great storehouse of experience, not always to be followed, but to be looked to as beacon lights in the progress of judicial investigation." *Leavitt v. Morrow*, 6 Ohio St. 71, 78, 67 Am. Dec. 334.

"Stare decisis" is not a rule of order, but a rule affecting the practical administration of justice. *Mead v. McGraw*, 19 Ohio St. 55, 62.

The decision of the Supreme Court settling the law in regard to sufficiency of notices of protest of promissory notes settled the law definitely and permanently as far as the court is able to settle it; and the court cannot be called on to overthrow the doctrine thus settled, which has been recognized and acquiesced in for 12 years or more in the business transactions of the state. On this question, therefore, the court will adopt the rule, "stare decisis." *Newberry v. Trowbridge*, 4 Mich. 391, 395.

The decisions of the highest judicial tribunal in the state on questions affecting rights of property, which becomes valuable and changes hands on the faith of such decisions, will not be disturbed without the most urgent necessity, to prevent injustice or vindicate obvious principles of law. *Kearny v. Buttles*, 1 Ohio St. 362, 367.

Under the judicial construction of the registry law of 1831, which has prevailed in the state for some years past, a mortgage which is not duly executed and delivered for record has no validity either in law or equity against a judgment lien; and though this is at variance with the former analogies of the law, yet, inasmuch as it has become a rule of property in settling priorities among creditors, the court, acting on the maxim, "stare decisis," which is a safe and established rule of judicial policy, will not disturb it. *White v. Denman*, 1 Ohio St. 110, 115.

"When a court comes to the deliberate conclusion that it has made a mistake, it is better \* \* \* that it frankly acknowledge its mistake and declare the true doctrine, as it should have done. When, however, a decision has become an established rule of property, it is not to be overthrown, except from the most urgent considerations of public policy." *Hines v. Driver*, 89 Ind. 339, 342.

The Supreme Court, in determining the constitutionality of the law, should not fol-

low the prior decision, if satisfied that it was erroneous. *State v. Alken*, 42 S. C. 222, 234, 20 S. E. 221, 223, 26 L. R. A. 345.

The decision of the Supreme Court in *Kelly's Heirs v. McGuire*, 15 Ark. 555, laid down rules of descent, which rules have become rules of property, to be disturbed only by the Legislature; and the court will apply to that decision the policy of "stare decisis." *Oliver v. Vance*, 34 Ark. 564, 567.

## STARTED.

"Started," as used in Code Iowa, § 3076, providing that, where the debtor who is the head of a family has "started to leave this state," he shall have exempt only the ordinary wearing apparel of himself and family, does not mean the actual setting out on a journey, but means the commencement of the enterprise or undertaking; and one who had placed his wagon close to the house, ready to be loaded with goods, and a part of the goods were placed in boxes out of the house, and the appearance in the house indicated a state of preparation for moving, will be deemed to have "started" to remove from the state. *Graw v. Manning*, 7 N. W. 150, 151, 54 Iowa. 719.

## STATE.

See "Another State"; "Foreign Nation or State"; "Within the State"; "Without the State."

"A state is defined by Vattel to be a body politic or a society of men united together to promote their safety and advantage by means of their union, who are guided and directed by the public political authority—the government. The government is the ligament that holds the political society together, and when that is destroyed the society as a political body is dissolved." *Thomas v. Taylor*, 42 Miss. 651, 706, 2 Am. Rep. 625. See, also, *Keith v. Clark*, 97 U. S. 454, 459, 24 L. Ed. 1071, where the above definition is quoted, with the following additional: "Such a society has her affairs and her interests. She deliberates and takes resolutions in common, thus becoming a moral person, who possesses an understanding and a will peculiar to herself, and is susceptible of obligations and rights."

A state, whatever may be the form of its internal government, and by whatever appellation it may be known, is, in the language of Vattel, "a moral person, having an understanding and a will, capable of possessing and acquiring rights and of directing and fulfilling obligations." *Republic of Mexico v. De Arango*, 12 N. Y. Super. Ct. (5 Duer) 634, 637 (quoting Vattel, *Droit des Gens*, liv. 1, c. 1, § 4).

The state is a body politic, and not an association, society, or corporation, within the

meaning of Comp. Laws, § 679, making property which is the subject of any association, society, or corporation the subject of embezzlement. *State v. Taylor*, 64 N. W. 548, 550, 7 S. D. 533.

The state is a political corporate body, can act only through agents, and can only command by laws. In a suit brought by a taxpayer, who has duly tendered bills of credit authorized by the law of the state in payment of his taxes, against the person who, under cover of office as tax collector, has acted in the enforcement of a void law passed by the Legislature of a state, is an action against the collector personally as a wrongdoer, and not against the state, within the meaning of the eleventh amendment to the federal Constitution; and such a defendant, so sued, who seeks to substitute the state in his place, must produce a valid law of the state which constitutes his commission as its agent and a warrant for his act. *Poin-dexter v. Greenhow*, 114 U. S. 270, 306, 5 Sup. Ct. 903, 29 L. Ed. 185, 193.

"State," as used in Const. U. S. art. 2, § 1, providing for the appointment of presidential electors, and requiring that each state shall appoint a number of electors equal to the whole number of Senators and Representatives, means the body politic and corporate. *McPherson v. Secretary of State*, 52 N. W. 469, 470, 92 Mich. 377, 16 L. R. A. 475, 31 Am. St. Rep. 587.

A state, in the ordinary sense of the Constitution, is "a political community of free citizens, occupying a territory of defined boundaries and organized under a government, sanctioned and limited by a written Constitution, and established by the consent of the governed." *Texas v. White*, 74 U. S. (7 Wall.) 700, 721, 19 L. Ed. 227; *State v. White*, 25 Tex. 465, 595.

A state is a political community organized under a distinct government, recognized and conformed to by the people as supreme; a commonwealth; a nation. *O'Connor v. State* (Tex.) 71 S. W. 409, 410.

The word "state" has a definite, fixed, certain legal meaning in this country and under our form of government. It had acquired this meaning when the Constitution was adopted, and this is the one which must be attached to it when used in that instrument or in laws of Congress. It means one of the commonwealths or political bodies of the American Union, and which under the Constitution stand in certain specified relations to the national government and are invested as commonwealths with full power in their several spheres over all matters not expressly inhibited. It is a political organization, having a chief executive, who can make a requisition for extradition, and whose duty under the law is to obey, when made by one having authority under the Constitution and

laws of the United States. *Ex parte Morgan* (U. S.) 20 Fed. 298, 308.

"The state is a political society organized by the common consent of the inhabitants of a certain territory for purposes of mutual protection and defense, and exercising whatever powers are necessary to that end." *Cooley*, Const. Lim. 1. "Its jurisdiction is coextensive with its territory, and in discharge of its natural functions it makes law, which is operative only within its own boundaries." 2 Burl. Natural & Pol. Law, 32. An attribute of a state is sovereignty. Its law as a general rule is supreme within its territory, but has no extraterritorial force; nor has the law of a foreign state any force within its territory. This rule is subject to modification, when applied to a state of the United States and the federal Union. There a dual system of sovereignty prevails, and the laws of the state are never considered foreign in the federal courts, and the federal laws are never considered foreign in the state courts. *People v. Martin*, 76 N. Y. Supp. 953, 954, 38 Misc. Rep. 67 (citing *United States v. Turner*, 52 U. S. [11 How.] 663, 13 L. Ed. 857).

The word "state" has two meanings, and is used in both of them in the Constitution, in different parts of that instrument. In one sense it signifies the territory inhabited by the people; in the other, it means the body politic inhabiting the territory. So that the words "civil office in the state" may mean either civil office within the territory or civil office in the frame of government or political organization which it was the business of the convention to establish. As the purpose of a constitution is to establish the principles of government for the community as a body politic, without any particular reference to the territory which they inhabit, the primary and leading sense in which the term "state" is used is that of the body politic. *State v. Wilmington City Council* (Del.) 3 Har. 294, 299.

#### As all state agencies.

The provision of the fourteenth amendment of the Constitution of the United States that "no state shall make or enforce a law which shall abridge the privileges or immunities of the citizens of the United States," etc., is addressed to the states, and has reference to actions of that political body, by whatever instruments and in whatever modes that action may be taken. A state acts by its legislative, its executive, and its judicial authorities, and the constitutional provision means that no agency of the state, or of the officers or agents by whom its powers are exerted, shall deny to any person within its jurisdiction the equal protection of the laws. Whoever by virtue of public position under a state government deprives another of property, life, or liberty without due process of

law, or denies or takes away the equal protection of the law, violates the constitutional inhibition, since he acts in the name of and for the state and is clothed with the state's power. His act is that of the state. Therefore Act Cong. March 1, 1875, providing that any officer charged with any duty in selecting or summoning jurors, who shall exclude or fail to summon any citizens on account of race, color, or previous condition of servitude, shall be guilty, etc., is authorized by the thirteenth and fourteenth amendments of the Constitution. *Ex parte Virginia*, 100 U. S. 339, 346, 25 L. Ed. 676. See, also, *Virginia v. Rives*, 100 U. S. 313, 318.

#### **As an artificial person.**

"By a state I mean a complete body of free persons united together for their common benefit, to enjoy peaceably what is their own and to do justice to others. It is an artificial person. It has its affairs and its interests, it has its rules, it has its rights, and it has its obligations. It may acquire property distinct from that of its members; it may incur debts, to be discharged out of public stock, not out of the private fortunes of individuals; it may be bound by contracts, and for damages arising from the breach of those contracts." *Chisholm v. Georgia*, 2 U. S. (2 Dall.) 419, 455, 1 L. Ed. 440.

#### **As association, corporation, or person.**

See "Association"; "Corporation"; "Municipal Corporation"; "Person."

#### **As a citizen.**

See "Citizen."

#### **Government thereof distinguished.**

In discussing the question as to the force in an act of the Legislature not authorized by the Constitution, the court, in *Polindexter v. Greenhow*, 114 U. S. 270, 290, 5 Sup. Ct. 903, 914, 29 L. Ed. 185, says the distinction between the government of the state and the state itself is important and should be observed. In common speech and common apprehension they are usually regarded as identical, and as ordinarily the acts of the government are the acts of the state, because within the limits of its delegation of power, the government of the state is generally confounded with the state itself. The state itself is an ideal person, intangible, invisible, immutable. The government is an agent, and within the sphere of its agency a perfect representative. This same distinction is to be observed in determining the effect of the acts of a Governor as binding the state. *Grunert v. Spalding* (Wis.) 78 N. W. 606, 613.

#### **As distinct from inhabitants.**

"It may be said that the inhabitants make the state; nevertheless the state in its political organization is entirely different and distinct from the inhabitants who may

happen to reside therein." *State v. Boyd*, 48 N. W. 739, 749, 31 Neb. 682.

#### **As jurisdiction.**

The word "state," used in the cases deciding questions as to the home port of a vessel, refers to the jurisdiction, and not merely to a sovereignty, and cannot have greater significance than the words "jurisdiction," or "county," or "territory." *Rees v. The General Terry*, 13 N. W. 533, 537, 3 Dak. 155.

#### **As the opposite of local.**

"State," as used in the title of an act to provide for raising taxes for the use of the state, must be construed in contradistinction to the term "local"; for, while the term "state" is used to designate the whole body politic, comprising the people and its territorial jurisdiction, it is also sometimes used to designate the agencies employed in administering the government, which would doubtless include within its signification local, as well as the properly so called state, officers. When, however, it is used in reference to the subject of taxation, it is used in contradistinction to the term "local," and hence an act which is expressly described as being intended to raise a revenue for the state cannot be construed as covering the subject of the support for a local object, such as lighting streets in a city by its municipal officers. *People v. Davenport*, 91 N. Y. 574, 591.

#### **As the people.**

The word "state" in its most enlarged sense means the people composing a particular nation and community. In this sense the state means the whole state or community united into one body politic, and "state" and "people of the state" are synonymous expressions. *Union Bank v. Hill*, 43 Tenn. (3 Cold.) 325, 330.

The term "state," in general use, sometimes means a people or a community of individuals, united more or less closely in political relations, inhabiting temporarily or permanently the same country; often it denotes only the country or territorial region inhabited by such a community; not infrequently it is applied to the government under which the people live; and at other times it represents the combined idea of people, territory, and government. In all these senses the primary conception is that of a people or community. The people, in whatever territory dwelling, either temporarily or permanently, and whether organized under a regular government or united by looser and less definite regulations, constitute the state. *Texas v. White*, 74 U. S. (7 Wall.) 700, 720, 19 L. Ed. 227.

Story, Const. bk. 2, c. 1, § 208, says:

"The word 'state' is often used where it expresses merely the positive or actual organization of the legislative, executive, or judicial powers. Thus the actual government of



a state is frequently designated by the name of 'the state.' We say the state has no power to do this or that, or the state has passed a law or prohibited an act, meaning no more than the proper functionaries organized for that purpose have power to do the act, or have passed the law, or prohibited the particular action. The sovereignty of a nation or state, considered with reference to its association, may be absolute and uncontrollable in all respects, except the limitations which it chooses to impose upon itself. But the sovereignty of the government organized within the state may be of a very limited nature. It may extend to a few or to many objects. It may be unlimited as to some and restricted as to others. To the extent of the power given the government may be sovereign, and its acts may be deemed the sovereign acts of the state. *Nay, the state, by which we mean the people composing the state, may divide its sovereign powers among various functionaries, and each in the limited sense would be sovereign in respect to the powers confided to each, and dependent in all other cases.*" *Crow v. State*, 14 Mo. 237, 264.

A state is "the whole people embraced in a prescribed territory, united into one body politic for the purpose of mutual protection and security from wrong and violence from within and from without its borders." *Wabash, St. L. & P. Ry. Co. v. People*, 105 Ill. 236, 240.

#### As place.

Rev. St. U. S. § 5134 [U. S. Comp. Ct. 1901, p. 3454], requiring banking associations in their certificates to name the place where their operations of discount and deposit are to be carried on, designating the state, territory, or district, means simply the place, the locality, in which the business is to be carried on. The word "state" has various meanings. *Silver Bow County v. Davis*, 12 Pac. 683, 690, 6 Mont. 306.

#### As precinct.

See "Precinct."

#### As the whole state.

When the Constitution speaks of the "state," the whole state, in her political capacity, and not her subdivisions, is intended. Such is the natural import of the word, and such must be its construction in making the Constitution consistent with itself and reasonable. *Cass v. Dillon*, 2 Ohio St. 607, 616.

Counties, cities, etc., are political subdivisions of the state, and are included in the term "state," which is the concrete whole. *State v. Levy Court (Del.)* 43 Atl. 522, 524, 1 Pennewill, 597.

#### District of Columbia and territories.

The District of Columbia is not a "state," within the clause of the federal Constitu-

tion extending the jurisdiction of the United States Supreme Court to controversies between states. *Metropolitan R. Co. v. District of Columbia*, 10 Sup. Ct. 19, 22, 132 U. S. 1, 33 L. Ed. 231.

The District of Columbia and the territories are not "states," within the judicial clause of the Constitution giving jurisdiction in cases between citizens of different states. *Downes v. Bidwell*, 21 Sup. Ct. 770, 780, 182 U. S. 244, 45 L. Ed. 1088; *Hepburn v. Ellzey*, 6 U. S. (2 Cranch) 445, 452, 2 L. Ed. 332; *Watson v. Brooks (U. S.)* 13 Fed. 540, 543; *Scott v. Jones*, 46 U. S. (5 How.) 343, 12 L. Ed. 181; *Corporation of New Orleans v. Winter*, 14 U. S. (1 Wheat.) 91, 94, 4 L. Ed. 44.

The territories are not states, within the meaning of Rev. St. § 709 [U. S. Comp. St. 1901, p. 575], permitting writs of error from the Supreme Court in cases where the validity of a state statute is drawn in question. *Downes v. Bidwell*, 21 Sup. Ct. 770, 780, 182 U. S. 244, 45 L. Ed. 1088; *Miners' Bank of Dubuque v. State of Iowa*, 53 U. S. (12 How.) 1, 8, 13 L. Ed. 867.

The territories are not within the clause of the Constitution providing for the creation of a Supreme Court and such inferior courts as Congress may see fit to establish. *Downes v. Bidwell*, 21 Sup. Ct. 770, 780, 182 U. S. 244, 45 L. Ed. 1088.

The word "state," as used in Act March 2, 1895 [U. S. Comp. St. 1901, p. 3178], making it an offense to cause lottery tickets to be transferred from one state to another, was used in its constitutional sense, which does not include a territory of the United States. *United States v. Ames (U. S.)* 95 Fed. 453, 456.

The term "state," when used in the Constitution of the United States, is confined to a part of the American confederacy, and does not embrace a territory of the United States. *Seton v. Hanham (Ga.) R. M. Charit.* 374.

While the word "state" is often used in contradistinction to "territory," yet in its general public sense, and as sometimes used in the statutes and the proceedings of the government, it has the larger meaning of any separate political community, including therein the District of Columbia and the territories, as well as those political communities known as the "states of the Union." *Talbot v. Silver Bow County Com'rs*, 11 Sup. Ct. 594, 597, 139 U. S. 438, 35 L. Ed. 210.

The term "state," as used in the federal statute regulating the taking of pilots on waters forming the boundary between two "states," also includes an organized territory of the United States. *The Ullock (U. S.)* 19 Fed. 207, 212; *Nell v. Wilson*, 12 Pac. 810, 812, 14 Or. 410.

The word "state," as used in the special currency act of 1864, or in the amendment

thereto, is construed to mean territory, wherever the same is applicable. *People v. Moore*, 1 Idaho, 504, 507.

The District of Columbia and the territories are "states" as that word is used in treaties with foreign powers, with respect to the ownership, disposition, and inheritance of property. *Downes v. Bidwell*, 21 Sup. Ct. 770, 780, 182 U. S. 244, 45 L. Ed. 1088.

The term "states of the Union," as used in article 7 of the treaty between the United States and France of February 23, 1853, providing that "in all the states of the Union, whose existing laws permitted, Frenchmen shall enjoy the right of possessing personal and real property by the same title and in the same manner as the citizens of the United States," means all the political communities exercising legislative powers in the country, embracing not only states, but also territories and the District of Columbia. *De Geofroy v. Riggs*, 10 Sup. Ct. 295, 298, 133 U. S. 258, 33 L. Ed. 643.

*Rev. St. U. S. § 5219* [U. S. Comp. St. 1901, p. 3502], relating to assessing taxes imposed by authority of the state within which a national banking association is located, should be construed to mean the legislative authority, or the authority within the locality in which the banking association is situated, that may rightfully and legally levy and assess taxes on personal property. It includes a territory, which is an organized political community. *Silver Bow County v. Davis*, 12 Pac. 688, 690, 6 Mont. 306.

A territory is not a state, nor are the words "territory" and "state" used as synonymous or convertible terms in the acts of Congress. For instance, in 1853, Congress passed "An act regulating the fees and costs in the several states." By act of 1855 Congress extended the provisions of the act of 1853 to the territories "as fully in all particulars as they would be had the word 'territories' been inserted after the word 'states,'" and the act had read in the several states and territories of the United States. *Smith v. United States*, 1 Wash. T. 262, 268. See *Bright. Dig.* pp. 273, 279.

The word "state," as used in Act March 2, 1895, c. 191, 28 Stat. 963 [U. S. Comp. St. 1901, p. 3178], which provides that any person who shall cause to be brought within the United States from abroad, for the purpose of disposing of the same, or deposited in or carried by the mails of the United States, or carry from one state to another in the United States, any ticket of a lottery, shall be punishable, etc., does not include the District of Columbia. *United States v. Whelpley* (U. S.) 125 Fed. 616, 619.

The word "state," when applied to the different parts of the United States, includes the District of Columbia and the several territories of the United States. *Shannon's*

*Code Tenn.* 1896, § 65; *Gen. St. N. J.* 1895, p. 3195, § 36; *Rev. St. Mo.* 1899, § 4160; *Code Miss.* 1892, § 1515; *V. S.* 1894, 18; *U. S. Comp. St.* 1901, pp. 2040, 3420; *Code Civ. Proc. Mont.* 1895, § 3463, subd. 6; *Civ. Code Mont.* 1895, § 4662, subd. 5; *Pen. Code Mont.* 1895, § 7, subd. 19; *Pol. Code Mont.* 1895, § 16, subd. 6; *Rev. St. Utah* 1898, § 2498; *Laws N. Y.* 1892, c. 677, § 23; *Code N. C.* 1883, § 3765, subd. 11; *Ky. St.* 1903, § 446; *Rev. St. Wis.* 1898, § 4971; *Rev. St. Me.* 1883, p. 59, c. 1, § 6, subd. 16; *Code Iowa* 1897, § 48, subd. 15; *Gen. St. Kan.* 1901, § 7342, subd. 15; *Comp. Laws Mich.* 1897, § 50, subd. 15; *Pub. St. N. H.* 1901, p. 63, c. 2, § 4; *Code W. Va.* 1899, p. 133, c. 13, § 17; *Code Civ. Proc. Cal.* 1903, § 17, subd. 7; *Pen. Code Cal.* 1903, § 7, subd. 19; *Pol. Code Cal.* 1903, § 17, subd. 10; *Horner's Ann. St. Ind.* 1901, § 240, subd. 7; *Mills' Ann. St. Colo.* 1891, § 4185, cl. 12; *Rev. Laws Mass.* 1902, p. 89, c. 8, § 5, subd. 21; *Rev. Codes N. D.* 1899, § 5152; *Rev. Code Civ. Proc. S. D.* 1903, § 8; *Rev. Code Del.* 1893, c. 5, § 1, subd. 12; *Gen. St. Minn.* 1894, § 255, subd. 17; *Code Va.* 1887, § 5 [1 *Code Va.* 1904, p. 5, § 5]; *Hurd's Rev. St. Ill.* 1901, p. 1720, c. 131, § 1, subd. 14; *Civ. Code Ala.* 1896, § 6.

#### Foreign state.

The word "state," as used in the inheritance tax law, imposed by the law or revenue act upon property passing either by will or by the intestate law of any state or territory, is not to be construed in a sense broad enough to include a foreign state or territory, but is limited to the states of the United States. *Eldman v. Martinez*, 22 Sup. Ct. 515, 517, 184 U. S. 578, 46 L. Ed. 697.

*Pen. Code*, § 789, provides that the jurisdiction of a criminal action for stealing in another state, or receiving property, "knowing it to have been stolen, and bringing the same into this state," is in any country into or through which such stolen property has been brought. Held, that the statute does not apply to property stolen in Canada, since it is apparent that the word "state," as used the second time, refers to a particular territory within the United States, and hence by an elementary rule of construction it must be held so used in the first instance. *People v. Black*, 54 Pac. 385, 386, 122 Cal. 73.

Under a statute exempting from taxation shares of stock in a corporation situated in another state, where all its stock is taxed in such state, it is held that the word "state" applies to a foreign state, as well as one of the United States. *Foster v. Stevens*, 22 Atl. 78, 79, 63 Vt. 175, 13 L. R. A. 166.

Within the statute requiring insurance companies, as a condition of doing business in Michigan, to make a certain deposit with the state treasurer or with a certain officer of the state where the company is organized, the word "state" is manifestly confined to the communities within the Unit-

ed States, and will not include a foreign country; for, while nations are often and properly designated as "states," yet where by the law companies formed under the laws of foreign governments are mentioned as distinct from companies of other states, the word "states" will not be held to apply to such foreign countries. *Employers' Liability Assur. Co. v. Insurance Com'rs*, 31 N. W. 542, 543, 64 Mich. 614.

#### **Indian tribe.**

"A state has been defined to be a people permanently occupying a fixed territory, bound together by common laws, habits, and customs (or by a constitution) into one body politic, exercising, through the medium of an organized government, independent sovereignty and control over all persons and things within its boundaries, capable of making war and peace, and of entering into international relations with other communities." The Miami tribe of Indians do not constitute an international political state. *Roche v. Washington*, 19 Ind. 53, 56, 81 Am. Dec. 376.

#### **United States.**

The word "state," as used in the statute prohibiting the sale of lottery tickets in the state of Connecticut issued under the authority of any other state, extends to the sale of tickets in a lottery authorized by the national government; the law not being aimed only against the sale of tickets by any of the states of the United States merely, but against the sale of such as are authorized by any other sovereignty. *Terry v. Olcott*, 4 Conn. 442, 445.

#### **STATE AGENT.**

"State agent," as used in a sheriff's return that he had served summons on a certain party as "state agent" of the defendant, sufficiently designated such person as the person appointed by the defendant, under Rev. St. § 6013, providing that foreign insurance companies shall file with the State Superintendent of Insurance a written instrument or power of attorney, duly signed and sealed, appointing and authorizing some person, who shall be a resident of this state, to acknowledge or receive service of process. *Stone v. Travelers' Ins. Co.*, 78 Mo. 655, 657.

#### **Commonwealth synonymous.**

See "Commonwealth."

#### **STATE AUDITOR.**

See "Auditor."

#### **STATE BOARDS AND COMMISSIONS.**

The words "state boards and commissions" are broad enough to include the board

of police commissioners for the city of Newport, appointed by the Governor, by and with the consent of the Senate, as the words were used in Gen. Laws, c. 17, § 14, providing that the Attorney General, whenever requested, shall act as the legal adviser of all state boards and commissions and the officers thereof. *In re Police Com'rs* (R. L.) 49 Atl. 36, 37.

#### **STATE BONDS.**

As bill of credit, see "Bill of Credit."

"State bonds," as used in a will directing certain funds to be invested in first-class state bonds, meant bonds of the state. *Griggs v. Veghte*, 19 Atl. 867, 870, 47 N. J. Eq. 179.

#### **STATE CENSUS.**

The phrase "state census," as used in Act Feb. 7, 1891, providing for the salaries of justices of the peace according to the population of their respective cities and towns "as shown by the last state or federal census," has reference to the state census provided by Const. art. 2, § 3, requiring the Legislature to provide for the taking of a state census in 1895 and every ten years thereafter, and does not include the census taken by assessors pursuant to Code 1881, § 2754, requiring assessors to take biennial censuses, commencing in 1883, of all the inhabitants in their respective districts. *Rohde v. Seavey*, 29 Pac. 768, 769, 4 Wash. St. 91.

#### **STATE COMPTROLLER.**

The term "state comptroller," as used in a provision creating the office of state comptroller, means a supervising officer of revenue, among whose duties is the final auditing and settling of all claims against the state. *State v. Doron*, 5 Neb. 399, 413.

#### **STATE CONSTABLE.**

The phrase "state constable" is equivalent to the phrase "a constable of the commonwealth," which was the designation used in the statutes. *Commonwealth v. Certain Intoxicating Liquors*, 97 Mass. 63, 66.

#### **STATE CONSTITUTION.**

The state Constitution is not a grant of power, or an enabling act to the Legislature, but it is a limitation on the general powers of a legislative character, and restrains only so far as the restriction appears, either by express terms or by necessary inference. *State v. Rogers*, 13 Cal. 159, 165.

#### **STATE CONVICTS.**

The term "state convicts" embraces all that class of persons convicted of crime and

sentenced to hard labor for the state in the penitentiary, within or without its walls. *Ex parte Gayles*, 19 South. 12, 13, 108 Ala. 514.

## STATE COURT.

See "Courts of the State."

## STATE CURRENCY.

See "Currency of State."

## STATE DEBTS.

"State debts" do not refer to obligations which can be enforced by legal process, either in a court of law or equity; for in this sense a state is never indebted. All its contracts, however solemnly made, rest solely upon the public faith. A state debt never contained in its definition any other obligation than the moral one of good faith in calling forth and applying the resources of the state to meet its engagements. A state debt always meant, as it still means, a moral duty on the part of the proper organs of the government to faithfully administer and call forth so much of the resources of the state as may be necessary to comply with its undertakings. *Rodman v. Munson* (N. Y.) 13 Barb. 188, 189.

## STATE ELECTION.

See "Election within State."

An election for constable, held under a general law which provides for such an election on the same day in each militia district of the several counties of the state of Georgia, is a "state election," within the meaning of the statute forbidding the sale or furnishing of intoxicating liquors to any person on days of election, state, county, or municipal; and the fact that the official duties of the officers elected are confined to respective counties or subdivisions of counties does not change the character of the election. *Rose v. State*, 33 S. E. 439, 441, 107 Ga. 697.

In statutes relative to elections, the term "state election" shall apply to any election held for the choice of national, state, district, or county officer by the voters, whether for a full term or for the filling of a vacancy. *Rev. Laws Mass. 1902*, p. 105, c. 11, § 1.

The term "state elections," as used in acts relating to ballots and manner of voting in counties of 50,000 inhabitants or more, applies to any election held for the choice of any national, state, county, or district officer or officers. *Shannon's Code Tenn. 1896*, § 1231.

## STATE GOVERNMENT.

Other state government, see "Other."

## STATE INSTITUTIONS.

"State institutions," as used in Const. art. 7, § 2, providing that the trustees of the benevolent and other state institutions should be appointed by the Governor, means institutions belonging to and owned by the state, and not to such as might belong to the particular municipalities or counties, though established under the legislative authority of the state, which contributes to the support of such institution and governs it by state laws. *Chalfant v. State*, 37 Ohio St. 60, 61.

## STATE JAIL OR PENITENTIARY.

The words "state jail or penitentiary," as used in *Rev. St. § 5543* [U. S. Comp. St. 1901, p. 3721], providing for a deduction from the time of certain United States prisoners confined in any state jail or penitentiary, are not to be construed so as to limit the provision to jails supported by the state at large. The words refer to jails and penitentiaries within a state, whether state, city, or county institutions, which are permitted by the state to be used for the confinement of prisoners of the United States. *United States v. Schroeder* (U. S.) 27 Fed. Cas. 977, 978.

"State jail or penitentiary," as used in *Rev. St. § 5541* [U. S. Comp. St. 1901, p. 3721], providing that, in every case where any person convicted of any offense against the United States is sentenced to imprisonment for a longer period than one year, the court may order the same to be executed in any state jail or penitentiary within the district or state where the court is held, means the same thing as state prison in Act Cong. March 3, 1865, § 3, providing that the sentence of every person so convicted and sentenced may be executed in any state prison or penitentiary within the district or state where the court is held. *In re Mills*, 10 Sup. Ct. 762, 764, 135 U. S. 263, 34 L. Ed. 107.

## STATE LAND BOARD.

The "state land board," authorized by *Hill's Ann. Laws, § 3598*, and *Laws 1899*, p. 157, to sell the land of the state, to make rules for the transaction of business, etc., is analogous to the "land department" of the general government. *Robertson v. State Land Board*, 70 Pac. 614, 616, 42 Or. 183.

## STATE LANDS.

The words "state lands," as used in the statutes providing that telegraph and telephone companies may construct and maintain telegraph and telephone lines over state lands, embrace the lands of the state adjacent to the state basin canal authorized by statute, providing for the construction of a canal, and providing that at the expiration of 35 years the property of the canal to the

extent of 120 feet on each side thereof should become vested in the state. *State v. Cumberland Telephone & Telegraph Co.*, 27 South. 795, 796, 52 La. Ann. 1411.

Tide lands belonging to the state are not "state lands," within Code Proc. § 649, providing for service of notice in condemnation proceedings if the property sought to be appropriated is "state, school, or county lands," and such lands cannot be condemned; there being no authority therefor. *Seattle & M. Ry. Co. v. State*, 34 Pac. 551, 7 Wash. 150, 22 L. R. A. 217, 38 Am. St. Rep. 866.

The terms "public lands" and "state lands" shall be defined and deemed to be synonymous, whenever either is used in the chapter relating to the management and disposition of state lands. *Ballinger's Ann. Codes & St. Wash.* 1897, § 2134.

### STATE LAW.

A municipal ordinance enacted under legislative authority is a "state law," within Const. U. S. art. 1, § 10, par. 1, inhibiting state laws impairing the obligation of contracts. *Citizens' St. Ry. Co. v. City Ry. Co.* (U. S.) 56 Fed. 746, 751.

A municipal ordinance, not passed under supposed legislative authority, cannot be regarded as a law of the state, within the meaning of the constitutional prohibition against state laws impairing the obligation of contracts. Hence a suit to prevent the enforcement of such an ordinance would not be one arising under the Constitution of the United States, in the absence of any showing that the ordinance is authorized, or supposed to be authorized, by a law of the state. *Hamilton Gaslight & Coke Co. v. City of Hamilton*, 13 Sup. Ct. 90, 92, 146 U. S. 258, 38 L. Ed. 963.

### STATE OFFICER.

"State officers" are those whose duties concern the state at large, or the general public, both exercised within defined limits. In re *Police Com'r's* (R. I.) 49 Atl. 36, 37 (citing *People v. Curley*, 5 Colo. 419).

"State officers," in a general sense, are officers whose duties and powers are coextensive with the territorial limits of the state. "County officers," in the same sense, are those whose general authority and jurisdiction are confined within the limits of the county in which they are appointed, who are appointed in and for a particular county, and whose duties concern more especially the people of that county. Whether an officer, unprovided for by the Constitution, but created solely by legislative enactment, is to be regarded as a state or county officer, must depend in a large measure upon the terri-

torial scope of his jurisdiction, and upon the nature and character of his powers and duties. If the jurisdiction for the exercise of his powers and duties is coextensive with the limits of the state, then he is a state officer; if confined, like a sheriff or county judge, within the limits of a county, but coextensive with the limits of such county, then he is a county officer. *State v. Burns*, 21 South. 290, 295, 38 Fla. 367.

The term "state officer," by the express provisions of Laws 1892, c. 681, includes every officer for whom all the electors of the state are entitled to vote, and every officer, appointed by one or more state officers or by the Legislature, and authorized to exercise his official function throughout the entire state, or without limitation to any political subdivision of the state, except United States Senators, members of Congress, and electors for President and Vice President of the United States. *People v. Nixon*, 52 N. E. 1117, 1118, 158 N. Y. 221.

An "office of the state," within the meaning of Act Feb. 3, 1849, which declares that, "whenever vacancies shall exist or shall occur in any of the offices of this state, \* \* \* the Governor shall appoint some suitable person," etc., must at least be an office directly created by Constitution or statute. The agency of a municipal corporation is not an office of the state. *People v. Conover*, 17 N. Y. 64, 67.

In statutes relative to elections, the term "state officer" shall apply to any person to be chosen at a state election. *Rev. Laws Mass.* 1902, p. 105, c. 11, § 1.

The term "state officer," as used in acts relating to ballots and manner of voting in counties of 50,000 inhabitants or more, applies to any person to be chosen at such elections. *Shannon's Code Tenn.* 1896, § 1231.

The words "state officers," as used in the title relating to elections, shall include the Governor, Lieutenant Governor, State Treasurer, Secretary of State, and State Auditor. *V. S.* 1894, 57.

Within the term "state or district officer," as used in the chapter punishing drunkenness in office, are included the Governor, Lieutenant Governor, the heads of the several executive departments at the capital, and their chief clerks, the judges of the Supreme Court, Courts of Appeals, and the district courts, district attorneys, members and officers of the Senate and House of Representatives, and all other officers who derive their appointment directly from state authority. *Pen. Code Tex.* 1895, art. 147.

By the term "officer of this state," as used in the article punishing any officer of this state who trades for, buys, or is in any way concerned in the purchase of any

claim or demand against the state, is meant the Governor, Lieutenant Governor, the heads, or employes of any executive departments, members and officers of both houses of the Legislature, the judges of the several courts, district and county attorneys, sheriffs, tax collectors, and tax assessors. Pen. Code Tex. 1895, art. 263.

#### **County, town, or school district officers.**

The term "state officer," as used in Const. art. 6, § 12, giving the Supreme Court exclusive appellate jurisdiction in cases where any "state officer" is a party, should be construed in their popular sense, as referring only to the officers whose official duties and functions are coextensive with the boundaries of the state, and do not include such officers as constables or justices of the peace, whose official functions are to be performed in the townships in which they are elected, and are in popular parlance known as "township officers," nor to sheriffs, coroners, county justices, etc., whose functions are confined to their respective counties, and are commonly known and called "county officers." *State v. Dillon*, 2 S. W. 417, 419, 90 Mo. 229.

The term "state officers," in Const. 1868, art. 4, § 23, providing that all state officers may be impeached for any misdemeanor in office, etc., does not include an officer elected by the vote of a single county and confined in his duties to the territorial limits of such county. *Ex parte Willey*, 54 Ala. 226, 228.

Rev. St. art. 946, providing that the Supreme Court may issue writs of mandamus against officers of the state government, does not apply to county officers. *Travis County v. Jourdan*, 42 S. W. 543, 91 Tex. 217.

Const. c. 2, § 29, which requires every officer in authority under this state, before he enters upon the execution of his office, to take and subscribe the following oath or affirmation of office, etc., does not apply to the town and school district officers. *Brock v. Bruce*, 2 Atl. 598, 606, 58 Vt. 261.

#### **Same—Constable.**

A constable, in Missouri, is a state officer, and not a municipal officer. *State ex rel. Attorney General v. McKee*, 69 Mo. 504, 508.

#### **Same—County commissioners.**

The phrase "officers of the commonwealth," as used in Const. pt. 2, art. 8, c. 1, § 2, providing that the Senate shall be a court with full authority to hear impeachments made by the House of Representatives against any officer or officers of the commonwealth, was not intended to include all civil officers of every grade within the commonwealth, and the various officers of cities or towns are not officers of the commonwealth;

but, on the other hand, officers elected by the people at large, or provided for in the Constitution, for the administration of matters of general or state concern, are included within the meaning of the phrase, so as to be subject to impeachment by the Senate. County commissioners, therefore, are not "officers of the commonwealth," within the meaning of the term as used in the Constitution. In re *Opinion of Justices*, 46 N. E. 118, 119, 167 Mass. 599.

There is no doubt that the words "officers of the commonwealth," standing alone, would include county commissioners, and so they would every other officer elected or appointed to perform a duty or fill an office created by law, from tipstave to Governor; but, as used in Pen. Code 1860, § 48, prohibiting bribery, they have a different meaning. That section provides for the punishment of any member of the General Assembly "or any officer of this commonwealth." The report of the commissioners clearly indicated that they did not use the words "officers of this commonwealth" in their broadest sense, because they say they have made a distinction between the party offering or attempting to bribe any public functionary on any account and the public functionary agreeing to receive it. What "any officer of this commonwealth" means is a state officer, or officer not of a particular locality, but of the state at large. *Commonwealth v. Neely* (Pa.) 3 Pittsb. R. 527, 528.

#### **Same—County judge or judge of probate.**

A county judge is not an officer of the state government, within Rev. St. art. 946, authorizing the Supreme Court to issue writs of mandamus against "officers of the state government." *Turner v. Cotton*, 57 S. W. 35, 93 Tex. 559.

A judge of probate is not a "state officer," in the sense in which that term is used in the statutes of the state. *Secord v. Foutch*, 44 Mich. 89, 90, 6 N. W. 110.

#### **Same—County treasurer.**

A county treasurer, though commissioned by the Governor and required to collect state revenues, is not a "state officer," within Const. art. 5, § 15, making all state officers liable to impeachment for misdemeanors in office. *Donahue v. Will County*, 100 Ill. 94, 103.

#### **Same—Sheriff or deputy.**

A sheriff is not a state officer, within the meaning of Const. art. 6, § 12, and the fifth section of the amendment thereto adopted in 1884 (*Laws 1883*, p. 216), giving the Supreme Court of Missouri exclusive appellate jurisdiction in causes where any state officer is a party; and the words "state officer," as used in the Constitution, are to be construed in

their popular meaning, and refer only to officers whose official duties and functions are coextensive with the boundaries of the state. *Paddock-Hawley Iron Co. v. Mason* (Mo.) 2 S. W. 841 (following *State v. Dillon*, 2 S. W. 417, 90 Mo. 229). Const. art. 6, § 12, as amended by the fifth section of the amendment thereto adopted in 1884, giving the Supreme Court of Missouri exclusive appellate jurisdiction in cases where any state officer is a party, does not include a sheriff. *State v. Spencer*, 3 S. W. 410, 91 Mo. 206.

A special deputy, authorized by sheriff to execute a particular process, is an "officer of the state," within an act punishing any person for knowingly resisting an officer of the state. *Andrews v. State*, 78 Ala. 483, 484.

#### City board of health.

Under a constitutional provision (Const. art. 6, § 12) giving the Supreme Court jurisdiction in cases where a county or other political subdivision of the state, or any "state officer" is a party, it is held that no appeal lies to the Supreme Court of Missouri from a judgment from the Court of Appeals of St. Louis upon an application by the state for a writ of prohibition to prevent the board of health of that city from abating a nuisance; members of that board being elected or appointed solely to execute the local laws of the city, and not being state officers, within the meaning of the Constitution. *State v. St. Louis Board of Health*, 90 Mo. 169, 2 S. W. 291.

#### Justices and officers of Supreme Court.

The justices and officers of the Supreme Court are included in the words "state officers," in Rev. St. c. 10, § 13, relating to the duties of the superintendent of public property, and providing that he is not authorized to interfere with any rooms in the Capitol that are appropriated by law for the use of the Legislature or state officers, during the time the same shall be used and occupied. *In re Janitor of Supreme Court*, 35 Wis. 410, 419.

#### Locktender.

Laws 1870, c. 82, § 1, conferring jurisdiction on the canal appraisers to hear and determine all claims against the state, etc., arising out of the negligence or conduct of any "officer of the state having charge of the canals," does not apply to a locktender, whose duty merely is to attend to the locks, to the opening and closing of the same, and the passing of boats through them. Such person is not a state officer in any respect, but is only a day laborer employed to perform manual or mechanical labor, a mere servant or employé, and is entirely divested of any official powers or functions. *Sipple v. State*, 3 N. E. 657, 659, 99 N. Y. 284.

#### Mayor of city.

The office of mayor of the city of Detroit is an office under the state, within Const. art. 5, § 15, providing that "no person holding office under the state shall execute the office of Governor." *Attorney General v. Common Council of City of Detroit*, 70 N. W. 450, 455, 112 Mich. 145, 87 L. R. A. 211.

#### Municipal officer distinguished.

There is a recognized distinction between state officers, whose duties concern the state at large or the general public, although exercised within defined territorial limits, and municipal officers, whose functions relate exclusively to their particular municipality. A state officer may be connected with some of the municipal functions, but he must derive his powers from a state statute, and execute his powers in obedience to a state law. The mayor of a city is not an officer under the state. *Britton v. Steber*, 62 Mo. 370, 374.

"It is important," says Judge Dillon (1 Dill. Mun. Corp. [4th Ed.] § 58), "to bear in mind the distinction between state officers (that is, officers whose duties concern the state at large or the general public, although exercised within defined territorial limits) and municipal officers, whose functions relate exclusively to the particular municipality. The administration of justice, the preservation of the public peace, and the like, although confined to local agencies, are essentially matters of public concern, while the enforcement of municipal by-laws, the establishment of gasworks and waterworks, the construction of sewers, and the like, are matters which pertain to the municipality, as distinguished from the state at large." In *People v. Curley*, 5 Colo. 419, the court says: "A popular but mistaken impression prevails to some extent that all civil officers, whose duties embrace municipal laws, ordinances, and regulations, are purely local or municipal in their character, and have no general relation to the body politic or the state. It must be borne in mind that there is a legal distinction between state officers (that is, officers whose duties concern the state at large or the general public, although exercised within defined limits) and municipal officers strictly, whose functions relate exclusively to the particular municipality." The board of police commissioners for the city of Newport, appointed by the Governor, by and with the consent of the Senate, is a state board or commission, within Gen. Laws, c. 17, § 4, providing that the Attorney General, whenever requested, shall act as the legal adviser of all state boards, and shall represent such boards in litigation, since the duties of such commissioners are of a general nature, rather than municipal. *In re Police Com'rs* (R. L.) 49 Atl. 36, 37.

**Notary public.**

See "Notary Public."

**Park commissioners.**

The commissioners who manage Yosemite Valley and the Mariposa Big Tree Grove are "officers of the state" of California, and their terms expire four years after their appointment. *People v. Ashburner*, 55 Cal. 517, 524.

**Representative in Legislature.**

A representative in the State Legislature is a state officer, within a statute relative to balloting for state officers. *Morrill v. Haines*, 2 N. H. 246, 247.

**Trustee or officer of state institution.**

Const. art. 16, § 3, provides that the Governor and all other state and judicial officers, etc., shall be liable to impeachment; and section 4 declares that all officers not liable to impeachment shall be subject to removal for misconduct or gross incompetency. Held, that the term "state officers," as used in section 3, included only such general officers as immediately belong to one of the three constituent branches of the state government, and therefore the term did not include a member of the board of trustees of one of the educational institutions of the state. *State v. Hewitt*, 52 N. W. 875, 878, 3 S. D. 187, 16 L. R. A. 413, 44 Am. St. Rep. 788.

As a general rule the term "state officer" is only applied to those superior executive officers who constitute the heads of the executive departments of the state. An ex-treasurer of the board of regents of the Agricultural College is not a "state officer," within the meaning of Const. art. 4, § 4, giving the Supreme Court original jurisdiction in mandamus as to all state officers. *State v. Smith*, 33 Pac. 974, 6 Wash. 496.

**Warden of city prison.**

The warden of the city prison in New York is not a "state officer," but a "person holding a position by appointment in a city or county, \* \* \* receiving a salary from such city or county," within Laws 1892, c. 577, prohibiting removal without a hearing of a veteran holding such an office. *People v. Wright*, 44 N. E. 1036, 1037, 150 N. Y. 444.

**STATE OF IOWA.**

The term "state of Iowa" and the term "the state of Iowa" are synonymous, so that the use of either in an indictment is a sufficient compliance with the constitutional provision that a prosecution shall be conducted in the name of "the state of Iowa." *Harri-man v. State (Iowa)* 2 G. Greene, 270, 271.

**STATE PAPER.**

The words "state paper" mean the newspaper designated by the Legislature, in which

public acts, resolves, advertisements, and notices are required to be published. *Rev. St. Me. 1883*, p. 59, c. 1, § 6, subd. 24.

**STATE PAUPER.**

The term "state pauper," in Laws 1878, c. 94, § 3, providing that all persons needing relief who have no settlement in any town in this state shall be state paupers, and shall, when needing relief, be provided for by the Comptroller for the period of six months after they come into the state, means one who is supported to some extent, at least, by the state. The term, by the express language of the statute, includes all persons needing relief and having no settlement in any town in the state. *Town of Marlborough v. Town of Chatham*, 50 Conn. 554, 557.

**STATE PRISON.****County jail.**

Code Civ. Proc. § 161, provides that bail may be exonerated either by the death of the defendant or his imprisonment in the state prison, etc. There is no substantial reason for making a distinction between county jails and the penitentiary, where the term of imprisonment may be the same in both. From all appearances the term "state prison," as used in the statute, may be equally applied, and was probably intended to apply, to either the penitentiary or the county jail. *Sedberry v. Carver*, 77 N. C. 319, 321.

**Prison in other state.**

"State prison," in the general sense of the term, means a place of confinement for state prisoners; that is, for persons charged with political offenses and confined for reasons of state. *Rev. St. c. 227*, enumerates as one of the causes of divorce conviction of crime and actual imprisonment in the state prison. The term "state prison" is limited in meaning to the prison established and maintained in the state in which the statute was passed, and does not include a prison in another state, though called there a "state prison." In New Hampshire and in some other states the term has been applied as the proper name of the penitentiary maintained by the state for the confinement of prisoners convicted of certain crimes, in distinction from other prisons maintained and used by counties and cities. If a man is sentenced to the state prison—that is, to the general penitentiary of the state—it is for a crime to a certain degree fixed by statute, and a crime of a higher legal character than one for which a criminal is confined in a county jail or other house of correction. *Martin v. Martin*, 47 N. H. 52, 53.

**State jail or penitentiary synonymous.**

"State prison," as used in Act Cong. March 3, 1865, § 3 [U. S. Comp. St. 1901, p.



3721], providing that, in every case where any person convicted of any offense against the United States shall be sentenced to imprisonment for a period longer than one year, it shall be lawful for the court passing sentence to order the same to be executed in any state prison or penitentiary within the district or state where such court is held, means the same thing as "state jail" in Rev. St. § 5541 [U. S. Comp. St. 1901, p. 3721], providing that the sentence of every person so convicted and sentenced may be executed in any state jail or penitentiary within the state or district where the court is held. In re Mills, 10 Sup. Ct. 762, 764, 135 U. S. 263, 34 L. Ed. 107.

The words "in the state prison," in a verdict, are equivalent to a state penitentiary; that being the only state prison known to the law. McCoy v. State, 7 Tex. App. 379, 381 (citing Moore v. State, 7 Tex. App. 14); Harris v. State, 8 Tex. App. 90.

#### State reformatory.

Pub. St. 1883, c. 148, § 1, making the support of a "state prison convict" committed to a state lunatic hospital a commonwealth charge, means the convicts of the one institution known as the "state prison," and does not include the convicts of the state reformatory. Beard v. City of Boston, 23 N. E. 826, 827, 151 Mass. 96.

Under Rev. St. 1881, §§ 6162-6202, the penal department of the Indiana reformatory institution is a "state prison." Walton v. State, 88 Ind. 9, 13.

#### STATE PURPOSE.

Lands exclusively used for state purposes, see "Exclusively Used."

Any legitimate expenditure of the state necessary to be provided for by a state tax is a "state purpose," within the meaning of Const. art. 10, § 11, limiting the tax to be assessed for state purposes. People v. Scott, 12 Pac. 608, 611, 9 Colo. 422; State v. Kenney, 26 Pac. 383, 385, 10 Mont. 488.

#### STATE SECURITIES.

The term "state securities," as used in Const. art. 8, § 9, declaring that all funds belonging to the state for educational purposes shall not be invested or loaned, except on United States or state securities, etc., includes state warrants drawn by the Auditor on the Treasurer in pursuance of an appropriation regularly made by the Legislature and secured by a levy of taxes for their payment. The term is not limited to state bonds. State v. Bartley, 58 N. W. 966, 967, 40 Neb. 298.

Const. art. 8, § 9, which provides that all funds belonging to the state for educational purposes, the interest and income whereof only are to be used, shall be deemed trust funds held by the state, etc., and shall not be invested or loaned, except on United States or state securities, etc., should be construed to include state warrants issued in pursuance of an appropriation and secured by a levy of taxes for their payment. In re State Warrants, 41 N. W. 636, 637, 25 Neb. 659.

A mere evidence of indebtedness, such as a state warrant of another state, might not be a state security, within Const. art. 8, § 9, requiring the investment of a permanent school fund of a state in United States or state securities, or county bonds; but a state bond, which in due form and by its lawful execution pledges the credit of the commonwealth is a state security. State v. Stuefer (Neb.) 92 N. W. 646, 647.

#### STATE TAX.

Taxes collected by the county officials for the support of the county government constitute a "state tax," in the sense that they can be imposed by no other authority, and are to be used for the public benefit. Neary v. Philadelphia, W. & B. R. Co. (Del.) 9 Atl. 405, 413, 7 Houst. 419.

"State taxation" means any taxation by authority of the state, whether it be strictly for state purposes, or for mere local and special objects. Wisconsin Cent. R. Co. v. Price County, 10 Sup. Ct. 341, 344, 133 U. S. 496, 33 L. Ed. 687.

It was settled in Walcott v. People, 17 Mich. 68, that the state might pass laws for the levy of new specific taxes, and in Kitson v. Ann Arbor, 26 Mich. 325, that local specific taxes might be authorized. In both of these cases the money was to be put to local purposes. In one sense, undoubtedly, any tax levied by a general law is a state tax; but, if the moneys are to be put to local uses, the only substantial difference between that and one levied by local action consists in this: that in one case the state levies the tax, and in the other it authorizes the levy. All taxation must be authorized by the state, and such taxes may be levied under general laws, when no express provision of the Constitution forbids it. Highway and school taxes are very commonly levied in that way. The school mill tax is collected under a general law, but put to the uses of the community which paid it, and it was in no proper sense anything more than a local tax; and a tax on the liquor business of a specific annual sum is not a state tax, when it is assessed and collected locally and appropriated to local purposes, though collected un-

der a general state law. *Youngblood v. Sexton*, 32 Mich. 406, 413, 20 Am. Rep. 654.

A tax to provide for the further construction of a railroad is a state tax. *State v. State Bank (Ind.)* 6 Blackf. 349, 350.

A tax voted by a township to pay for a subscription to the stock of a railroad about to be built through the township is not a state tax. *Carolina, C. G. & C. Ry. Co. v. Tribble*, 25 S. C. 260, 264.

An impost for county and township purposes is a state tax. It can be imposed by no other authority. *Camden & A. R. Co. v. Commissioners of Appeal*, 18 N. J. Law (3 Har.) 71.

The General Assembly, by the several acts passed February 13, 1862 (59 Ohio Laws, p. 9), March 21, 1863 (60 Ohio Laws, p. 18), and February 25, 1864 (61 Ohio Laws, p. 15), assess a tax on the dollar valuation of the taxable property of the state for the relief of the necessities of families of soldiers and marines in the state and United States service, and provide that it shall be collected in the same manner as other taxes. Held, that the levy thus made was a "state tax," within Act Feb. 18, 1864, § 17, establishing a university in the town of Athens, and providing that the lands of two townships vested in the Ohio University should thereafter be exempt from all state taxes. *State v. Auditor of State*, 15 Ohio St. 482.

#### STATE TAX LANDS.

"State tax lands," as used in Pub. Acts 1893, No. 206, § 84, providing that any person may purchase any state tax lands by paying therefor the amount for which the same was bid off to the state, with interest, includes all lands of which the state had become purchaser, either on original sale or on a second sale to the state. *Muirhead v. Sands*, 111 Mich. 487, 493, 69 N. W. 826.

#### STATE WATERS.

See "Waters of the State."

#### STATE WITNESS.

"County and state witnesses," within the meaning of Code, art. 25, § 7, imposing on the county commissioners the duty of levying all needful taxes to compensate county and state witnesses, must be construed to mean such witnesses as are entitled to be paid by the public authorities. The section requires the county commissioners to pay all witnesses before justices of the peace summoned on behalf of the state, and all summoned on behalf of defendant when he is discharged, or fined only 15 cents, or acquitted, but not to pay fees due to the prisoner's witnesses when he is convicted. *Schamel v. Washington County Com'rs*, 34 Atl. 839, 83 Md. 128.

#### STATE'S COUNSEL.

The oath administered to grand jurors, established by common-law usage and prescribed by our own statute, contains this clause, "The state's counsel, your fellows', and your own you shall keep secret." Held, that the expression "state's counsel" means more than the opinions or advice given by the prosecuting attorney to the jury. The injunction of secrecy applies as well to the secrets of the state, the person accused, the facts testified to which indicate the guilt of the accused of the offense under investigation, and the witnesses who testify to such facts. The expression "state's counsel" is equivalent to the secrets of the cause. *State v. Bowman*, 38 Atl. 331, 332, 90 Me. 363, 60 Am. St. Rep. 266.

#### STATEHOUSE COMMISSIONERS.

"Statehouse commissioners" are not trustees of the statehouse fund, to be used in the purchase of a site for and the erection of a new statehouse, in the legal sense of the word. They are intrusted with the disposition of the fund which is devoted by law to certain purposes, which are analogous to the purposes of a trust fund; but so are other officials, who could not be called trustees. The Governor, for instance, has at his disposal a certain fund, which he may expend at his discretion for the apprehension of criminals. This does not make him a trustee, and subject his administration of the fund to the supervision of a court of equity. These commissioners are officials of the state, agents of the General Assembly, and accountable to the Legislature for their official acts. If public office is a public trust, it is so in a moral sense, not in legal intentment. In re *Statehouse Construction Loan*, 38 Atl. 927, 929, 20 R. I. 704.

#### STATEHOUSE FUND.

By the term "statehouse fund" is meant the sum authorized to be raised by loan by a vote of the people, adopting the proposition for the issue of state bonds for the purchase of a site for and the erection and completion of a new statehouse. In re *New Statehouse (R. I.)* 37 Atl. 2, 3; In re *Statehouse Construction Loan*, 38 Atl. 927, 928, 20 R. I. 704.

#### STATE.

See "Natural State of Stream."

The word "state" is defined to mean to aver or allege, to represent fully in words, to narrate, to recite. The petition in an action for slander of title declared that defendants did represent and state that defendant was not the owner of certain property, and it was held that those allegations meant that

defendant spoke the language charged; the words "represent and state" implying the utterance of the language mentioned in connection with those words. *Butts v. Long*, 68 N. W. 754, 756, 94 Mo. App. 687.

The expression "stating separately and distinctly the facts found," as used in Act May 14, 1874, making it the duty of referees to reduce their decision to writing, "stating separately and distinctly the facts found, the answers to any facts submitted in writing by counsel, and the conclusion of law," means that the referee must make his finding contain facts as fully as a special verdict. *Sweigard v. Wilson*, 106 Pa. 207, 213.

"Stating the evidence," under Const. art. 4, § 26, declaring that "judges shall not charge juries in respect to matters of fact, but may state the testimony and declare the law," means more than repeating it. It includes the idea of placing it in its logical relation to the propositions which it is adduced to support or contradict, as well as to the principles and rules of law by which its bearing and force ought to be controlled. To say that there is no evidence bearing on an issue does not conflict with such section. The intention of the section was to prevent judges from forcing upon the jury their own convictions as regards matters of fact. *Redding v. South Carolina R. Co.*, 5 S. O. (5 Rich.) 67, 69.

The use in the Penal Code of any word expressive of "relationship," "state," "condition," "office," or "trust" of any person, as "parent," "child," "ascendant," "descendant," "minor," "infant," "ward," "guardian," or the like, or of the relative pronouns "he" or "they" in reference thereto, includes both males and females. Pen. Code Tex. 1895, art. 22.

#### As allege.

"Stating" a case to be within the purview of a statute is simply alleging that it is. *Spalding v. Spalding* (N. Y.) 3 How. Prac. 297, 301.

#### As contain.

"State," as used in Horner's Rev. St. 1897, § 339, cl. 5, declaring it a ground of demurrer that the complaint does not state facts sufficient to constitute a cause of action, is substantially equivalent to the word "contain." *Leach v. Adams*, 52 N. E. 813, 814, 21 Ind. App. 547.

#### As refer to.

Sess. Laws 1832, p. 28, § 42, incorporating the city of Utica, and providing that all actions brought to recover any penalty or forfeiture shall be brought in the corporate name, and in any such action it shall be lawful to declare generally in debt for such penalty or forfeiture, "stating the section"

of the act or ordinance under which the penalty is claimed, does not require that the contents of the section be set forth, but is synonymous with "referring," and a reference to the section by number is sufficient. Webster defines the verb "state" as to detail; but it may mean to set down in gross, Webster not being considered a very fit authority by which to test the force of the word in a statute concerning pleading. *City of Utica v. Richardson* (N. Y.) 6 Hill, 300, 302.

#### Show distinguished.

The word "show" is not synonymous with "state," since stating is simply alleging, while showing consists in the disclosure of the facts. *Spalding v. Spalding* (N. Y.) 3 How. Prac. 297, 301.

There is a material distinction between "showing" a fact and "stating" it. In the former case satisfactory proof may be required; in the latter the mere recital of the fact is sufficient. *Meadow Valley Min. Co. v. Dodda*, 7 Nev. 143, 148, 8 Am. Rep. 709.

#### STATE AN ACCOUNT.

Where a decree referred the cause to the master to ascertain and report the nature and amount of all advances between the parties, "stating an account" of the same, the master was authorized, under the authority to state an account, to allow and compute interest on such advances and on the account as an incident thereof. *Hodges v. Hodges*, 9 R. I. 32, 35.

#### STATE OF CULTIVATION.

1 Laws, p. 190, provides that a widow is entitled to dower in her husband's lands, if the lands were at the time of his death in a state of cultivation. Held, that the phrase "in a state of cultivation" meant that the lands were not in their original state of nature, or that they had been cleared and worked and have not reverted to a similar state; but if the lands were in a state of cultivation, as thus defined, the fact that they yielded no net income was immaterial. *Johnson v. Perley*, 2 N. H. 56, 57, 9 Am. Dec. 35.

#### STATED.

See "Account Stated"; "Case Stated."

"Stated" is defined as settled; established; regular; occurring at regular times; not occasional; as stated hours of business. *People v. Tuthill*, 31 N. Y. 550, 560; *Wood v. Moore* (Pa.) 1 Chest. Co. Rep. 265, 266.

In Act May 14, 1874, exempting from taxation churches, meeting houses, or other places of stated worship, "stated" means fixed, established, occurring at regular times,

as stated hours of business. So "statedly" means at certain times, not occasionally. *Mullen v. Erie County Com'rs*, 85 Pa. 288, 291, 27 Am. Rep. 650.

"Stated" signifies told, recited; whereas the word "acknowledged" means received with approbation, owned before authority. The use of the word "stated" in a certificate of acknowledgment of a deed by the grantor, which states that the grantor stated before the officer, etc., cannot be used as a substitute for the word "acknowledged." *Dewey v. Campau*, 4 Mich. 565, 567.

#### STATED ACCOUNTS.

See "Account Stated."

Stated accounts are those which have been examined by the parties, and where a balance due from one to the other has been ascertained and agreed upon as correct. *McLellan v. Crofton*, 6 Me. (6 Greenl.) 307, 308.

A stated account is an agreement by both parties that all the articles are true. *Union Bank v. Knapp*, 20 Mass. (3 Pick.) 96, 113, 15 Am. Dec. 181.

#### STATED ATTENDANT.

An act incorporating religious societies, and providing that no person shall be entitled to vote at any election held by any such society until he shall have been a "stated attendant on divine worship" in such congregation at least one year before such election, means more than mere attendance, but is an attendance of a particular nature or character; and the term "stated" is used to characterize the nature or kind of attendance which shall confer qualification to vote, and hence the attendance must be regular, at certain times, and not occasional. This attendance must be personal, and cannot be supplied by another; and the regular attendance of another member of the family is not sufficient to meet the requirements of the statute. *People v. Tuthill*, 31 N. Y. 550, 560.

#### STATED MEETING.

Under a statute making meetings of school directors either stated meetings or special adjourned meetings, the court, in determining the meaning of the word "stated," uses the following language: "The adjective 'stated' does not occur in Bailey's Dictionary (Ed. 1759), nor in Johnson's (Quarto Ed. 1819), except in quotations under the verb 'to state,' nor in the Critical Pronouncing Dictionary, published at Burlington by D. Allinson & Co., in 1813; but it is in Webster, and his definition is 'settled, established, regular; occurring at regular times, not occasional, as stated hours of business; fixed, established, as a stated salary.' Webster defines 'regular' as conformed to a rule, methodical, peri-

odical, and the adverb 'regularly' as in uniform order, at certain intervals or periods, as day and night regularly returning. So, also, the word 'ordinary,' a synonym of 'regular,' is defined as methodical, regular, according to established order. In legal phraseology, we speak of an account stated, a case stated; and where damages are fixed by contract they are styled liquidated, stipulated, or stated damages." *Zulich v. Bowman*, 42 Pa. (6 Wright) 83, 87.

The terms "stated meeting" and "regular meeting" of a board of directors or controllers, whenever they occur in an act relating to the organization of boards of school directors, shall be taken to mean the first meeting thereof, for organization, after the annual election of directors or controllers, and the monthly or other periodical meetings, held thereafter in accordance with the standing regulations of the board; but, if there are no standing regulations, then every meeting held in succession from said first meeting for organization, by adjournment to a time and place certain, and so entered on the minutes of the proper board, shall be to all intents and purposes regarded as a regular meeting. 1 P. & L. Dig. Laws Pa. 1894, col. 766, § 52.

#### STATED MINISTER.

A minister ordained by an unincorporated religious society composed of members belonging to different towns is not a "stated and ordained minister," within St. 1786, c. 3, providing that a marriage shall be solemnized by a "stated and ordained minister of the gospel." *Ligonia v. Buxton*, 2 Me. (2 Greenl.) 102, 108, 11 Am. Dec. 46.

A statute authorizing the solemnization of marriage by "stated and ordained ministers of the gospel" should be construed to include a person ordained as minister of the gospel according to the form observed in Baptist churches, after being engaged by two public societies in the town where he lives to preach to them alternately. *Commonwealth v. Spooner*, 18 Mass. (1 Pick.) 235.

#### STATED PLACE OF WORSHIP.

"Stated," in Act May 14, 1874, exempting from taxation places of religious worship and all churches or other places of stated worship, means fixed, established, occurring at regular times. *Mullen v. Erie County Com'rs* (Pa.) 4 Wkly. Notes Cas. 502, 503.

#### STATED SALARY.

The solicitors for county criminal courts, who receive a certain sum per diem, payable quarterly, receive "stated salaries," within the meaning of the Constitution, making counties liable for compensation of officers

receiving stated salaries. *State v. Barnes*, 3 South. 433, 434, 24 Fla. 29.

## STATED WORSHIP.

The holding of occasional services in the parsonage of a church, situated on the same lot with the church, does not make the parsonage a regular place of stated worship. *Wood v. Moore* (Pa.) 1 Chest. Co. Rep. 265, 266. See, also, *Mullen v. Erie County Com'rs*, 85 Pa. 288, 291, 27 Am. Rep. 650.

## STATEMENT.

See "Agreed Statement"; "Plain Statement"; "Short Statement"; "Succinct Statement"; "Written Statement."

"Statement," as defined by Webster, is the act of stating, reciting, or presenting verbally or on paper, and, as used in Code, § 4565, prohibiting a person from testifying as to any "transaction with or statement by" a deceased person, is not confined to verbal statements, but includes written. *Montague v. Thomason*, 18 S. W. 264, 265, 91 Tenn. 168.

A statement is different from a declaration, which is a specification, in legal and technical form, of the circumstances which constitute plaintiff's cause of action. A statement is an immethodical declaration, stating in substance the time of the contract, the sum, and on what founded, whether a verbal promise, book account, note, bond penal, or single bill, with a certificate of the belief of the plaintiff, or his agent, of what is really due. *Dixon v. Sturgeon*, 6 Serg. & R. 25, 28.

"To state" is to express the particulars of in writing or in words; to make known specifically or explain particularly. Under Act Dec. 2, 1882, authorizing defendants in criminal cases to make statements in their own behalf, the defendant is not allowed to become a witness, or his statement to become evidence, but it simply allows the accused to produce his explanation. *Chappell v. State*, 71 Ala. 322, 324.

Where a certificate in a beneficiary society provides that it is issued on condition that the statements in the application for membership be made a part of the contract, the word "statements" includes a warranty in the application as to representations therein and a waiver of all provisions of law preventing the applicant's physician from disclosing communications relative to his patient's physical condition. *Foley v. Royal Arcanum*, 45 N. E. 456, 457, 151 N. Y. 196, 56 Am. St. Rep. 621.

The term "statement in a public journal," within the meaning of the statute providing that no juror shall be disqualified because he has formed an opinion based on statements in a public journal, if he states that he can act impartially in the matters

submitted to him, includes a publication of the evidence, or what purports to be the evidence, in a newspaper. *People v. Thiede*, 39 Pac. 837, 845, 11 Utah, 241; *Hopt v. Utah*, 7 Sup. Ct. 614, 616, 120 U. S. 430, 30 L. Ed. 708.

## Mechanic's lien.

The term "statement of his demand," as used in a statute requiring a person claiming a mechanic's lien to set out a "statement of his demand" in the lien notice, "has been frequently held, in the case of materialmen, to mean a reasonable bill of items." *Fairhaven Land Co. v. Jordan*, 32 Pac. 729, 731, 5 Wash. 729 (citing *Gates v. Brown*, 25 Pac. 914, 1 Wash. St. 470; *Warren v. Quade*, 29 Pac. 827, 3 Wash. St. 750).

Code Civ. Proc. § 1187, requiring that the notice of a claim for a mechanic's lien should contain a statement of the claimant's "demand," does not mean an itemized account. *Jewell v. McKay*, 23 Pac. 139, 142, 82 Cal. 144.

Code, § 3673, providing that the claimant for a mechanic's lien should file with the county clerk a claim containing a true statement of his "demand" after deducting all just credits and offsets, means the thing claimed as due, which is a sum of money; and a statement of the demand would be a recital of facts out of which it arises, and does not imply that the claim should contain an itemized statement. *Ainslie v. Kohn*, 19 Pac. 97, 101, 16 Or. 363.

Under section 4 of the mechanic's lien law (Rev. St. 1874, p. 665, c. 82, as amended in 1887), requiring the filing of a statement or demand due the claimant after allowing all creditors, the statement must show the amount of each particular kind of mason work done, where the contract fixed and designated price for each kind. *Ehlin v. Murphy*, 48 N. E. 956, 957, 170 Ill. 399.

## STATEMENT OF ACCOUNT.

As between a bank and a depositor, the entry of debts in the depositor's pass book and striking a balance thereon constitute a "statement of the account," and the delivery of the book to the depositor and his retention of it without objection make it a stated account; and where the book has been retained many months without objection, and the precise balance it exhibits has been drawn out, these facts afford clear evidence of a settled, as well as a stated, account, which establishes prima facie the accuracy of the items. *Clark v. Mechanics' Nat. Bank* (N. Y.) 11 Daly, 239.

## STATEMENT OF FACT.

"Statement of fact," as distinguished from hearsay or opinion evidence, is a brief legal phrase, and means the testimony by a

witness of his recollection of things observed and perceived by him. It is that knowledge which is derived through impressions upon the senses by external objects and through subjective sensations. It is that knowledge which a witness gains by ordinary perception and understanding of things seen or heard, or otherwise perceived through the senses or subjectively experienced through sensation. *Lipscomb v. State*, 23 South. 210, 218, 75 Miss. 559.

## STATION.

See "Passenger Station or Depot"; "Police Station"; "Railroad Station"; "Regular Station"; "Skimming Station"; "Telegraph Stations."

See, also, "Depot."

All stations, see "All."

"Station," as used in *Sayles' Civ. St.* 1897, art. 4517, providing that every railroad company shall have a good and sufficient brake upon the hindmost car on all trains transporting passengers and merchandise, and also permanently station there a trusty and faithful brakeman, under a penalty of not exceeding a certain sum, means that a trusty brakeman shall be selected and assigned permanently to the post and place indicated; but it was not intended that the brakeman so assigned should under no circumstances absent himself from such station without liability for the penalty. *Mr. Webster* defines the word "station" as "to place; to set; to appoint or assign to the occupation of a post, place, or office; as to station troops on the right of an army; to station a sentinel on the rampart; to station ships on the coast of Africa." *Ft. Worth & D. O. Ry. Co. v. Shetter* (Tex.) 58 S. W. 179, 181.

### As employment, occupation, or business.

The word "station," as used in *Code*, § 583, providing that a writ of mandamus may be issued to any inferior court, board, officer, or person to compel the performance of an act which the law especially enjoins as a duty resulting from a "station," means employment, occupation, or business. Therefore the writ is properly issued to compel the owner of steamboats and other water craft to furnish certified lists of the tons of freight and number of passengers passing through the locks, as prescribed by *Act Oct. 19, 1876*, § 12, providing for a board of canal commissioners, as the owners of such boats and water craft may be said to occupy a sort of public station, on whom the Legislature has seen fit to impose this regulation on behalf of the public. *Board of Canal and Locks Com'rs v. Willamette Transp. & Locks Co.*, 6 Or. 219, 228.

### As military depot or post.

The words "depots, posts, and stations," as used in a contract for the transportation

of military stores, obligating the carrier to receive the stores from the "depots, posts, or stations" named, etc., are to be taken in their military sense, and not in the sense of railway depots, posts, or stations, and hence obligated the carrier to receive and transport the goods from the military depots, posts, and stations within the posts or territories contemplated. *Caldwell's Case*, 86 U. S. (19 Wall.) 264, 268, 22 L. Ed. 114.

In the approved use of language, no doubt, the word "station" means a place or position, and it may be said that wherever a man, in pursuance of orders, stays or remains, he is stationed, and that, if he is a military man, such place becomes a military station. This word has a recognized and a different meaning under different circumstances. It is a technical word in church relations, in the science of ecclesiology, in the civil law, in surveying, in railroad language, and in military science. Although an army captain left a military station, his home, to which he went, did not become and is not to be deemed a military station, within the meaning of army regulations. A military station is merely synonymous with the term "military post," and means a place where troops are assembled or military stores, animate and inanimate, are kept or distributed, where military duty is performed or military protection offered, where something, in short, more or less closely connected with army or war, is kept or is to be done. *United States v. Phisterer*, 94 U. S. 219, 222, 24 L. Ed. 116.

"Station," within the meaning of *Army Regulations 1863*, par. 176, providing that the expiration of an officer's leave of absence must find him at his station, means his permanent station, the place of performance of his military duties, and not a place to which he was temporarily ordered for a special duty, and at which he accepted his leave of absence. An officer's proper station cannot be changed by his being ordered to perform a temporary duty while on leave of absence. *Anderson v. United States* (U. S.) 15 Ct. Cl. 264, 269.

### As railroad depot.

In *Act March 9, 1889*, § 1, providing that every corporation, company, or person operating a railroad within the state shall place in each "passenger depot" of such company located at any "station" in this state at which there is a telegraph office, a blackboard on which such company or person shall post the fact whether each scheduled passenger train is on time or not, the word "station" is synonymous with the words "passenger depot," meaning the place, ground, and buildings prepared for and used by the traveling public at such point in waiting for, taking, and leaving the trains, and by the company in operating the roads at that point. *State v. Indiana & I. S. R. Co.*, 32 N. E. 817, 818, 133 Ind. 69, 18 L. R. A. 502.

The word "station," so far as it applies to railroads and their management, has acquired no technical legal meaning. It is not necessary at all that it should be a regular station of the company, or one at which the train is scheduled to stop, in order to compel the company to the exercise of the care requisite in law toward an alighting passenger. The signification of the word "station" in this respect, in relation to the conduct and management of a railroad, is that it is a place at which a halt is made for the purpose of taking on or letting down passengers or goods; and this definition will be good for all stations, terminal or otherwise. *Falk v. New York, S. & W. R. Co.*, 29 Atl. 157, 158, 56 N. J. Law (27 Vroom) 380.

Every regular stopping place of a railway train, where it receives or leaves passengers, is a "station," and universally so understood. *Ricker v. Portland & R. F. Ry.*, 38 Atl. 338, 340, 90 Me. 395.

The act providing that no railroad shall abandon any "depot or station" on its road, after the same has been established for 12 months, except by the approval of the railroad commissioners, means a station at which trains stop, not merely for wood and water, but for the transaction of the ordinary business of receiving and delivering freight and passengers. *State v. New Haven & N. Co.*, 37 Conn. 153, 163.

"Station," as used in a statute forbidding a railroad company to abandon a station without the consent of the railroad commissioners, does not include a mere platform at which certain daily trains stopped to take or leave passengers, but at which no office or agent is kept, nor tickets sold. *State v. New Haven & Northampton Co.*, 41 Conn. 134, 139.

In an action against a street railway company for personal injuries, the plaintiff claimed that she was injured by the negligence of the defendant street car company in suddenly starting the car while she was boarding at the crossing, and the court submitted to the jury the question whether the street corner was near the station for receiving and discharging passengers. On appeal the court said: "It is somewhat out of the ordinary in calling a street corner in a city a 'station.' We, however, regard the word in the connection used as meaning 'place,' and so understood there was no harm in the misnomer." *Maxey v. Metropolitan St. R. Co.*, 68 S. W. 1063, 1064, 95 Mo. App. 303.

#### **Yards included.**

In law, "station," or "station limits," includes railroad yards. *Hall v. Chicago, B. & N. R. Co.*, 46 Minn. 439, 441, 49 N. W. 239.

#### **STATION AT EACH END OF LINE.**

The phrase "station at each end of the line," as used in Sp. Laws 1881, c. 200, grant-

ing to a street railway company the right to construct and operate a single or double track for a passenger railway, with all necessary tracks and turnouts, side tracks, and switches in the streets of Duluth and its suburbs, and declaring that no car shall remain standing on any of the stations more than 10 minutes, except at each end of the line and the stations nearest the passenger depot of any other railway companies, at which excepted stations they may stay a longer time, means stations at each end of the tracks, and not at each end of the run of particular cars. *Wilson v. Duluth St. Ry. Co.*, 64 Minn. 363, 364, 67 N. W. 82.

#### **STATION AGENT.**

As agent, see "Agent."

A statute authorizing service of process on a railroad by service on any station agent or ticket agent did not authorize a service on a commercial agent of the road. Station agent means the agent locally in charge of the station depot, and generally is not at the end of the road, but at some intermediate place. *City of Detroit v. Wabash, St. L. & P. Ry. Co.*, 30 N. W. 321, 322, 63 Mich. 712.

Under Code 1873, § 1289, declaring that service of a notice of a claim against a railroad for the killing of animals might be made on the "officer, station or ticket agent employed in the management of the business of the corporation," a return on the notice showing that the service was made on the "station agent of the road" was sufficient; such phrase being well understood to mean agents of the company operating or owning a railroad. *Welsh v. Chicago, B. & Q. R. Co.*, 6 N. W. 13, 53 Iowa, 632.

#### **STATIONARY MACHINERY.**

The term "stationary machinery" has been construed to include an engine, in part attached to the floor and in part kept in position by its own weight, used in operating machinery in railroad shops. *Richmond & D. R. Co. v. Commissioners of Alamance*, 84 N. C. 504, 506.

#### **STATIONER.**

Worcester says that "stationer" originally was synonymous with "bookseller," and meant one who kept a stall or station for selling books. *State v. Dupré*, 7 South. 727, 728, 42 La. Ann. 561.

#### **STATIONERY.**

Worcester defines "stationery" to be the goods sold by a stationer, such as books, papers, pens, sealing wax, ink, etc. In modern use the term "stationery" probably covers only blank books, account books, etc. *State v. Dupré*, 7 South. 727, 42 La. Ann. 561.

It is the duty of a sheriff of the county to furnish fuel for the county, and the county clerk is not entitled to an allowance for fuel for his office; but he is entitled to an allowance for postage stamps as "stationery," postage stamps being often necessary in the discharge of the duties of the clerk's office. *Cole v. White County*, 32 Ark. 45, 54.

The term "stationery," as applied to purchases for the state, includes everything properly so called, and printed letterheads and envelopes, as well as all blanks and blank books not covered by a printing contract. *Code Miss.* 1892, § 4218.

The term "stationery," as used in a provision of the Code regulating the manner of purchasing stationery for the use of the state, includes everything properly so called, as well as blank books not covered by a printing contract. *Shannon's Code Tenn.* 1896, § 33.

#### Blank forms.

"Stationery," as used in *Scates' Comp. St. c. 41, § 32*, providing that all county commissioners shall make allowances to clerks of courts for articles of stationery for their respective courts, includes blank forms indispensable for the prompt performance of the duties of the office of clerk of court. *Knox County v. Arms*, 22 Ill. (12 Peck) 175, 179.

Blanks used by a clerk of a district court are not "stationery," within the meaning of *Rev. St. p. 172, c. 21, § 28*, providing that the county board of commissioners shall provide suitable books and stationery for the use of the county officers. *Arapahoe County Com'rs v. Koons*, 1 Colo. 160.

As used in *Code, § 660*, and *Act Feb. 8, 1858*, providing that certain officers, including the circuit clerk, should be furnished the necessary books and stationery for the use of his office, "stationery" includes blank writs, subpoenas, witness certificates, etc., procured by a circuit clerk and actually used in his office. *Pike County Com'rs v. Goldthwaite*, 35 Ala. 704, 706.

"Stationery" is defined by Webster to mean paper, pens, inks, quills, blank books, etc. As used in *Rev. St. 1895, art. 2475*, providing that there shall be allowed to county officers, at the expense of the county, such stationery, including bail bonds and blank complaints, as may be necessary, it includes printed blanks other than bail bonds and complaint blanks. *Harris County v. Clarke* (Tex.) 37 S. W. 22, 23.

#### Election tickets.

"Stationery" embraces all writing materials and implements, together with the numerous appliances of the desk and of mercantile and commercial offices; and hence supplying of election tickets cannot come within the provisions of a statute authoriz-

ing a contract for furnishing all blanks and stationery for a county. *Oklahoma County v. Blakeney*, 48 Pac. 101, 103, 5 Okl. 70.

## STATUARY.

"Statuary as is wrought by hand from metal," as used in *Tariff Act Oct. 1, 1890, par. 465*, does not include statuary cast from bronze, and touched up by hand and made expressive after casting, under the supervision of the sculptor. *Tiffany v. United States* (U. S.) 65 Fed. 494, 495. See, also, *Id.*, 66 Fed. 737, 738; *Merritt v. Tiffany*, 10 Sup. Ct. 52, 53, 132 U. S. 167, 33 L. Ed. 299.

A marble figure, produced in the establishment of a professional sculptor, under whose instructions the original model was made, and who gave such oral instructions and other supervision as were necessary to insure a faithful reproduction of the design, is held to be "statuary," within the meaning of *Tariff Act July 24, 1897, c. 11, § 1, Schedule N, par. 454, 30 Stat. 194* [U. S. Comp. St. 1901, p. 1678], where it is provided that that term, wherever used in the act, "shall be understood to include only such statuary \* \* \* as is the professional production of a statuary or sculptor only." *Sibbel v. United States* (U. S.) 124 Fed. 105.

In *Rev. St. § 2504*, imposing a 10 per cent. ad valorem duty on paintings and statuary, it is provided: "The term 'statuary,' as used in the laws now in force imposing duties on foreign importations, shall be understood to include professional productions of a statuary or sculptor." Copies by modern artists of ancient statues come within the meaning of this section. A statuary is one who professes or practices the art of carving images or making statues. *Viti v. Tutton* (Pa.) 15 Phila. 507, 508; *Id.* (U. S.) 14 Fed. 241, 246.

## STATU QUO.

See "In Statu Quo."

## STATUS.

See "Civil Status"; "Political Status."

The legal social relation and condition of the parties, as husband and wife, or otherwise, is what we understand by the term "status." The status of marriage is one of the domestic relations. If a suit is brought between the parties to it for the purpose of determining the existence or continuance of this status, the judgment establishes the legal position of the parties as to the rest of the community, and upon considerations of public policy is binding upon all the world. But this rule does not extend to judgments which merely convey the rights of property



or of the person, or other incidents of the status. *Barney v. Tourtellotte*, 138 Mass. 106, 108.

In a divorce case, the court said: "It is said that the relation of the parents to the children, and their relation to each other in regard to the children, is a status. \* \* \* But the very meaning of the word 'status,' both derivative and as defined in legal proceedings, forbids that it should be applied to a mere relation. Status implies relation, but it is not a mere relation." *De La Montanya v. De La Montanya*, 112 Cal. 101, 115, 44 Pac. 345, 348, 32 L. R. A. 82, 53 Am. St. Rep. 165.

A status, once established, is presumed by the law to remain until the contrary appears, or, as expressed by Code Civ. Proc. § 1936, a thing once proved to exist continues as long as is usual with things of that nature. *Kidder v. Stevens*, 60 Cal. 414, 419.

Each sovereignty determines for itself what the condition—"status"—of individuals shall be, so long as they are domiciled within the jurisdiction of its laws. The status of an individual as to marriage, as well as freedom, may be very different in the various sovereignties in which he travels and dwells. A person may in Dakota be regarded and treated by the laws of that state as a single person, free to marry, and at the same time, while in Illinois, regarded by the law as a married person. Marriage is a state which people can enter into only in accordance with the laws of the state where it takes place; but whether in a new sovereignty, to which they may remove, they will be recognized as husband and wife, depends upon the law of such sovereignty. *Dunham v. Dunham*, 57 Ill. App. 475, 497.

## STATUTE.

See "Against the Statute"; "Betterment Statutes"; "Directory Statute"; "Expository Statute"; "Imperative Statute"; "Permanent Statute"; "Personal Statute"; "Real Statute"; "Remedial Statute"; "Severance of Statute"; "Temporary Statute."

Local statute, see "Local Law."

Penal statute, see "Penal Laws."

Private statute, see "Private Act."

Public statute, see "Public Act."

Special statute, see "Special Law."

A statute is the express written will of the Legislature, rendered authentic by certain prescribed forms and solemnities. 1 Kent, Comm. 447. Its enactment always implies the judgment of the Legislature that it is expedient. There certainly can be no statute law which is not the will of the law-makers, implying this judgment as to its expediency; and every expression of its will, implying this judgment, which is the prox-

imate cause of an obligatory rule of civil conduct, is clearly an exercise of legislative power. *People v. Collins*, 3 Mich. 343, 418. See, also, *In re Seat of Government*, 1 Wash. T. 115, 122.

A statute is an act of the Legislature as an organized body. It expresses the collective will of that body, and no single member of it, or all the members as individuals, can be heard to say what the meaning of the statute is. It must speak for and be construed by itself, by the means and signs to which, as appears upon its face, it has reference. Otherwise, each individual might attribute to it a different meaning, and thus the legislative will and meaning be lost sight of. *State v. Partlow*, 91 N. C. 550, 552, 49 Am. Rep. 652.

"A statute," says Bish. Cr. Law, § 291, "is simply a fresh particle of legal matter dropped into the previously existing ocean of law." *State v. Rechnitz*, 52 Pac. 264, 265, 20 Mont. 488.

Any enactment, from whatever source originally, to which a state gives the force of law, is a "statute" of the state, within the meaning of the statutes relative to the jurisdiction of federal courts. *New Orleans Waterworks Co. v. Louisiana Sugar Refining Co.*, 8 Sup. Ct. 741, 748, 125 U. S. 18, 31 L. Ed. 607.

A statute is an act of ordinary legislation by the appropriate organ of the government, the provisions of which are to be executed by the executive or judiciary, or by officers subordinate to them. *Eakin v. Raub*, 12 Serg. & R. 330, 347.

A statute is a declaration of the Legislature that a given statement is the law. Bouvier defines a statute to be the written will of the Legislature, solemnly expressed according to the form necessary to constitute it a law of the state. *Lane v. Missoula County Com'rs*, 13 Pac. 136, 139, 6 Mont. 473.

Any enactment to which the state gives the force of law, whether it has gone through the usual stages of legislative proceedings or been adopted in other modes of expressing the will of the state, is a statute of the state, within the meaning of the acts of Congress relative to appellate jurisdiction of the federal Supreme Court. *Stevens v. Griffith*, 4 Sup. Ct. 283, 284, 111 U. S. 48, 28 L. Ed. 348.

"Potter, in giving his division of statutes, divides them thus: Public and private; declaratory and remedial; perceptive, prohibitive, permissive, and penal; temporary and perpetual." *People v. Wright*, 70 Ill. 388, 399.

The organic law is the Constitution of the United States and of this state, and is altogether written. Other written laws are denominated "statutes." *Ann. Codes & St. Or.* 1901, § 734.

**By-law distinguished.**

See "By-Law."

**City charter.**

The Los Angeles city charter (Stat. 1889) as an instrument of government and in its political provisions, is a statute, within the meaning of Civ. Code, § 1622, providing that all contracts may be oral, except when required by statute to be in writing. *Frick v. City of Los Angeles*, 47 Pac. 250, 251, 115 Cal. 512.

**Municipal ordinance.**

A statute is the written will of the Legislature, expressed in the form necessary to constitute it a part of the law, an act of legislation, an enactment, or a written law; and it is manifest that a municipal ordinance is not a statute in the sense in which that word is used in Mill. & V. Code, § 47, providing that the repeal of a statute does not affect any penalty incurred nor any proceeding commenced under the statute repealed. *City of Rutherford v. Swink*, 35 S. W. 554, 555, 96 Tenn. 564.

**STATUTE BOOKS OF SISTER STATES.**

The provision of the statutes of Missouri that the printed statute books of sister states, purporting to be printed under the authority of such state or territory, shall be evidence of the legislative acts of such state or territory, does not render admissible in evidence as the printed statute books of a sister state a book entitled "The Statute Laws of the State of Tennessee of a Public and General Nature, Revised by John Haywood and Robert L. Cobbs, by Order of the General Assembly," nor a book entitled "A Compilation of the Statutes of Tennessee of a General and Permanent Nature from the Commencement of the Government to the Present Time, with Reference to the Judicial Decisions in Notes, to Which is Appended a New Collection of Forms, by K. L. Caruthers and A. O. Nicholson," etc.; neither purporting to be printed under the authority of the state. *Bright v. White*, 8 Mo. 421, 422.

**STATUTE LAW.**

See, also, "Statutory Law."

Common law distinguished, see "Common Law."

"Statute law" is the express written will of the Legislature, rendered authentic by certain prescribed forms and solemnities. Law is a rule of conduct prescribed by legislative power for the government of the citizens of the state. The Legislature cannot delegate this power to any other person or body, not even to the people at large. *Rohrbacher v. City of Jackson*, 51 Miss. 735, 773.

**STATUTE MERCHANT.**

A "statute merchant" is where a man is bound before a mayor or bailiff of a corporate town, who has power to take such bonds or recognizances to pay a certain sum of money at a fixed day. If there be default in payment, then the person in whose favor it is made comes before the officer taking the statute, and prays him to certify it under his seal, upon which there issues a writ to execute the statute. *Yates v. People* (N. Y.) 6 Johns. 337, 404.

**STATUTE OF LIMITATIONS.**

See "Limitation of Actions."

**STATUTE OF USES.**

The "statute of uses" was that of 27 Hen. VIII, which provided that, in the case of a conveyance of property to uses, the cestui que use should take the legal estate. The purpose of the statute was to abolish estates in which the legal right was held in one person for the use and benefit of another; but its operation was limited in such a manner as to cause it to fail to accomplish the purpose intended by a judicial construction that the statute only operated to pass the title to the cestui que use when the property was transferred to the grantee to the use of another. Where the property was granted to A., for the use of B., to be held in trust for C., the statute was only construed to pass the legal title to B., and it was held that he held the property in trust for C. Thereafter the equitable estate created was called a "trust," though it had formerly been known as a "use." The leading practical effect of the statute was the introduction of a number of forms of conveying real estate, as bargain and sell, covenants to stand seised, etc., by which title in fee could be passed without livery of seisin. *Thompson v. Bennet* (N. H.) 1 Smith, 327, 330.

**STATUTES OF ENGLAND.**

"Statutes of England," as used in the repealing clause of the act of 1788 providing that none of the statutes of England, etc., shall be considered as laws of this state, "can mean nothing less than the acts of Parliament." *Levy v. McCartee*, 31 U. S. (6 Pet.) 102, 111, 8 L. Ed. 834.

**STATUTES PARI MATERIA.**

See "In Pari Materia."

**STATUTORY ALLOWANCES.**

A devise to testator's widow in lieu of her "statutory allowances" applies to the widow's quarantine and exemptions made

by law. They are provisions having for their primary object the temporary relief of a widow, and, strictly speaking, may be termed "statutory allowances." While the courts of New York have not made extensive use of the word "statutory allowances," yet that expression is a most common one, and is one generally used when speaking of provisions similar to those given by the statute. In *re Mersereau*, 77 N. Y. Supp. 329, 332, 38 Misc. Rep. 208.

### STATUTORY BOND.

A statutory bond is a bond required or directed by statute to be made in a particular manner. To authorize a summary judgment against the securities of the principal obligor in such a bond, the bond itself must conform in all essential requisites to the statute. "If a departure from the conditions of the bond described by the statute makes the obligation less onerous, the bond may be enforced by a summary judgment; but, when the conditions of the bond are more onerous than the statute requires, such judgment ought not to be entered." *Janes v. Reynolds' Adm'rs*, 2 Tex. 250, 251.

A statutory bond is a bond required by a statute to be made in a particular mode, and such mode must be substantially pursued in order to make a valid statutory bond; but, to render a bond void for want of conformity to the statute, it must be made so by express enactment, or be intended as a fraud on the obligors by color of law, by an evasion of the statute, or be more onerous than required. A literal conformity to the statute in the statutory bond in general would not be required; but, where its conditions are specially and particularly set out, the bond should substantially embrace each of those conditions. *Johnson v. Erskine*, 9 Tex. 1, 9.

The chief distinction between a statutory bond, strictly so called, and a common-law bond, is that the obligee or beneficiary of the former is entitled to all the remedies and processes which are granted by statute law, whereas the common-law or voluntary bond stands on the footing of an ordinary contract. Bonds intended to be official and statutory, but too defective to fulfill all the requirements of the statute and to be entitled to all the privileges appertaining to strictly official bonds, are good as common-law bonds, unless they contain provisions contrary to those which are prescribed in the statute, or in violation of other rules of law, common or statutory, or of public policy. *Hedderick v. Pontet*, 12 Pac. 765, 768, 6 Mont. 345.

### STATUTORY CONTRACT.

A statutory contract is a contract which the statute says shall be implied from cer-

tain facts, and is governed by the ordinary rules relating to actions on contracts. *Foley v. Leisy Brewing Co.*, 89 N. W. 230, 231, 116 Iowa, 176.

### STATUTORY DEDICATION.

A statutory dedication of land to the public use is one made in conformity with the provisions of the statute. The general rule is that, in order to constitute a valid statutory dedication, the provisions of the statute must be substantially complied with, and such acts as it requires must be performed substantially in the manner prescribed. *City of San Antonio v. Sullivan*, 57 S. W. 42, 44, 23 Tex. Civ. App. 619; *People v. Marin County*, 37 Pac. 203, 204, 103 Cal. 223, 26 L. R. A. 659.

### STATUTORY FORECLOSURE.

"Statutory foreclosure" is the execution of a power of sale given in a mortgage. The provisions of the statute regulate the execution of a power granted by the mortgagor, and they do not authorize the taking away of one's property without any authority from the owner. Proceedings taken under the statute should be sustained when the power of sale has been fairly exercised and the statutory provisions strictly complied with. *Mowry v. Sanborn* (N. Y.) 11 Hun, 545, 548.

### STATUTORY INSOLVENCY.

"Statutory insolvency" is generally determined as an inability to pay debts when due or demandable. *Finch Mfg. Co. v. Stirling Co.*, 41 Atl. 294, 296, 187 Pa. 506.

### STATUTORY LAW.

"Statutory law" is the express or written will of the Legislature, rendered authentic by certain prescribed forms and solemnity. *Thorne v. Cramer* (N. Y.) 15 Barb. 112, 114.

"Statutory law" is the declared will of the Legislature, and presupposes the exercise of judgment and reason, and, if a general law, must be complete and absolute in itself, and not dependent for its enactment upon any other body or tribunal or person. *People v. Collins*, 3 Mich. 343, 347.

### STATUTORY LIABILITY OF STOCKHOLDERS.

"Statutory liability of stockholders" is a liability created by statute in addition to unpaid subscriptions; the one great distinction between these two classes of liability being that stock subscriptions are held to be a trust fund for the payment of creditors, while the additional statutory liability produces a fund without any trust features.

as has been held in some states. *Burch v. Taylor*, 24 Pac. 438, 1 Wash. St. 245.

### STATUTORY LIEN.

Statutory liens have, without possession, the same operation that exist in common-law liens, where possession was delivered. *Jones, Liens*, par. 114, says: "Statutory liens generally differ from common-law liens in not requiring possession to support them. The protection afforded at common law by possession is in the case of statutory liens afforded by notice to the owner or by attachment of property within a limited time. A statutory lien without possession has generally the same operation and efficacy that a common-law lien has with possession." An agister's statutory lien will not, as between the parties or as to third persons having notice, be lost by a change of possession not inconsistent with it, and not under such circumstances as to indicate an intent to waive, relinquish, or abandon it. *Becker & Degen v. Brown*, 91 N. W. 178, 179, 65 Neb. 264.

### STATUTORY RECEIVER.

A statutory receiver is one appointed in pursuance of special statutory provisions. He derives his power from the statute, and to it must look for the duty imposed upon him. He possesses such power only as the statute confers, or such as may be fairly inferred from the general scope of the law of his appointment. *Boonville Nat. Bank v. Blakey* (U. S.) 107 Fed. 891, 894, 47 C. C. A. 43.

### STAVE BOLTS.

A contract to deliver to a manufacturer of barrels and staves a certain quantity of "stave bolts" meant bolts of a good merchantable quality and suitable for the purpose for which they were intended. *Ketchum v. Wells*, 19 Wis. 25, 34.

### STAY.

In its general meaning, "to stay" is to forbear to act, or to stop; but in its technical sense a "stay" applies to proceedings already commenced, and, as used in an injunctive order, directing "that all suits and proceedings to collect a debt set forth be and the same are hereby stayed," applies, not to past proceedings alone, but future ones also, and as well to those pending as those *de novo*. In *re Schwarz* (U. S.) 14 Fed. 787, 788.

### STAY OF EXECUTION.

As matter of procedure, see "Procedure."

A stay of execution is an order prohibiting one from issuing process to enforce a

judgment. *National Docks & N. J. J. & Ry. Co. v. Pennsylvania R. Co.*, 33 Atl. 936, 939, 64 N. J. Eq. 167.

### STAY OF PROCEEDINGS.

An order "to stay proceedings" and an order "to extend the time in which a particular act or proceeding is to take place" are not synonymous. An order to stay proceedings puts an end to all action, and no steps can be taken lawfully during its continuance; but after an order to enlarge the time in which a particular act may be done expires the parties may lawfully take any steps not dependent on or connected with the order. *Rev. St. c. 140, § 29*, providing that no order to stay proceedings for longer period than 20 days shall be granted by a judge out of court, etc., does not prohibit such judge from extending the time to answer in a case for a longer period than 20 days. *Wallace v. Wallace*, 13 Wis. 224, 226.

*Thomp. Dig. p. 453, § 2*, providing that no writ of injunction to stay proceedings at law shall issue, except on motion and notice, refers to the interposition of the equitable power of the court of chancery to stay judgment or the enforcement of a judgment at law, to the end that the equitable rights and liabilities of parties could be inquired into, and ultimately permanently enjoined, in whole or in part. *Lewton v. Hower*, 18 Fla. 872, 876.

"Injunction" is defined as a judicial proceeding whereby a party is required to do a particular thing, or to refrain from doing a particular thing, according to the exigency of the writ. 2 *Story, Eq. Jur. § 861*. Under *Rev. St. § 2773*, it is a command to refrain from a particular act; but under such definition a stay of proceedings, which is defined to be the act of stopping or arresting a judicial proceeding by the order of the court or judge, is not an injunction, such as gives a writ of appeal from an order refusing a stay. *Rossiter v. Aetna Life Ins. Co.*, 71 N. W. 898, 96 Wis. 466.

### STAYOR.

A "stayor" of a judgment is a surety for the payment of the judgment. *Stockard v. Granberry*, 71 Tenn. (3 Lea) 668, 678.

### STEAD.

See "In Its Stead."

"Stead" originally meant place or spot. This meaning is now obsolete, except as preserved in compound words, such as "homestead," which is defined as the home place. *McKeough's Estate v. McKeough*, 37 Atl. 275, 276, 69 Vt. 34.

## STEADY EMPLOYMENT.

An agreement to give a person a job of "steady and permanent employment" means employment as long as the person is able, ready, and willing to perform such services as the other party may have for him to perform. The words "steady" and "permanent" usually signify stability and duration. *Pennsylvania Co. v. Dolan*, 32 N. E. 802, 805, 6 Ind. App. 109, 51 Am. St. Rep. 289.

## STEAL.

See "Private Stealing."

"Steal," as defined by Webster, means to take without right, with intent to keep. *People v. Lammerts*, 58 N. E. 22, 24, 164 N. Y. 137.

A newspaper article, stating that a city board had voted to issue city bonds to construct a boulevard, which would enhance the value of the land, and that such project was pushed to further the interests of the owners at the public expense, and calling it a "steal," but stating that the landowners were the recipients of the benefits, the word "steal" is qualified by the rest of the language, so that the word cannot be used in its ordinary sense. *Randall v. Evening News Ass'n*, 60 N. W. 301, 305, 101 Mich. 561.

Pen. Code, § 528, defines with considerable detail what acts shall constitute larceny and what intent shall characterize the crime, and provides that he who with such intent does any of such acts steals such property and is guilty of larceny. The word "steal," as thus defined by the statute, covers all the prescribed details, and its use in an indictment which charges the taking to have been felonious or with a criminal intent sufficiently includes the particular intent needed to constitute larceny. *People v. Dumar* (N. Y.) 42 Hun, 80, 85.

The word "steal," or "larceny," when used in this Code in reference to the acquisition of property, includes property acquired by theft. Pen. Code, art. 739. The word "steal" is a legal result of facts—a mere conclusion of law. *Williams v. State*, 12 Tex. App. 395, 401.

"Stealing" is defined by statute in Massachusetts as a criminal taking, obtaining, or converting of personal property with intent to defraud or deprive the owner permanently of the use of it, including all forms of larceny, criminal embezzlement, and obtaining by criminal false pretenses. *Commonwealth v. Kelley*, 68 N. E. 346, 347, 184 Mass. 320.

The word "stolen," as used in the title relating to search warrants, is intended to

embrace also the acquisition of property by any means forbidden and made penal by the laws of the state. Code Cr. Proc. Tex. 1895, art. 348.

The words "steal," or "stolen," when used in this Code with reference to the acquisition of property, include property acquired by theft. Pen. Code Tex. 1895, art. 873.

To take an article from another, and to steal it, are not necessarily synonymous terms. Therefore an instruction, in an action for malicious prosecution, that, if such circumstances existed as would cause a suspicion in a reasonable mind that plaintiff in the malicious prosecution suit has taken the articles described in a search warrant from defendant, it amounted to probable cause, was erroneous, as defendant might have had a suspicion that they were taken by plaintiff, and yet not the slightest reason to suppose that plaintiff had stolen them. *Stone v. Stevens*, 12 Conn. 219, 228, 229, 30 Am. Dec. 611.

The terms "stolen" or "embezzled" cannot be appropriately used as to describe the misappropriation and application to his own purpose by one partner of more than his share of the partnership property. The title of a copartner in and to all of the partnership property is clear and well-recognized. So the fact of misappropriating any portion thereof by a partner and using the same for his individual benefit cannot be termed a stealing of the same, for the reason that one cannot steal property to which he has title. *Holmes v. Gilman*, 19 N. Y. Supp. 151, 153, 154, 64 Hun, 227.

### As actionable per se.

A charge that one "stole" a thing not the subject of larceny is not actionable per se. *Ogden v. Riley*, 14 N. J. Law (2 J. S. Green) 186, 187, 25 Am. Dec. 513; *Blanchard v. Fisk*, 2 N. H. 398, 400; *Stitzell v. Reynolds*, 67 Pa. (17 P. F. Smith) 54, 56, 5 Am. Rep. 396; *Morton v. Ladd*, 5 N. H. 203, 20 Am. Dec. 573; *Wing v. Wing*, 66 Me. 62, 63, 22 Am. Rep. 548; *Cock v. Weatherby*, 13 Miss. (5 Smedes & M.) 333, 337.

The term "stealing" imports a felony, and therefore to charge a person with stealing is actionable. *Little v. Barlow*, 26 Ga. 423, 425, 71 Am. Dec. 219; *Cock v. Weatherby*, 13 Miss. (5 Smedes & M.) 333, 337; *Hall v. Adkins*, 59 Mo. 144, 145.

### As a carrying away.

Carry away as, see "Carry Away."

In an indictment for larceny, the word "steal" implies a carrying away, and therefore an indictment charging that the defendant did feloniously "steal, take, and drive"

a sheep, without alleging that he drove or carried it "away" is sufficient. *State v. Mann*, 25 Ohio St. 668.

The word "steal" means the felonious taking and carrying away of the goods of another. The word "steal" in an indictment implies a carrying away. *State v. Parry*, 21 South. 30, 31, 48 La. Ann. 1483.

#### As a felonious taking.

The word "steal" has a uniform signification, and in common, as well as in legal parlance means the felonious taking and carrying away of the personal goods of another. *State v. Chambers* (Iowa) 2 G. Greene, 308, 311; *State v. Boyce*, 65 Ark. 82, 83, 44 S. W. 1043.

"To steal a man's property is to take it from his custody with a felonious intent, which felonious intent is the purpose of appropriating it fraudulently to the taker's own use." *State v. Fitzpatrick* (Del.) 32 Atl. 1072, 1073, 9 Houst. 385.

The word "steal" means to take and carry away feloniously, without right or leave. It implies a felonious taking, and the words "feloniously steal," as used in a section of the Code defining larceny, refer to the intent with which the stealing is done. *State v. Smith*, 71 Pac. 767, 768, 31 Wash. 245.

"Steal" means to take and carry away feloniously; hence it is held that an indictment charging defendant with stealing a horse was not defective for a failure to allege that it was taken feloniously. *People v. Lopez*, 27 Pac. 427, 90 Cal. 569.

The word "steal," in *Sess Laws 1896*, c. 11, § 8, providing that any person who shall steal, embezzle, or knowingly drive away or deprive another, etc., of any cattle, horse, etc., shall be guilty, "is used in its popular and broader, and not in its purely technical, sense, and refers to any wrongful taking, although the taking may not be accompanied with felonious intent, or with an intent to deprive the owner permanently of his property, as in the case of larceny." In *re Gannett*, 39 Pac. 496, 497, 11 Utah, 283.

"Steal," as used in a statute, implies a simple larceny, and it is a necessary constituent of this crime that the taking should be with felonious intent; that is, the possession must be acquired *animo furandi*, and accused must have intended to apply the thing stolen to his own use, or to derive some service or benefit to himself or another from the taking, so that the enticing away of a slave out of the possession of the owner, as it need not necessarily be with any hope on the part of him who enticed him away of deriving any benefit to himself, does not constitute stealing. *Alexander v. State*, 12 Tex. 540, 542.

"Steal," in common as well as in legal parlance, imports a larceny, and, when used

in connection with property which is the subject of larceny, means the felonious taking. *State v. Chambers*, 2 G. Greene, 311; *People v. Robertson*, 3 Wheeler, Cr. Cas. 181; *People v. Urquidas*, 96 Cal. 241, 31 Pac. 52. And hence an instruction stating a party obtaining possession of property with the intention of stealing it is guilty of larceny is sufficient, without the use of the word "feloniously" before the word "stealing." *People v. Tomlinson*, 36 Pac. 506, 508, 102 Cal. 19.

"Steal" means to take and carry away feloniously; to take without right or leave, and with intent to keep wrongfully. Under this definition it is unnecessary for an indictment, in which it is alleged that defendant did "feloniously steal, take, and carry away" the property, to allege that they were taken with intent to steal. *State v. Dewitt*, 53 S. W. 429, 431, 152 Mo. 76.

The words "stole, took, and carried away," in an instruction that defendant is guilty of grand larceny if she stole, took, and carried away the property, is bad, in failing to state the nature of the taking, as the words are not as particular as the words used in a statute, which requires that a taking must be wrongful and with a felonious intent in order to constitute a sufficient indictment. *State v. Campbell* (Ky.) 18 S. W. 1109, 108 Mo. 611.

#### As larceny.

The word "steal" has a legal signification. To steal is to commit larceny. *State v. Tough* (N. D.) 96 N. W. 1025, 1028.

Bonvier says: "The term 'stealing' has nearly the same meaning as 'larceny.'" An indictment charging the breaking and entering of a building for the purpose of stealing goods contains a sufficient allegation that it was for the purpose of committing larceny. *Mathews v. State*, 36 Tex. 675.

The term "steal," as used in the Criminal Code of Nebraska defining larceny, includes all of the elements of larceny at common law; and hence it is not error for the court to charge the jury that they may convict on finding the accused guilty of stealing the property described. *Barnes v. State*, 59 N. W. 125, 126, 40 Neb. 545.

The words "take and steal," in a complaint charging that the defendant did feloniously take and steal certain articles, was construed to be sufficient designation of the crime, and larceny, though the words "steal, take, and carry away" are the proper technical words to be used. *Green v. Commonwealth*, 111 Mass. 417, 419.

The natural and most obvious import of the word "steal" is that of a felonious taking of property, or larceny. The word "steal" or "stealing," in a criminal statute, when unqualified by the context, signifies a taking which at common law would have been de-

nominated "felonious," and imports the common-law offense of larceny. *Gardiner v. State*, 26 Atl. 30, 33, 53 N. J. Law (26 Vroom) 17.

The natural and most obvious meaning of the word "steal" is the felonious taking of property, or larceny. Such is its meaning as used in an allegation charging a person with stealing wood. The word "steal" may be qualified by accompanying words, so as to show that such was not the meaning. Thus to say of a person that "he stole apples from my trees" imputes a trespass, not larceny; but it is otherwise to say that "he stole apples from my bin." *Darling v. Clement*, 37 Atl. 779, 780, 69 Vt. 292.

"The natural and most obvious import of the word 'steal' is that of felonious taking of property, or larceny; but it may be qualified by the context. If one says to another, 'He stole the apples from my trees,' it imports a trespass, and not a felony, and the words are not actionable; but if he says, 'He stole the apples from my cellar,' he imports a felonious taking, and the words are actionable." But the words may be equivocal, and the question whether they impute a felonious taking or not may depend upon the facts and circumstances under which they were spoken, and the facts and circumstances referred to the speaker and understood by the hearers; and therefore to charge that another stole certain patterns for castings is equivocal, as it may be properly used to describe material forms for molding and making castings, or may only import that plaintiff carried away in his memory a prototype of the forms and proportions of the castings, or by drawing descriptions or models made by himself out of his own materials; and therefore it is for the jury, in a slander suit, to determine whether it is intended by such language to charge the crime of larceny. *Dunnell v. Fiske*, 52 Mass. (11 Metc.) 551, 554.

The word "steal," when used to characterize a taking of personal property, imports larceny, and is actionable. It means more than the word "take," and therefore a complaint in an action for slander, which alleges that defendant charged plaintiff to have stolen tea, etc., is not supported by evidence that defendant stated that the plaintiff took tea. *Coleman v. Playsted* (N. Y.) 36 Barb. 26, 28.

The term "intention of stealing," as used by a court in defining burglary to the jury, as follows: "If you believe from the evidence, beyond a reasonable doubt, that the defendant entered the barn, as charged in the information, with the intention of stealing hay therein, then the offense of burglary would be complete," is equivalent to "intention of committing grand or petit larceny." *People v. Urquidas*, 31 Pac. 52, 53, 96 Cal. 239.

The word "steal" is not the technical word to describe the common-law crime of larceny. That word is not at all essential to describe that crime, and it is a mistake to imply from its use only the technical offense of larceny. It is the common speech to describe that offense, no doubt, but not the technical words. "Feloniously take and carry away" are the technical words; the word "steal" having perhaps crept from common speech into statutes, decisions, and indictments. *United States v. Jolly* (U. S.) 37 Fed. 108, 111 (citing *Same v. Stone* [U. S.] 8 Fed. 232).

Stealing and larceny at common law had the same meaning, and hence stealing means the wrongful or fraudulent taking and removal of personal property by trespass, with a felonious intent to deprive the owner thereof and to convert the same to the taker's own use. *Hughes v. Territory*, 56 Pac. 708, 709, 8 Okl. 28.

The Legislature has modified the meaning of "larceny," as used in the crimes act, so that the taking of personal property, accomplished by fraud or stealth, and with intent to deprive another thereof, is larceny, regardless of whether or not it was taken for the purpose of depriving the owner thereof, and for the purpose of converting it to the use of the taker. Therefore, while "stealing" and "larceny" at common law were synonymous terms, our statute has given to the word "larceny" a much broader meaning than it then had, while "steal" or "stealing" has not been defined by our statutes, and must be construed according to its common-law meaning. *Sullivan v. Territory*, 58 Pac. 650, 8 Okl. 499.

The word "steal" cannot be accepted as the equivalent of larceny. It is but one word in the definition, and does not even define all the verb "action." "Steal, take, and carry away" have always been indissolubly conjoined, each as essential to the other, in order to constitute the crime of larceny. *Hale*, P. C. 513. Accordingly, where an indictment charged that the defendant broke and entered, etc., with intent to "take, steal, and carry away" certain pieces of meat, the use of the word "steal" does not serve to correct a failure to charge that the meat was the property of another. *Barnhart v. State*, 56 N. E. 212, 214, 154 Ind. 177.

The term "steal" in its legal significance imports a larceny; but the words of an indictment for robbery, that defendant did "seize, take, and carry away," import a trespass, and do not express a larceny. *Matthews v. State*, 4 Ohio St. 539, 540.

#### Theft synonymous.

"Steal" and "theft" are synonymous terms, and in an indictment for theft an allegation that the defendant did steal, etc.,

charges merely a conclusion of law, and is insufficient for not charging the acts, intents, and omissions which enter into a definition of the crime. *Young v. State*, 12 Tex. App. 614, 615.

On an appeal from a conviction under an indictment "for receiving and selling stolen property, knowing the same to have been stolen," a recognizance which recites that defendant stands charged with receiving stolen property, instead of describing the offense in the language of Pen. Code, art. 743, as property "acquired by another in such manner as that the acquisition comes within the meaning of the term 'theft,'" is sufficient, as by article 739 it is provided that the word "steal" or "stolen," when used in this Code in reference to the acquisition of the property, includes property acquired by theft. Thus we have a fixed, definite meaning for the word "stolen," and, giving to it this meaning, the offense is sufficiently set forth and described in the recognizance. *Sands v. State*, 18 S. W. 86, 87, 30 Tex. App. 578.

#### STEAL AND TAKE.

"Steal and take," as used in Code 1873, § 3858, providing that if any person, with force or violence or by putting in fear, shall "steal and take" from the person of another any property that is the subject of larceny, he is guilty of robbery, is synonymous with "stealing" as used in section 3905, providing that, if any person commits the crime of larceny by stealing from the person of another, he shall be punished. *State v. Graff*, 24 N. W. 6, 7, 66 Iowa, 482.

#### STEAM.

"Steam" is the elastic aeriform fluid into which water is converted when heated to the boiling point. It is an element of power, and, when that power is transmitted or applied by means of a mechanism termed a "steam engine," it furnishes what is known as applied or transmitted power or motion for practical purposes, like the running of machinery. Steam, however, is not the only source of power, as there is water power, electric power, etc. As used in a lease of a building, together with power, not exceeding six-horse, for the conduct of the lessee's business, that of a steam laundry, also "steam" for washing machines and dry rooms, it is used for a different purpose and to accomplish a different end than the word "power." The common speech of people indicates that there is a difference between "steam" and "power," in the popular understanding, at least; for we speak of heating our houses by or with steam, but never by or with power. We inquire of a manufacturer by what power he runs his mill, and he replies, steam, water, or electric power, as the case may be,

and the question excites no surprise. If, however, "steam" and "power" mean the same thing, it would be a very idle inquiry as to what power was used to run the mill inquired about. *Reynolds v. Washington Real Estate Co.*, 49 Atl. 707, 709, 23 R. I. 197.

Plaintiff company in 1882 owned a horse railroad from F. Ferry to C. Depot, whence it carried passengers by a steam railroad to a pleasure resort. Defendant owned a horse railroad from the ferry to the resort, which ran within five blocks of C. Depot, and passengers were accustomed to walk the five blocks and change to plaintiff's steam line. The companies then agreed that defendant should use plaintiff's tracks to C. Depot, so that its passengers might avoid the five blocks' walk, and that defendant should run its cars between the ferry and the depot by plaintiff's schedules; the intention being to increase the traffic, both of the steam railroad and the defendant's line, as far as C. Depot. There was a provision in the agreement that, if defendant at any time used or permitted "steam as a motive power" on its line from near C. Station to the resort, the contract could be rescinded by either party. Held, that the words "steam as a motive power" should be construed to include electricity generated by steam, since steam at the time of the agreement was the only recognized motive power for rapid transit. By such use of the words, any motive power for rapid transit was referred to. *Prospect Park & C. I. R. Co. v. Coney Island & B. R. Co.*, 21 N. Y. Supp. 1046, 1048, 66 Hun, 366.

#### STEAM FARM ENGINE.

The phrase "steam farm engine," as used in an insurance policy, not being the name of any pattern or style of engine, must be understood as descriptive of any engine adapted to farm purposes. *Wilson v. Union Mut. Fire Ins. Co.*, 55 Atl. 662, 663, 75 Vt. 320.

#### STEAM SAWMILL.

"Steam sawmill," as used in a policy of insurance on a steam sawmill, includes, not only the building itself, but all apparatus and machinery necessary to make it a steam sawmill in all its parts. *Bigler v. New York Cent. Ins. Co. (N. Y.)* 20 Barb. 635, 636.

#### STEAM VESSEL.

Seventeen canal boats and two tugs, fastened together, are not to be deemed a "steam vessel" under steam, within the meaning of Rev. St. § 4233 [U. S. Comp. St. 1901, p. 2893], requiring a steam vessel to keep out of the way of a sailing vessel. *Millbank v. The A. P. Cranmer (U. S.)* 1 Fed. 255, 257.

In the collision rules, every steam vessel which is under sail, and not under steam, is



to be considered a sailing vessel, and every vessel under steam, whether under sail or not, is to be considered a steam vessel. The words "steam vessel" shall include any vessel propelled by machinery. U. S. Comp. St. 1901, pp. 2863, 2876, 2886, 2893.

### STEAMBOAT.

See, also, "Steamer"; "Steamship"; "Steam Vessels."

A vessel propelled by steam, whether the power be applied in one part of the vessel or another, and whether the vessel uses the auxiliary power of sails or relies solely upon steam, is a "steamboat," within the meaning of Laws 1826, p. 253, §§ 3, 4, providing that, whenever any steamboat shall be navigating in the nighttime, the master of such boat shall cause her to carry and show two good and sufficient lights. *Fitch v. Livingston*, 6 N. Y. Super. Ct. (4 Sandf.) 492, 506.

A boat, which is a canal boat in common and just parlance, does not become a "steamboat," or anything but a canal boat, by being pulled or pushed by a steam tug. The character of a boat—i. e., the question whether a boat is a canal boat or a vessel of another kind—is to be determined by her build, object, and general and ordinary purposes and uses, and not upon the fact whether she is found for part of her voyages or occasionally in tide waters, and is moved on them by steam. *Buckley v. Brown* (U. S.) 4 Fed. Cas. 566, 567.

The word "steamboat," in 2 Hill's Code, p. 662, § 46, which defines burglary as an unlawful entry, with intent to commit a felony, of an office, shop, store, warehouse, malt-house, stillhouse, mill, factory, bank, church, schoolhouse, railroad car, barn, stable, ship, steamboat, and water craft, or any building in which goods, merchandise, or valuable things are kept for use, sale, or deposit, means any steamboat, without regard as to whether any valuable things are kept therein or not, as the latter clause of the statute only refers to buildings not specifically designated. *State v. Sufferin*, 32 Pac. 1021, 6 Wash. 107.

"Steamboats used for the transportation of freight and passengers," within the meaning of a statute authorizing a canal company to charge tolls upon all "boats, vessels, steamboats, and other craft used for the transportation of freight or passengers," do not include tugs engaged in towing freight or passenger vessels through the canal, or passing through the canal on their return trip. *Sturgeon Bay & L. M. Ship Canal & Harbor Co. v. Leatham*, 45 N. E. 422, 423, 164 Ill. 239.

### As boat or vessel.

See "Boat"; "Vessel."

### As building.

See "Building."

### STEAMBOAT CHANNEL.

The "steamboat channel" of a river is the deepest part of the stream, and the channel upon which commerce on the river by steamboats or other vessels is usually conducted, and is synonymous with "channel of commerce." *Iowa v. Illinois*, 13 Sup. Ct. 239, 147 U. S. 1, 37 L. Ed. 55.

### STEAMBOAT DEBTS.

"Steamboat debts," within the meaning of a contract to release a part owner of a steamboat from debts due by the said steamboat, and to hold him harmless of any and all claims and demands that may arise or be brought against the steamboat, cannot be shown by oral testimony to have a well-known meaning among steamboat men and merchants, in the port where the vessel was, as limited to debts made a lien on the boat for supplies and material. The evident meaning of the contract was to secure the part owner against all liability arising from his part ownership of the boat. *Moran v. Prather*, 90 U. S. (23 Wall.) 492, 499, 23 L. Ed. 121.

### STEAMER.

A steamer is a vessel propelled by steam, and is so called, no matter whether it is a passenger, freight, or war vessel; so that a contract to render services on a steamer is not indefinite as to the kind of vessel. *Campbell v. Jimenes*, 27 N. Y. Supp. 351, 353, 7 Misc. Rep. 77.

### STEAMSHIP.

A steamship is a vessel provided with three masts, with cross-yards on each mast fitted to carry square sails on each, in addition to a number of fore and aft sails, and also provided with steam power. *Swan v. United States* (U. S.) 19 Ct. Cl. 51, 62.

### STEARIC ACID.

"Stearic acid" is an oily substance. 7 Century Dictionary and Cyclopedia, p. 5922, states respecting the acid: "It burns like wax, and is used for making candles." Webster's International Dictionary gives this definition: "Stearic acid (Chem.): A monobasic fatty acid, obtained in the form of white crystalline scales, soluble in alcohol and ether. It melts to an oily liquid at 69° C." *Propfe v. Coddington* (U. S.) 108 Fed. 86, 87, 47 C. C. A. 218.

### STEARINE.

In *Tilghman v. Proctor*, 102 U. S. 707, 26 L. Ed. 279, the court said: "It was dis-

covered by Chevreul, an eminent French chemist, as early as 1813, that ordinary fat, tallow, and oil are chemical compounds consisting of a base, which has been termed 'glycerine,' and of different acids, termed generally 'fat acids,' but specifically, 'stearic, margaric, and oleic acids.' These acids, in combination severally with glycerine, form stearine, margarine, and oleine. They are found in different proportions in the various neutral fats and oils; stearine predominating in some, margarine in others, and oleine in others. When separated from their base, (glycerine) they take up an equivalent of water, and are called 'free fat acids.'" *Tilghman v. Proctor*, 8 Sup. Ct. 894, 895, 125 U. S. 136, 31 L. Ed. 664.

"Stearine" is one of the products resulting from the manufacture of tallow, and is a hard substance or residuum, left after extracting or pressing the oil from the tallow. *Fairbanks v. Spaulding* (U. S.) 19 Fed. 416.

## STED.

Coke says: "Stethe or sted betokeneth properly a bank of a river, and many times a place." *Woodman v. Lane*, 7 N. H. 241, 244 (quoting Co. Litt. 4b); *Barney v. Leeds*, 51 N. H. 253, 265.

## STEEL

See "Sheet Steel."

"Steel" is iron carbonized with a certain proportion of carbon. *United States v. Ullman* (U. S.) 28 Fed. Cas. 823, 826.

"Steel" formerly meant a compound of iron and carbon, in which the carbon was present in an amount varying from one-half of 1 per cent. to 2 per cent. The compound thus called "steel" possessed the properties of both cast iron and wrought iron in a certain degree. It had strength, hardness, and resiliency, but it also possessed a salient property, which the others possessed in a moderate degree or not at all, and that is the property of being hardened and tempered by heating and cooling. But the new processes in the manufacture of iron with carbon have left the distinctions between steel and iron in an unsettled condition, and so there have been for some years two contending definitions of steel—one which excludes all compounds of iron and carbon which do not have the tempering quality, and another which includes all malleable products by fusion, whether or not the percentage of iron is sufficient to give the tempering quality. The term "steel" is practically applied by American steel manufacturers to the low carbon article. *Wallace v. Noyes* (U. S.) 13 Fed. 172, 177.

"Steel," as used in Tariff Act March 3, 1883, imposing a certain tariff duty on steel,

means all metal produced from iron or its ores, of whatever description or form, without regard to the per cent. of carbon contained therein or the particular process of manufacture, either granular or fibrous in structure, which is cast and which is malleable. *Farris v. Magone* (U. S.) 46 Fed. 845, 849.

"Steel," as used in Tariff Act Oct. 1, 1890, par. 150, does not include billets of metal, produced from iron or its ores, containing 20 per cent. of carbon, and smaller percentages, ranging from .002 to .081, of silicon, manganese, phosphorus, and sulphur, which is granular in structure, malleable, and which, at any stage of the process of production, has been cast, by being run into molds. *Gary v. Cockley* (U. S.) 65 Fed. 497, 501, 13 C. C. A. 17.

## STEEL STRIPS.

Strips of steel from 6 to 12 millimeters wide, and .12 to .20 of a millimeter long, cold rolled, tempered, polished, with edges slightly rounded, which are used for the manufacture of steel tape measures, are comprehended in the ordinary meaning of "steel strips" or "strip steel," and are dutiable under Act March 3, 1883, par. 177, as steel strips. Webster's Unabridged and the Century Dictionaries define "strip" as a narrow piece, comparatively long. *Magone v. Vom Cleff* (U. S.) 70 Fed. 980, 981, 17 C. C. A. 549.

## STEELY IRON.

By the term "steely iron" we understand to be meant a grade of mild or soft steel, which approaches so closely in physical and chemical characteristics the metal known as malleable wrought iron as to be difficult to distinguish the one from the other, or a grade of wrought iron so nearly approaching steel as to be almost undistinguishable. Mr. H. De B. Parsons, an expert of marked intelligence, declares the term "steely iron" to be unscientific, and one which should not be used. He says that the point when a metal ceases to be wrought iron and reaches a grade known as steel is difficult of definition, in that they fade away, one class to the other, as daylight to darkness. *Gary v. Cockley* (U. S.) 65 Fed. 497, 503, 13 C. C. A. 17.

## STEER.

See "Beef Steer."

A steer is a castrated male of the cattle species. A person indicted for stealing a steer cannot be convicted on evidence that he stole a bull. *State v. Royster*, 65 N. C. 539.

Under Rev. Code, § 3706, making the stealing of animals of the "cow kind" grand

larceny, the stealing of a steer is included. *Watson v. State*, 55 Ala. 150.

#### Calves.

"Steers," as used in Gen. St. c. 47, § 13, exempting from attachment "one yoke of oxen or steers," includes male animals of this species two or three months less than a year old. Though cattle of this age are generally called "calves," they are none the less steers; the proper appellation being "steer calves." *Mundell v. Hammond*, 40 Vt. 641, 644.

#### As cattle.

A steer belongs to the class of "neat cattle," and in an indictment under a statute making the stealing of "neat cattle" grand larceny without regard to value, it would be sufficient to use the word "steer," without employing the term "cattle" or "neat cattle." *State v. Bowers* (Mo.) 1 S. W. 288; *State v. Lawn*, 80 Mo. 241, 242; *Arrington v. State*, 13 Tex. App. 551, 553.

"Steer," as used in an indictment for wounding a steer, will be understood to be within the words "cattle or other beast," which are the words of the statute providing for the punishment of the offense, etc. *State v. Abbott*, 20 Vt. 537, 538.

"Steer," as used in an indictment charging the malicious killing of a steer, etc., will be understood to designate an animal of the species cattle. *State v. Lange*, 22 Tex. 591.

#### As equivalent to ox.

"Steer" and "ox," in the popular use of the words, are equivalent, and are used to designate a castrated taurine male, which has been brought under the yoke. Hence the word "steer," in an indictment, is a sufficient description of the animal stolen. *Watson v. State*, 55 Ala. 150.

#### Spayed cow.

"Steer" is defined to be a young male of the ox kind, or common ox; especially a castrated taurine male from two to four years old. Hence, under an indictment charging the theft of a steer, proof that the animal was a spayed cow is a fatal variance. *Territory v. Martinez* (Ariz.) 44 Pac. 1089.

## STENOGRAPHER.

See "Official Stenographer."

The stenographer is a new officer, unknown until lately in our judicial history. He is a sworn officer of the court, whose duty it is "to take full stenographic notes of all pleadings, including the testimony, rules, and charge of the court, and every trial had thereat, which must be done under the directions of the presiding judge of the

court." The mere statement of the stenographer, without the sanction and signature of the judge who presided at the trial of the issues, is not a certificate of the proceedings and findings had upon the trial of the issues. *Rynerson v. Allison*, 30 S. C. 534, 538, 9 S. E. 656.

A stenographer is one who writes in shorthand by using abbreviations or characters for whole words, and a court stenographer is not a clerk. In re Appropriations for Deputy State Officers, 41 N. W. 643, 646, 25 Neb. 662.

Under Act May 8, 1876 (P. L. 140), a stenographer is an officer of the court, acts under oath, and his notes are declared to be official, and to be the best authority in case of dispute. They are to be used whenever their use is required, including the use thereof in the appellate court, and his transcript shall be filed and made a part of the records of the case. In view of these provisions, intended to preserve and reproduce the evidence in the most accurate form, to be done by a sworn officer, and deemed to be official and the best authority, and filed as a part of the record, it cannot be held that the note of an exception taken, and by whom, is not to be regarded as a part of the record, and is valueless, because it is not sealed by the judge. One of the purposes of the appointment of a stenographer is to secure rapid and unabating progress in the trial, relieving court and counsel from taking full notes. The act intended that the officer should perform a duty which would supersede the necessity of personal attention to these details by the court *Chase v. Vandergrift*, 88 Pa. 217-219.

## STEPCHILDREN.

As children, see "Child—Children."

## STEPFATHER.

As included in term father, see "Father."

A stepfather, strictly speaking, is the husband of one's mother by a subsequent marriage; and therefore a man who marries the mother of an illegitimate child does not become the stepfather of such child. *Citizens' St. R. Co. v. Cooper*, 53 N. E. 1092, 1094, 22 Ind. App. 459, 72 Am. St. Rep. 319; *Thornburg v. American Strawboard Co.*, 40 N. E. 1062, 1063, 141 Ind. 443, 50 Am. St. Rep. 334.

The relation of stepfather and stepdaughter, within the meaning of the statute against incest, does not exist after the termination of the marriage relation between the stepfather and the stepdaughter's mother. To aver the relation of stepfather and stepdaughter in an indictment for incest is,

therefore, a sufficient allegation of the marriage of the mother to the stepfather, and the subsistence of the marriage relation at the time in question. *Noble v. State*, 22 Ohio St. 541, 545.

## STEPSISTER.

Strictly speaking a stepbrother or stepsister is one related by marriage only, without common blood, as where a widow having issue marries a widower having issue. These issues are to each other stepbrother or stepsister, being related by the marriage of their parents, but having no common blood. It is, however, held that, under the designation of stepbrother and stepsister in a will, half-brothers and half-sisters can take; such an intention of the testator being inferable from the fact that he had no stepbrothers or stepsisters, strictly speaking, in existence. In *re Weiss' Estate* (Pa.) 1 Montg. Co. Law Rep'r, 209, 210.

## STEPS.

As building, see "Building."

## STEPS NECESSARY TO SELL.

An authority given to an agent to "take any steps necessary to sell" property does not empower him to employ another broker to make such sale. *Carroll v. Tucker*, 21 N. Y. Supp. 952, 953, 2 Misc. Rep. 397.

## STERLING.

If a man draws a bill in Ireland upon England, and recites that it is for "sterling" money, it must be taken to mean sterling in that part of the United Kingdom where it is payable. *Taylor v. Booth*, 1 Car. & P. 286.

## STET.

"Stet" is a word used by printers to indicate that words which have been struck out are to be regarded as still in. *Beach v. O'Riley*, 14 W. Va. 55, 62.

## STETHE.

Coke says: "Stethe, or sted, betokeneth properly a bank of a river, and many times a place." *Barney v. Leeds*, 51 N. H. 253, 265 (quoting Co. Litt. 4b); *Woodman v. Lane*, 7 N. H. 241, 244.

## STEVEDORE.

Stevedores are a class of laborers at the ports whose business it is to load and unload vessels. *The Senator* (U. S.) 21 Fed. 191.

"Stevedore" is defined as "one whose occupation is to load and unload vessels in port"; in other words, a contractor or a jobber for special business, ready to be employed by anybody at his line of work. *Ran-kin v. Merchants' & Miners' Transp. Co.*, 73 Ga. 229, 232, 54 Am. Rep. 874.

A stevedore is not an independent contractor doing the work which, when completed, is to be turned over to the master for his approval or disapproval, but he must load the steamer at all times under the direction of, and so subject to, the control of the master. *The Elton* (U. S.) 83 Fed. 519, 521, 31 C. C. A. 496 (citing *The Alejandro* [U. S.] 56 Fed. 621, 6 C. C. A. 54).

## STEWARD.

See "Shop Steward."

In the terms "trustee" and "steward," as referring to a church organization, there is no legal import of such ownership or control of real property as to render such officers responsible for the negligent falling of a gate located in the church property, which results in the death of a child. *Fop-piano v. Baker*, 3 Mo. App. 560.

A steward of a vessel is generally regarded as one of the crew, and may be merely a waiter on board the vessel, and there is nothing in his title which gives him more implied authority to bind the vessel or its owner for supplies than any other member of the crew, and they have none. *Du-rando v. New York & N. Steamboat Co.*, 23 Abb. N. C. 56, 58, 4 N. Y. Supp. 386.

## STICKER.

"Sticker" is a term apparently used to designate a slip of paper bearing the name of a candidate, to be attached to a ballot in the blank space provided for any name not already on the ballot. *Act June 19, 1891. De Walt v. Bartley*, 24 Atl. 185, 188, 15 L. R. A. 771, 146 Pa. 529, 28 Am. St. Rep. 814.

A sticker shall be a strip or piece of paper bearing upon one side the printed or written name or names of a candidate or candidates for office, and bearing upon the other side an adhesive substance. *Rev. St. Wyo. 1899, § 240.*

## STICKS.

A railroad company gave an order for a quantity of timber for building cars, and a few months later, none of the timber having been delivered, countermanded the order and stated that the vendor might deliver the sticks he had then ready, but need not saw any more. Held, that the words "sticks" referred to the sawed timber then

ready for delivery, and did not include the unsawed logs on hand at the time. *Cincinnati, H. & D. R. Co. v. Dickey*, 30 Ohio St. 16, 19.

Umbrella sticks, of wood, having celluloid handles, are within Tariff Act July 24, 1897, c. 11, § 1, Schedule N, par. 462, 30 Stat. 194 [U. S. Comp. St. 1901, p. 1679], imposing a duty on "sticks for umbrellas." *United States v. Borgfeldt* (U. S.) 124 Fed. 304.

## STILL

Distillery distinguished, see "Distillery."

The words "still are," in an indictment charging that a dam and pond still are a nuisance to the public, import a prior and continuing offense, and therefore evidence of the existence of the nuisance at any time within two years prior to the date laid in the indictment is admissible. *State v. Holman*, 10 S. E. 758, 104 N. C. 861.

## STILLBORN CHILD.

A stillborn child is one born dead, or in such an early state of pregnancy as to be incapable of living, though not actually dead at the time of birth. Children born within the first six months after conception are considered by the civil law as incapable of living; and therefore, though they are apparently born alive, if they do not in fact survive so long as to rebut the presumption of law, they cannot inherit, so as to transmit the property to others. *Marsellis v. Thalheimer* (N. Y.) 2 Paige, 35, 41, 21 Am. Dec. 66.

## STILLHOUSE.

The word "stillhouse," in 2 Hill's Code, p. 662, § 46, which defines burglary as an unlawful entry, with intent to commit a felony, of an office, shop, store, warehouse, malt-house, stillhouse, mill, factory, bank, church, schoolhouse, railroad car, barn, stable, ship, steamboat, and water craft, or any building in which goods, merchandise, or valuable things are kept for use, sale, or deposit, means any stillhouse, without regard whether any valuable things are kept therein or not, as the latter clause of the statute only refers to buildings not specifically designated. *State v. Sufferin*, 32 Pac. 1021, 6 Wash. 107.

## STIPEND.

The word "stipend" means "to pay by settled wages." The word "stipend," as used in the statute providing that any officer or employé or other person in the service of the Hawaiian government, or entitled to a salary or stipend from the government, shall be described as a government beneficiary, and de-

claring that the salary or stipend of such beneficiary may be attached, does not include the balance due a defendant by virtue of a contract to build a bridge, and therefore such balance due could not be attached. *Morse v. Robertson*, 9 Hawaii, 195, 197.

Stipends "are the requital of some supposed service, and are paid yearly, or at even portions of a year, and are the subject of contract between parties." *Mangam v. City of Brooklyn*, 98 N. Y. 585, 597, 50 Am. Rep. 705.

## STIPULATE.

To stipulate is to make an agreement, to bargain, to contract, to settle terms, etc. *Campbellsville Lumber Co. v. Hubbert*, 112 Fed. 718, 724, 50 C. C. A. 435.

A contract is an agreement entered into by the mutual consent of the parties. A stipulation is an instrument taken by order of the court. Its terms are determined by the will of the court, and not by that of the parties. Consequently it is to be interpreted by the intention of the court only as to the nature and intent of its obligation. If it means an instrument taken in the interest of justice to sustain the jurisdiction of the court, it ought not to receive such a construction as would deprive either party of any of his legal rights. *Lewis v. Orpheus* (U. S.) 15 Fed. Cas. 492, 493, *Jones v. Same*, *Id.*; *Young v. Same*, *Id.*

## STIPULATION BOND.

A stipulation bond for the release of a vessel is not a mere personal security given to the plaintiff, but a security given to the court. It is a pledge, or substitute for the property proceeded against, and the sureties are not parties to the suit, or entitled to interfere in any way with the management of the suit. *The New York*, 104 Fed. 561, 564, 44 C. C. A. 38.

## STIPULATION FOR JUDGMENT.

Final decree distinguished, see "Final Decree or Judgment."

## STIRPS.

A "stirps" is a root of inheritance. It designates the ancestor from whom the heir derives title, and it necessarily presupposes the death of the ancestor. *Rotmanskey v. Heiss*, 39 Atl. 415, 86 Md. 633.

## STITCHED.

Leather gloves, the stitching being in three rows, each of which presents the appearance of three-plait crochet work, the ef-

fect being produced by the needle with only one cord or strand of thread, are not subject to duty as gloves "stitched or embroidered with more than three single strands" under Tariff Act July 24, 1897, c. 11, § 1, Schedule N, par. 445, 30 Stat. 193 [U. S. Comp. St. 1901, p. 1677]. *United States v. Robinson* (U. S.) 124 Fed. 1013, 1014.

## STOCK.

See "Farming Stock"; "Live Stock"; "Rolling Stock"; "Trespassing Stock"; "Very Fine Stock"; "Wholesale Stock."

Under a statute providing that, where there is no wife or children, there shall be made a just and equal distribution to the next of kindred to the intestate in an equal degree or legally representing their stocks, and according to his or her respective rights, it is held that the terms "next of kindred" and "stock" are common-law words, and not civil. *Davis v. Vanderveer's Adm'r*, 23 N. J. Eq. (8 O. E. Green) 558, 567.

The term "bonds" or "stocks," whenever used in the chapter relating to the revenue, shall be held to mean and include bonds or stocks of whatsoever kind, whether issued by incorporated or unincorporated companies, towns, townships, counties, states, or other corporations, held or controlled by persons residing in this state, whether for themselves, or as guardians, trustees, or agents, on which the holder or owner thereof is receiving or is entitled to receive interest, for himself or others. Rev. St. Mo. 1899, § 9123.

A fire policy on a "stock of hair, wrought, raw, and in process," does not cover fancy goods made of other materials, although such as are usually kept and sold in a retail hair store. *Medina v. Builders' Mut. Fire Ins. Co.*, 120 Mass. 225, 226.

### As crops or farm machinery.

"Stock," as used in the Compiled Laws, exempting from execution the tools, implements, materials, stock, apparatus, team, vehicles, horses, harness, or other things to enable any one to carry on the profession, trade, occupation, or business in which he is wholly or principally engaged, not exceeding in value \$200, should be construed to include seed wheat of a farmer; for it is unquestionably necessary to enable one to carry on the business of farming. *Stilson v. Gibbs*, 9 N. W. 254, 255, 46 Mich. 215.

Hay, oats, corn, corn stalks, calves, etc., are exempt to a farmer, within the term "stock" in the statute exempting tools, stock, materials, etc., to enable any person to carry on his business, trade, or profession. *Hutchinson v. Whitmore*, 51 N. W. 451, 452, 90 Mich. 255, 30 Am. St. Rep. 431.

In connection with farm or land, "stock" has a settled meaning, whereby it is re-

stricted to the animals which are used or that are supported by or reared upon it. A devise of stock in this connection would not pass the crop of the antecedent year made on the land or the farming utensils. *Graham v. Davidson*, 22 N. C. 155, 171.

In an agreement by the parties for the sale of the stock of one of them to satisfy a debt, "stock" was in itself an uncertain term, and might include wagons, sleighs, bugles, hay, and other articles. *Bradshaw v. McLoughlin*, 39 Mich. 480, 482.

"Stock upon my farm," as used in a will providing that all such stock should go to a certain person, carries the standing crops of corn growing on the farm at the time of the testator's death. *West v. Moore*, 8 East, 339, 343.

"Stock," as used in a will whereby testator devised and bequeathed a certain farm, with all the stock, grain, and farming utensils that might be on the farm at the time, was employed in its popular sense, as including domestic animals, cattle, etc., used upon the farm, and did not embrace a clip of wool of the year previous from sheep kept and sheared on the farm. *Baker v. Baker*, 8 N. W. 289, 290, 51 Wis. 538.

The word "stock," in a devise by a husband to his wife of all his household goods, cattle, corn, hay, and implements of husbandry and stock belonging to his house, messuage, farm, and premises, was construed to include the stock of a malthouse on property in which he had a leasehold interest, as well as the stock in husbandry. *Brook Bank v. Wentworth*, 3 Atk. 64.

### As domestic animals.

A testator, who, after bequeathing several tracts of land, devised his stock and movable property, will be held to have intended by the word "stock" nothing more than his live stock. *Wood's Adm'r v. George's Adm'r*, 36 Ky. (6 Dana) 343, 344.

"Stock," as used in Iowa, relating to stock running at large, means domestic animals collected, raised, or used on a farm, and includes swine. *State v. Clark*, 21 N. W. 666, 667, 65 Iowa, 336.

"Stock" is defined by Webster as meaning domestic animals or beasts collected, used, or raised on a farm, as a stock of cattle or of sheep, and includes horses. *Inman v. Chicago, M. & St. P. Ry. Co.*, 15 N. W. 286, 287, 60 Iowa, 459.

"Stock," as used in a devise to the testator's wife of a farm, etc., and all the stock, household goods, furniture, provisions, and other goods which may be thereon at the time of the testator's decease, should be construed to have been used in its agricultural sense, as signifying the domestic animals,

and nothing more. *Heagy v. Cheesman*, 33 Ind. 98, 99.

It is held that, under an exemption of certain stock, a horse may be exempted from execution. *Webb v. Brandon*, 51 Tenn. (4 Heisk.) 285, 292.

The term "stock" uniformly imports cattle, and not horses; and such is its popular meaning when used in reference to a farm. *Dudley v. Deming*, 34 Conn. 169, 173.

"Stock," as used in 71 Ohio Laws, p. 81, requiring railroad companies to construct a fence sufficient to turn stock, should not be limited to embrace only such animals as are not breachy or unruly. *Pittsburg, O. & St. L. Ry. Co. v. Howard*, 40 Ohio St. 6, 7.

As used in the chapter relating to domestic animals, the term "stock" means cattle, horses, mules, and asses. Code Iowa 1897, § 2311.

For the purposes of the chapter relating to railroad corporations, the terms "live stock" and "stock" shall include all classes of horses, asses, mules, neat cattle, sheep, and swine. Rev. St. Wyo. 1899, § 3216.

As used in the fence and stock law, the word "stock" means horses, mules, colts, cows, calves, sheep, goats, jennets, and all neat cattle and swine. Code N. C. 1883, § 2822.

#### As goods or merchandise in trade.

Of drugs, see "Drug Stock."

"Stock," in mercantile law, is defined to be "the goods or chattels which a tradesman holds for sale or traffic." In general terms, the entire property employed in business. *Burrill's Law Dict.* Worcester defines it to be "the funds employed in some business or enterprise; also public funds or securities; the shares of various corporations." *Commonwealth v. Danville, H. & W. R. Co. (Pa.)* 2 Pears. 400, 401.

The term "stock" is frequently used by merchants to designate their goods and merchandise in trade. *Whiting v. Root*, 3 N. W. 134, 141, 62 Iowa, 292.

"Stock," as defined, is not limited to the goods with which a merchant begins business, but rather to the goods he employs in his trade, and such will be held to be its use in a bond that a consignee shall account for all property, goods, and chattels which may come into his possession or under his control. *Braun v. Woollacott*, 61 Pac. 801, 803, 129 Cal. 107.

"Stock" generally comprehends articles accumulated in a business or calling for use and disposal in its regular prosecution. *Jewell v. Trustees of Sumner Tp.*, 84 N. W. 973, 975, 113 Iowa, 47.

A fire policy on the stock of a grocer, wearing apparel, and household furniture does not cover linen sheets, etc., not laid in for the use of the family, but smuggled into the country for clandestine sale. *Clary v. Protection Ins. Co., Wright*, 227, 229.

The terms "tools, implements, materials, stock, or fixtures," necessary for carrying on a debtor's business, which are exempted from execution in the statute, do not include a wagon, with patent couplings attached, used by the owner in carrying on his business of selling patent couplings. *Gibson v. Gibbs*, 75 Mass. (9 Gray) 62.

The tools or implements, materials, stock, and fixtures of a debtor necessary for carrying on his trade or occupation, which are exempted from execution by St. 1855, c. 264, do not include the stock of goods, scales and measures, horse, wagon, and harness of a shopkeeper in the country. The clause in this section which exempts from attachment the tools and implements of the debtor has never been so construed as to embrace that class of persons who are engaged merely in the business of buying and selling articles of merchandise. On the contrary, it has always been considered as having been intended specially for the benefit of those to whom, on account of their peculiar pursuits and avocations, tools and implements are essential to make their labor available and to enable them to complete the work which they undertake to perform. *Wilson v. Elliot*, 73 Mass. (7 Gray) 69, 70.

In a guaranty to be responsible to a certain amount for what stock a certain shoemaker had or might thereafter want, "stock" denoted the supply of materials for the business. *Gates v. McKee*, 13 N. Y. (3 Kern.) 232, 234, 64 Am. Dec. 545.

"Stock," as used in a mortgage covering a stock of groceries described as being located in a designated store, does not include groceries and other merchandise stored in another and different building, used by the mortgagor as a warehouse, merely because the articles composing this latter stock were first received into the store, and thence removed to the warehouse, none of them, however, being kept in the store for sale until brought back thereto for that purpose; the mere transit of the goods through the store on their way to the wareroom not operating to make them a part of the stock. *Robinson v. Norton*, 34 S. E. 147, 148, 108 Ga. 562.

#### Same—Collections.

"Stock," as used in Code 1880, § 585, fixing a privilege tax upon each store proportionate to the stock carried therein, means only the goods, etc., kept by the merchant for sale in the course of business, and did not extend to the collections made by him, whether made in money or in property taken

as a mere step in the collection of the debts due him. *Harness v. Williams*, 1 South. 759, 760, 64 Miss. 600.

#### As shares in corporations.

"Stock," as used by a testator, bequeathing "all my notes, bonds, stock, and money on hand" to his wife and certain named children, meant bonds and evidences of shares in corporations, and not live stock. *Capehart v. Burrus*, 29 S. E. 97, 99, 122 N. C. 119, 42 L. R. A. 152.

#### STOCK (In Corporation Law).

See "Available Stocks"; "Bank Stock"; "Certificate of Stock"; "Common Stock"; "Free Stock"; "Increased Stock"; "Ordinary Stock"; "Original Stock"; "Overissued Stock"; "Preferred Stock"; "Prepaid Stock"; "Special Stock"; "Watered Stock."

See, also, "Share of Stock."

Stocks or otherwise, see "Otherwise."

"The stock of a corporation," says Mr. Lowell, "may be defined as the sum of all the rights and duties of stockholders." *Winslow v. Fletcher*, 4 Atl. 250, 253, 53 Conn. 390, 55 Am. Rep. 122.

"Stocks" are property consisting of shares in joint-stock companies. *Parker v. Otis*, 62 Pac. 571, 572, 130 Cal. 322, 92 Am. St. Rep. 56.

"Stock" is defined as a proportional part of certain rights in the management and profits of the corporation during its existence, and in the assets upon its dissolution. *Thayer v. Wathen*, 44 S. W. 906, 909, 17 Tex. Civ. App. 382 (citing 1 Cook, Stock, Stockh. & Corp. Law, § 12).

As to banking corporations, the term "stock" is used in its technical sense; as to other corporations and persons engaged in banking business, the term refers to rights in property equivalent to rights presented by shares of stock in a corporation; that is to say, a given interest in the capital of an unincorporated association engaged in banking business is placed on the same basis as if the association were incorporated and such interest were represented by shares of stock therein. *State v. Lewis*, 95 N. W. 383, 389, 113 Wis. 432.

"Corporate stock" is not commercial paper, and it has none of the privileges and immunities that such paper has. A purchaser takes it subject to any debt due from the stock he purchases to the corporation. *Spilman v. Mendenhall*, 57 N. W. 468, 471, 56 Minn. 180.

Stock in a corporation, in the sense of a stockholder, is a species of incorporeal personal property in the nature of a chose in action. A certificate of stock is only written

evidence of the ownership of the shares of stock named therein, and is not negotiable. Though by the by-laws of the corporation shares of the stock may be only transferable on the books of the company, an equitable right in them may be acquired by a delivery of the certificate, or by a written assignment or contract, which will be good between the parties, and may be perfected, as against the corporation and third parties, by notice of the assignment or contract. *Cherry v. Frost*, 75 Tenn. (7 Lea) 1, 7.

#### As capital.

The "stock" of a corporation is the capital on which it is to do business, and it does not become available for that purpose until after directors are elected under the corporate act of the state. *Coyote Gold & Silver Min. Co. v. Ruble*, 8 Or. 284, 293.

"Stock," whether preferred or common, is capital; and, generally speaking, a certificate of stock merely evidences the amount which the holder has contributed to or ventured in the enterprise. Such a certificate, representing nothing more than the extent of his ownership in the capital, cannot well be treated as indicating that he is by virtue of it alone also to the same extent a creditor, who may compete with other creditors in the distribution of the funds arising from the conversion of the corporation's assets into money. *Heller v. National Marine Bank*, 43 Atl. 800, 801, 89 Md. 602, 45 L. R. A. 438, 73 Am. St. Rep. 212.

"Stock," as used in Acts 1796, c. 29, directing that the county court may appoint commissioners to lay off to the widow and heirs maintenance out of the stock, crop, and provisions of her deceased husband, means that which is commonly denominated "stock" in the country, namely, animals with which the plantations of farmers are usually supplied, and does not include general or perishable articles on the farm. *Van Norden v. Primm*, 3 N. C. 149.

Bouvier defines "stock" to be the capital of a corporation. This is usually divided into shares of a definite value, as \$100 or \$50 per share. 2 Bouv. Law Dict. 531. The stock of railroad companies consists of their capital, invested in such property as may be necessary and proper for conducting the business for which they were chartered. All the property of these companies, necessary for the purpose of laying, building, and sustaining their respective railroads, constitutes a part of the capital stock of said companies, and is not liable to be taxed in any other manner than as specified in their respective charters. *Bibb County v. Central R. & Banking Co.*, 40 Ga. 646, 650.

The word "stock" is defined in Bouvier's Law Dictionary as "the capital of corporations; the indebtedness of states, which is



sometimes represented by stocks and sometimes bonds." The word "stock," as used in Gen. St. § 3828, as amended so as to provide that personal property in the state not exempt from taxation shall include all stocks not issued by the United States, includes both public stocks and shares in private corporations. *Lockwood v. Town of Weston*, 61 Conn. 211, 216, 23 Atl. 9.

Stock of a railroad company is the aggregate of the property and effects of the company, which as a principal or capital fund is employed in or made subservient to the prosecution of the specific business for which the company was chartered. In its ordinary form it is the sum of the moneys contributed in fixed proportions for the purposes of the adventure by the persons willing to take part in it, but by speedy conversion it becomes the lands, rights of way, roadbed, track, depots, workshops, machinery, engines, carriages, etc., acquired for the company. *State v. Hood* (S. C.) 15 Rich. Law, 177, 185.

#### **As capital stock.**

The term "stock of the company" imports the capital stock of such company; the subscribed fund, which the company held, as distinguished from separate interests of individual stockholders. *Trask v. Maguire*, 85 U. S. (18 Wall.) 391, 402, 21 L. Ed. 938.

#### **As certificate of stock.**

Section 1753, Rev. St. 1898 (Laws 1899, c. 193, § 1), providing that no corporation shall issue any stock, or certificate of stock, except in consideration for money, labor, or property actually received, equal to the par value thereof, and that all stocks issued contrary to such provision shall be void, refers to certificates of stock, as distinguished from the stock itself. *Pietsch v. Krause*, 93 N. W. 9, 11, 116 Wis. 344.

#### **As chattels.**

See "Chattel"; "Personal Property."

#### **As chose in action or credits.**

See "Chose in Action"; "Credits."

#### **As debt.**

"Stock," as used in Act March 25, 1870, authorizing manufacturing corporations to issue and dispose of preferred stock and guaranty the holders of such stock semiannual dividends not exceeding the rate of interest allowed by law to be contracted for, and on final payment of such preferred stock at such time as shall be specified in the certificate, should be construed in the sense of "debt," so that certificates of stock will mean certificates of debt, and "preferred stockholders" mean preferred creditors or preferred certificate holders. *Burt v. Rattle*, 31 Ohio St. 116, 128.

#### **As intangible right of property.**

"Stock" is an intangible right of property; the shares being distinguished from each other only by their respective owners. *Princeton Bank v. Crozer*, 22 N. J. Law (2 Zab.) 383, 386, 53 Am. Dec. 254.

#### **As merchandise.**

See "Merchandise."

#### **As money.**

See "Money."

#### **As personal property.**

See "Personal Property."

#### **As share or share of stock.**

The word "stocks," as used in Const. art. 13, § 2, providing for taxation, and declaring that "this article shall not be so construed as to authorize the taxation of the stocks of any company or corporation, when the property of such company or corporation represented by such stocks has been taxed," is in the plural form, and evidently means property consisting of shares in joint-stock companies, whether of banking institutions or other corporations. *Commercial Nat. Bank v. Chambers*, 61 Pac. 560, 561, 21 Utah, 324, 56 L. R. A. 346.

In a statute providing that it shall be the duty of any person, firm, corporation, or association owning any shares or stock in any banking company or corporation to render and return the same for taxation, the words "shares" and "stock" are evidently used as of synonymous import, as is often done in common parlance. Each corporation is required to give in for taxation the part or portion of the capital stock of the corporation or association which he owns. This individual interest may be designated as either his "share" or his "stock," and, whether it is spoken of as one or the other, evidently it is the interest represented and conveyed by certificates of stock or shares into which the capital of the association is divided to which reference is had. *Harrison v. Vines*, 46 Tex. 15, 21, 22.

"Stock," as used in Act Ga. Dec. 14, 1835, amending the charter of the Central Railroad & Banking Company, and denying to municipal corporations the power to tax its stock, but giving them power to tax any property, real or personal, of the company, means shares of stock in the hands of stockholders, and is not used in the sense of "capital stock," or as equivalent to plant or property. *Central R. & Banking Co. v. Wright*, 17 Sup. Ct. 80, 81, 164 U. S. 327, 41 L. Ed. 454.

An enactment which exempts a corporation or its stock from taxation also exempts the shares of stock held by its stockholders, and the exemption of the shares of stock of an incorporated company in the hands of

stockholders from "any taxation or impost whatsoever" also exempts the capital stock of the company from taxation or impost. *Hancock v. Singer Mfg. Co.*, 41 Atl. 848, 848, 62 N. J. Law, 289, 42 L. R. A. 852.

#### **As tangible property.**

"Stock," as used in 1 Rev. St. 1852, p. 113, requiring the president, secretary, agent, or other accounting officers of every railroad, plank road, turnpike road, slack water navigation, telegraph, and bridge company to furnish a list of stock to the auditor of the county where its principal office is situated, does not mean the subscriptions of stock, but the actual, tangible property of such company. *State v. Hamilton*, 5 Ind. 310.

"Stock," as used in 1 Rev. St. 1852, p. 113, requiring the officers of a railroad company to furnish a list of stock to the auditor of the county wherein is situated the principal office, includes not only stock subscriptions, but all the actual, tangible property of the company. *Michigan Cent. R. Co. v. Porter*, 17 Ind. 380.

#### **STOCK CATTLE.**

"Stock cattle" includes all descriptions of the bovine kind not included in the term "beef cattle," which means steers over the age of three years intended for beef. *Elliott v. Long*, 14 S. W. 145, 146, 77 Tex. 467.

#### **STOCK CERTIFICATE.**

See "Certificate of Stock."

#### **STOCK CLOCK.**

A "stock clock" is a gambling device, consisting of a mechanical contrivance, composed of wheels, cogs, and weights, constructed so as to be wound up with a crank, containing a spout in which cards are placed, each one marked so as to represent a particular kind of railroad or other stock. Players of the machine invest a sum of money in some stock represented by a particular card. The clock is then set in motion, when two of the cards in the spout drop out of the spout through two slots, one dropping through the upper and the other through the lower slot. If the card representing the stock invested in by the customer is forced through the upper slot, then the stock has risen, and he wins a sum equal to one-half of the amount invested. If the card drops through the lower slot, the stock has fallen, and the customer loses a like amount. *State v. Grimes*, 49 Minn. 443, 445, 52 N. W. 42.

#### **STOCK CORPORATION.**

A stock corporation is a corporation having capital stock divided into shares, and which is authorized by law to distribute to

the holders thereof dividends or shares of the surplus profits of the corporation. *Baker v. Steele*, 43 N. Y. Supp. 346, 350.

#### **STOCK DIVIDEND.**

A "stock dividend" is not in the ordinary sense a dividend; the latter being the distribution of profits to stockholders as income from their investment. A stock dividend is merely an increase in the number of shares; the increased number representing exactly the same property that was represented by the smaller number of shares. One who sells stock, reserving the dividend that may be declared at a certain date, cannot claim the stock dividend then declared, but only the cash dividend. *Kaufman v. Charlottesville Woolen Mills Co.*, 25 S. E. 1003, 1004, 93 Va. 673.

Stock dividends on a trust fund are generally held to be capital, though there may be cases in which they are held to be income, depending on the substance and intent of the action of the corporation, as manifested by its vote or resolution; and such is the case where a testator bequeathed in trust, for the use of his daughters for life, stock in a company which thereafter passed a resolution reciting that for three years the net earnings had amounted to a specified sum, and that they had been applied to the improvement of the property, and that therefore a dividend of 20 per cent. be declared for such period, payable in the common stock of such company. *Thomas v. Gregg*, 28 Atl. 565, 568, 78 Md. 545, 44 Am. St. Rep. 310.

A stock dividend gives the stockholders merely an evidence of the additions made by the corporation to its own capital. It adds nothing to the capital of the corporation, nor to the capital of the stockholder. *De Koven v. Alsop*, 68 N. E. 930, 931, 205 Ill. 309, 63 L. R. A. 587.

#### **STOCK DROVER.**

Every person, whether owner or employé, who drives or brings, or assists in driving or bringing, any cattle, horses, mules, asses, sheep, or hogs through or into the state, is deemed a "stock drover." Code Idaho 1901, § 660.

Any person who shall drive or bring live stock into or through this state shall be deemed a "stock drover." Rev. Codes N. D. 1899, § 1544.

Any person driving live stock through any county in Wyoming is a "stock drover." Rev. St. Wyo, 1899, § 2003.

#### **STOCK GROWER.**

Every person who owns any cattle, horses, mules, asses, sheep, or hogs in the state, and is engaged in the business of breeding

and growing the same for profit, is deemed a "stock grower." Pol. Code Idaho 1901, § 660.

Each person who shall keep neat cattle, horses, mules, sheep, swine, or goats for their growth or increase, within the state, shall be deemed a "stock grower." Rev. Codes N. D. 1899, § 1544; Cobby's Ann. St. Neb. 1903, § 3119.

### STOCK HOGS.

The term "stock hogs," in a statute exempting so many head of stock hogs, does not include hogs incapable of reproduction. *Byous v. Mount*, 17 S. W. 1037, 1038, 89 Tenn. 361.

### STOCK IN TRADE.

What shall be comprehended in the term "stock in trade" must always in a great measure depend upon "the evidence of intention, intrinsically or extrinsically collected; but, where there is nothing peculiar in the case to determine the import of the phrase, the popular and usual understanding of the words must govern their interpretation." 1 Roberts, Wills, p. 369. "It seems to me that what constitutes stock in trade must, in general, be a question for extrinsic evidence, and is a proper subject of reference. \* \* \* It was urged that the popular meaning of the words 'stock in trade' is the stock of goods on hand at any particular time. I am aware that among traders the goods on hand are designated as 'stock'; but I cannot think that in the general understanding the term 'stock in trade' embraces no more than this." The words "stock in trade and notes," in a bequest of "all my stock in trade, \* \* \* the notes and book accounts there owing to me," etc., must be taken together. "The notes intended are those which constituted a part of the stock in trade. What the stock in trade was is a matter to be inquired of by extrinsic evidence. It is agreed that there were no notes constituting a part of the stock in trade but certain sealed ones, or, if there were, it was only accidentally, and not in the ordinary course of business. Such instruments are known by that name, though it is not the most obvious and appropriate one; and I certainly cannot think the enumeration of 'notes' sufficient to exclude these instruments. So any ready money on hand, under the circumstances, would be part of the stock in trade." *Todd v. Lewers* (S. C.) Rich. Eq. Cas. 463, 464.

An insurance policy covering the insured's "stock in trade" includes everything necessary for carrying on the insured's business. *Harper v. Albany Mut. Ins. Co.*, 17 N. Y. 194, 197.

Where a dealer brought goods from another state, where he had a branch of his business, and combined and intermingled such goods with his "stock in trade" used at

his principal place of business, the combined property should be taken as his "stock in trade," within the meaning of Laws Kan. 1864, exempting stock in trade of any person from execution. *In re Jones* (U. S.) 13 Fed. Cas. 931, 932.

In order that "stock in trade" may be exempt, the owner must be engaged or about to engage in manufacturing or other business in which such stock is or is to be used. *Prosser v. Hartley*, 29 N. W. 156, 158, 35 Minn. 340.

Statutes of Wisconsin exempt from execution "the tools and implements or stock in trade of any mechanic, miner, or other person, used and kept for the purpose of carrying on his trade or business," etc. Under this provision it would seem "stock in trade," there referred to, does not include articles simply bought for sale or exchange, and which are not "used and kept for the purpose of carrying on trade or business." *Ex parte Robinson* (U. S.) 20 Fed. Cas. 963, 964.

The phrase "stock in trade," in a fire policy taken out by one on his stock in trade, includes goods in stores, bought on joint account and sold for the mutual profit of the insured and another person. *Millaudon v. Atlantic Ins. Co.*, 8 La. 557, 561.

As used in Gen. St. c. 38, exempting from execution the necessary tools and implements of any mechanic, miner, or other person, used and kept for the purpose of carrying on his trade or business, and in addition thereto "stock in trade" to a certain amount, etc., do not apply to partnership property, nor to goods bought to be sold again as merchandise, but only to the "stock in trade" of a mechanic, miner, or some other person who earns his livelihood in whole or in part by the use of tools or implements, and to the exercise of whose trade or business tools are necessary. *Guptil v. McFee*, 9 Kan. 30, 34.

### Debts due.

"Stock in trade," as used in Pub. St. c. 11, § 20, cl. 1, providing for the taxation of goods, wares, merchandise, and other stock in trade, means the visible and tangible property with which the trade or business of the owner is carried on and to which it relates, and does not include debts due a corporation. *New York Biscuit Co. v. City of Cambridge*, 37 N. E. 438, 439, 161 Mass. 323.

The expression "all the stock in trade," as used in a mortgage covering all the stock in trade of any nature or kind whatever of a partnership, does not embrace debts due to the partnership. *Kemp v. Carnley*, 10 N. Y. Super. Ct. (3 Duer) 1.

### Ice stored for sale.

Ice stored for the purpose of future sale, contingent upon a great variety of conditions,

is "stock in trade," within Gen. Laws, c. 54, § 9, declaring that stock in trade only, by a person not a resident of the town wherein it is located, shall be taxed in such town to the owner or person having charge thereof. It is as much stock in trade as harvested crops of any kind, blocks of granite, or any other commodity, separate from the land, converted into personal property and held by the dealer until the demand therefor by his customers may render a remunerative sale probable. *Winkley v. Town of Newton*, 36 Atl. 610, 612, 67 N. H. 80, 35 L. R. A. 756.

#### **Liquors in saloon.**

"Stock in trade," as used in Gen. St. §§ 1866, 1868, and Mills' Ann. St. §§ 2562, 2564, exempting the stock in trade of any mechanic, miner, or other person from execution, apply to the merchant or shopkeeper, as well as to the mechanic, and include the stock of goods kept on sale by the merchant, including the liquors of a saloon keeper, regularly carrying on such business. *Well v. Nevitt*, 31 Pac. 487, 488, 18 Colo. 10.

#### **Money in bank.**

"Stock in trade," as used in a statute relating to the taxation of stock in trade, cannot be construed to include money in bank. *Boston Inv. Co. v. City of Boston*, 33 N. E. 580, 581, 158 Mass. 461.

#### **Revenue stamps.**

United States internal revenue stamps are not subject to taxation as "stock in trade," under Gen. St. c. 11, § 12. *Palfrey v. City of Boston*, 101 Mass. 329, 8 Am. Rep. 364.

#### **Tools, fixtures, etc.**

A fire insurance policy, insuring the "stock in trade" of a baker, should be construed to cover the tools, fixtures, and implements of business, necessary for the carrying on of such baker's business. The term "stock in trade" is to have a more extended meaning than in the ordinary application to the business of merchants. The policy protected everything which was necessary for carrying on the baker's business. The meaning of the term will vary according to the business to which it is applied. The stock of a merchant comprehends articles entirely different from the stock of a farmer; but the term in all cases applies to personal property only. A mechanic, who insures his stock, covers his implements of trade also. *Moadinger v. Mechanics' Fire Ins. Co.*, 2 N. Y. Super. Ct. (2 Hall) 527, 530.

#### **Unfinished articles.**

"Stock in trade," as used in a statute exempting from attachment or sale on execution stock in trade not exceeding a certain amount, embraces unfinished and incomplete articles bought and held for the

sole purpose of finishing and fitting them for sale and use. *McAbe v. Thompson*, 6 N. W. 479, 27 Minn. 134.

#### **Watches and jewelry.**

Watches and jewelry manufactured by a watchmaker and jeweler, whether manufactured for particular customers upon special orders, or for customers generally and for sale to any person who might wish to purchase, whether completed or not completed, as well as the raw materials kept by such watchmaker and jeweler from which to manufacture watches and jewelry, are included in the term "stock in trade," under the Kansas exemption laws, providing that the stock in trade, etc., of any person, etc., shall be exempt. *Bequillard v. Bartlett*, 19 Kan. 382, 386, 27 Am. Rep. 120.

#### **STOCKJOBBER.**

The words "bank," "banker," "broker," and "stockjobber," when used in the revenue act, shall be construed to include whoever has money employed in the business of dealing in coin, notes, or bills of exchange, or in the business of dealing in or buying or selling any kinds of bills of exchange, checks, drafts, bank notes, promissory notes, bonds, or other writings obligatory, or stock of any kind or description whatsoever, or receiving money on deposit. *Hurd's Rev. St. Ill.* 1901, p. 1493, c. 120, § 292, subd. 3.

#### **STOCKJOBGING.**

"Stockjobbing" is the business of dealing in stocks or shares, and the purchase and sale of stocks, bonds, etc., as carried on by jobbers who operate on their own account. *State v. Debenture Guarantee & Loan Co.*, 26 South. 600, 606, 51 La. Ann. 1874 (approving Cent. Dict.).

#### **STOCK ON HAND.**

"Stock on hand," as used in a mortgage on the stock on hand, etc., of a baker, who was allowed to retain possession thereof, is an indefinite description of the property mortgaged, since it may mean the stock on hand when the mortgage was made, or the stock which might be on hand when the debt to be secured became due. *Rocheleau v. Boyle*, 28 Pac. 872, 879, 11 Mont. 451.

#### **STOCK OWNER.**

Every person who owns neat cattle, horses, mules, asses, sheep, or goats is a "stock owner." *Rev. St. Wyo.* 1899, § 1986.

#### **STOCK POLICY.**

A "stock policy" of insurance must not be confounded with a cash policy. They are essentially different. The payment of a cash premium does not decide the character of

a policy, as to whether it is mutual or stock. A mutual company may insure for either note or cash, and so may a stock company. A stock policy is issued solely upon the credit of the capital stock of the company to one who may be an entire stranger to the corporation. *Given v. Rettew*, 29 Atl. 703, 705, 162 Pa. 638.

### STOCK RANCHER.

Every person, who for a consideration takes horses or other stock to keep and take care of by the day, week, month, or year, is deemed a "stock rancher." Pol. Code Idaho 1901, § 715.

### STOCK SUBSCRIPTION.

See "Subscribe—Subscription (To Stock)."

### STOCKBROKER.

As broker, see "Broker."

As merchant, see "Merchant."

A "stockbroker" is one employed to buy and sell shares of stock in incorporated companies and the indebtedness of governments. *City of Little Rock v. Barton*, 33 Ark. 436, 444; *Gast v. Buckley* (Ky.) 64 S. W. 632, 633; *Banta v. City of Chicago*, 50 N. E. 233, 237, 172 Ill. 204, 40 L. R. A. 611.

A stockbroker deals in stocks of moneyed corporations and other securities for his principal. *White v. Brownell* (N. Y.) 2 Daly, 329, 337.

One who deals in securities on his own account cannot be a broker. *Gast v. Buckley* (Ky.) 64 S. W. 632, 633.

The functions of a stockbroker are recognized as broader than those of the ordinary broker, since he is intrusted with the possession of the property concerning which he acts, and may even take and transfer the same without the name of his principal appearing in the transaction. An ordinance defining a "broker" as one who for a compensation is engaged in selling or negotiating the sale of goods, wares, and merchandise, produce, or grain belonging to others, applies to "stockbrokers," though they have possession of the goods which they sell and buy, and though the transactions are completed in their own name, those for whom they were really acting not appearing at all. *Banta v. City of Chicago*, 50 N. E. 233, 237, 172 Ill. 204, 40 L. R. A. 611.

### STOCKHOLDER.

See "Bona Fide Stockholder."

All stockholders, see "All."

A stockholder is the owner of his shares absolutely, and has a right to manage his

property as suits his own notions. *Bird Coal & Iron Co. v. Humes*, 27 Atl. 750, 752, 157 Pa. 278, 37 Am. St. Rep. 727.

A "stockholder" is one owning stock. One whose shares of stock in a railroad corporation have been forfeited for nonpayment of calls is not a stockholder, within the meaning of the railroad act of 1850, providing that each stockholder shall be individually liable to the creditors of the corporation to an amount equal to the amount unpaid on the stock for all the debts and liabilities of the corporation, and therefore such person is not liable to a creditor of the corporation for the amount unpaid on the forfeited stock, though the debt was contracted by the company before the stock was forfeited. *Mills v. Stewart*, 41 N. Y. 384, 386.

The "stockholder" of a corporation is one who is the holder or proprietor of stock in the funds of the corporation. To be a stockholder of an incorporated company is to be possessed of the evidence that the holder is the real owner of a certain undivided portion of the property in actual or potential existence held by the company in its name as a unit for the common benefit of all the owners of the entire capital stock of the company. *Ross v. Knapp, Stout & Co. Company*, 77 Ill. App. 424, 433.

A stockholder is one who appears on the books of a corporation as owner of shares, and is therefore entitled to a voice in the management of its affairs, and is burdened with liabilities incident to that relation, which can only be thrown off by transferring the stock. *In re Argus Printing Co.*, 48 N. W. 347, 348, 1 N. D. 434, 12 L. R. A. 781, 26 Am. St. Rep. 639.

"Stockholders" does not necessarily mean only those who have subscribed to a stock subscription list, whereby certain sums are agreed to be paid as contribution to a fund intended to supply a capital stock for the company; but those who agree to be answerable for assessments are really stockholders in the company, whose operating fund is thus secured. *Sugg v. Farmers' Mut. Ins. Ass'n* (Tenn.) 63 S. W. 226, 228.

The word "stockholder," within the statute imposing individual liability on stockholders, includes one who has subscribed for stock and is acting as an officer of the corporation, although no certificate of stock has been issued to him. *Corwith v. Culver*, 69 Ill. 502, 505.

The term "stockholder," under Banking Law 1892, § 52, includes every owner of stock, legal or equitable, though not standing in his own name on the books of the corporation, but not a person who holds such stock as collateral for a debt. *Hirshfeld v. Bopp*, 39 N. E. 817, 818, 145 N. Y. 84.

The "stockholders" of a business corporation are partners, with rights and liabilities fixed by the general or special law, which is a part of their contract. In re Opinion of Justices, 33 Atl. 1076, 1082, 66 N. H. 629.

A stockholder is not, as a stockholder, a creditor of the corporation whose stock he owns. The rights of a stockholder are all subordinate to the rights of the corporation's creditors. The stockholders are entitled to none of the company's assets or property until all just debts due by the corporation are paid. A stockholder does not stand on equal footing with the creditor, and is not jointly entitled with him to the fund. His claim to it begins only after every creditor has been satisfied. *Cook v. Emmet Perpetual & Mutual Bldg. Ass'n*, 44 Atl. 1022, 1023, 90 Md. 284 (citing *Davis v. Gemmell*, 73 Md. 530, 21 Atl. 712).

The word "stockholder," as used in the statute, giving such a person a right to inspect the books of a corporation, not only defines the class upon which the right is conferred, but also the capacity in which the right is to be enjoyed, namely, that it must be with respect to the relator's interest as a stockholder, or be germane to his interest as such. *O'Hara v. National Biscuit Co.*, 54 Atl. 241, 242, 69 N. J. Law, 198.

"Stockholders," as used in the charter of an insurance company providing that the association may be dissolved by two-thirds in number and value of the members and stockholders, means shares of stock. *Commonwealth v. Detwiller*, 18 Atl. 990, 181 Pa. 614, 7 L. R. A. 357.

Under Sess. Laws 1876, p. 117, providing that "any one of the directors or executive officers of any corporation, owning stock in another corporation, shall be eligible to be elected director of the latter at any meeting convened for that purpose," the secretary-treasurer and managing director of a saving society, which was, at the time of his appointment as director of another corporation, a lawful stockholder of such latter corporation, was eligible to the office of director. He was a stockholder by representation, though not a personal stockholder. He was also a stockholder within the joint-stock act (Sess. Laws 1888, p. 561), providing that the directors of every joint-stock corporation shall be stockholders of the corporation, as the savings bank, in its corporate capacity, could not well act as director of such other corporation, and its executive officer or chief manager must be the stockholder, within the meaning of the act. *Chase v. Tuttle*, 12 Atl. 874, 876, 55 Conn. 455, 3 Am. St. Rep. 64.

A stockholder in a railroad company may be said to be one who is interested in

the funds of the company and who assumes the liability of a stockholder. By issuing bonds, with the proceeds of which land was purchased and donated to a railway as a bonus for machine shop purposes, a city did not become interested in the funds of the railway company, and hence did not partake of the character of a stockholder in any way, and was not within the constitutional prohibition against becoming a stockholder in any company. *Jarrott v. Moberly* (U. S.) 13 Fed. Cas. 366, 370.

The individual contributors to the stock of a corporation are denominated "stockholders." They are holders of the stock in shares proportionate to their several contributions; but they are not in law owners, either jointly of the whole, or severally of distinct parts, of the property and effects which thus constitute the stock of the company. *State v. Hood* (S. C.) 15 Rich. Law, 177, 188.

A stockholder is a person, and as such is not an integral member of a corporation in which he may own stock. *Fredericks v. Pennsylvania Canal Co. (Pa.)* 16 Phila. 605, 607.

A stockholder is so far an integral part of the corporation that, in view of the law, he is privy to the proceedings touching the body of which he is a member. *Johnson v. Stebbins-Thompson Realty Co.*, 76 S. W. 1021, 1026, 177 Mo. 581.

The term "stockholder," as used in this section, shall apply, not only to such persons as appear by the books of the corporation to be such, but also to every equitable owner of stock, although the same appears on the books in the name of another, and also to every person who has advanced the installments or purchase money of stock in the name of a minor, so long as the latter remains a minor, and also to every guardian, or other trustee, who voluntarily invests any stock funds in the stock. *Hurlburt v. Arthur*, 73 Pac. 734, 735, 140 Cal. 103, 98 Am. St. Rep. 17.

The owners of shares in a corporation which has a capital stock are called "stockholders." Civ. Code Idaho 1901, § 2096. If a corporation has no capital stock, the incorporators and their successors are called "members." Rev. St. Okl. 1903, § 951; Rev. Codes N. D. 1899, § 2871.

The term "stockholders," as used in a provision limiting the time within which action can be brought upon the liability of stockholders, applies not only to such persons as appear by the books of the corporation to be such, but to any equitable owner of stock, although the stock appears on the books in the name of another. *Bates' Ann. St. Ohio 1904*, § 3259.

Within the meaning of a provision in the act relating to mines and minerals re-

quiring corporations or companies to permit persons owning stock in such corporation or companies to enter the mine at any time during the business hours of the day, the term "stockholders" means stockholders whose names appear on the stock book of the company as owners of stock, and none others. Comp. Laws N. M. 1897, § 2308.

**As servant.**

See "Servant."

**As trustee.**

See "Trustee."

**STOCKHOLDERS' LIABILITY.**

See "Statutory Liability of Stockholders."

**STONE.**

See "Soapstone."

A stone is earthy or mineral matter condensed in a hard state. *Jenkins v. Johnson* (U. S.) 13 Fed. Cas. 525, 527.

St. 7 Geo. III, c. 93, imposing a toll on "every ton of coals, cinders, lime, and limestone, stone, gravel, and manure," applies to blocks cut with wedges from the quarry, reduced to certain dimensions, and squared with a pickax, to be used as railway sleepers, each being, after such preparation, worth 9d. more than unwrought stone of the same weight. *Fisher v. Lee*, 12 Adol. & El. 622, 623.

**STOP.**

Rev. St. § 3375a, giving a sheriff the right to ride on freight trains in the performance of his official duties between stations where such trains "stop," means where they in fact stop, and not where such trains regularly stop, or are scheduled to stop; and hence a sheriff is entitled to board a freight train, if it is in fact stopping at a place at the time he goes on board. *Allen v. Lake Shore & M. S. Ry. Co.*, 47 N. E. 1037, 1038, 57 Ohio St. 79.

Riding round and round by a bicyclist in large or small circles, waiting for a chance to shoot across a railroad crossing, is not a "stop" at all, either in form or substance. *Robertson v. Pennsylvania R. Co.*, 36 Atl. 403, 404, 180 Pa. 43, 57 Am. St. Rep. 620.

**STOP ORDER.**

The meaning of a "stop order" given to a broker is to await a certain figure, and, whenever this figure is reached, to stop the transaction by then selling or buying, as the case may be, as well as possible. An instance

given by a witness was: "If you give a stop order at 109 or 110, you must sell as soon as the stock or bonds have sold at that price by some one else. If you can sell at that price, you must do it; but, if you cannot, you must sell at whatever the price is after they have sold at that price." *Porter v. Wormser*, 94 N. Y. 431, 443.

**STOPE.**

The excavation made in the breast of a drift in a mine is called a "stope," which, may be defined to be the excavation made in a mine to remove the ore which had been rendered accessible by the shaft and drifts. *Fisher v. Central Lead Co.*, 56 S. W. 1107, 1111, 156 Mo. 479 (citing Cent. Dict.).

**STOPPAGE IN TRANSITU.**

See "In Transit"; "Transit."

"Stoppage in transitu" is the right which the vendor has, when he sells goods on credit to another, of assuming the possession of the goods while they are in the hands of the carrier or middleman in their transit to the consignee or vendee, and before they arrive into his actual possession, or at the destination which he has appointed for them, on his becoming bankrupt or insolvent. The right came from courts of equity, and was first established in *Wiseman v. Vendeputt*, 2 Vern. 203, and its parent, equity, recommended the adoption of it in the courts of law as a legal right. *O'Brien v. Norris*, 16 Md. 122, 130, 77 Am. Dec. 234.

Chancellor Kent, in his Commentaries, defines the right of stoppage in transitu to be that right which the vendor has, when he sells goods on credit to another, of resuming possession of the goods while they are in the possession of the carrier or middleman, in transit to the consignee or vendee, and before they arrive into his actual possession, or the destination he has appointed for them, on his becoming bankrupt and insolvent. *Branan v. Atlanta & W. P. R. Co.*, 33 S. E. 836, 108 Ga. 70, 75 Am. St. Rep. 26. See, also, *Kingman & Co. v. Denison*, 84 Mich. 608, 611, 48 N. W. 26, 11 L. R. A. 347, 22 Am. St. Rep. 711.

The right of stoppage in transitu is nothing more than an extension of a right of lien which by the common law the vendor has on the goods for the price, originally allowed in equity, and subsequently adopted as a rule of law. By a bargain and sale without delivery the property vests in the vendee; but where, by the terms of sale, the price is to be paid on delivery, the vendor has a right to retain the goods until payment is made, and this right is strictly a lien, a right to detain and hold the goods of another as credit for the payment of some debt or the perform-

ance of some duty. But where the vendor and vendee are at some distance from each other, and the goods are on their way from the vendor to the vendee, or to the place by him appointed for their delivery, if the vendee becomes insolvent, and the vendor can repossess himself of the goods before they have reached the hands of the vendee or the place of destination, he has a right so to do, and thereby regain his lien. This, however, does not rescind the contract, but only restores the vendor's lien, and it can only take place when the property has vested in the vendee. *Rowley v. Bigelow*, 29 Mass. (12 Pick.) 307, 313, 23 Am. Dec. 607.

"Stoppage in transitu" is the right which arises to an unpaid vendor to resume the possession, with which he has parted, of goods sold upon credit, before they come into the possession of a buyer who has become insolvent, bankrupt, or pecuniarily embarrassed. It is nothing more than the extension of the right of lien which by common law the vendor has upon goods for the price, originally allowed in equity, and subsequently adopted as a rule of law. The essential ground of the right of lien is possession; that of stoppage in transitu is nondelivery. *Inslee v. Land*, 57 N. H. 454, 457.

The right of stoppage in transitu is merely an extension of the lien for the price which the vendor has after contract of sale and before delivery of goods sold on credit. The term itself implies that the goods are in transit, and that they have not come into the possession of the vendee. It permits the vendor to resume possession before the goods sold have come into the vendee's possession, if the latter has become insolvent. Whether they are in the possession of a carrier while in transit, or in the possession of a middleman, is immaterial. 2 Kent, Comm. 702. The right also exists when they are sent by private conveyance, as well as by a common carrier. Logs being driven down a river are subject to the right of stoppage before actual delivery to the vendee. *Johnson v. Eveleth*, 45 Atl. 35, 37, 93 Me. 306, 48 L. R. A. 50.

"Stoppage in transitu" is the act by which an unpaid vendor of goods stops their progress and assumes possession while they are in transit to the purchaser. The right to arrest the goods so sold while in the hands of the carrier, when the sale was on credit and the purchaser has become insolvent, is conferred by law, independently of any contract between the parties. The right is peculiar in its character, and bears no analogy to the power to treat as void a transaction invalid on the ground of fraud. The right exists where the sale was in all respects valid, and where there was no condition attached to the delivery to the carrier, and where the title and right of possession are transferred to the purchaser on the execution of the in-

strument of sale. *Dows v. Perrin*, 16 N. Y. 325, 331.

The right of stoppage in transitu is an equitable extension, recognized by the courts of common law, of the seller's lien for the price of goods of which the buyer has acquired the property, but not the possession. The right is paramount to any lien created by usage or agreement between the carrier and consignee for a general balance of accounts. *Potts v. New York & N. E. R. Co.*, 131 Mass. 455, 457, 41 Am. Rep. 247.

The right of stoppage in transitu is but an equitable extension or enlargement of the vendor's lien, and is not an independent or distinct right. *McElwee v. Metropolitan Lumber Co.*, 69 Fed. 302, 307, 16 C. C. A. 232.

It is not necessary for the person stopping goods in transitu to show that the consignee failed after the contract. It is sufficient if his failure becomes known after the sale. *Reynolds v. Boston & M. R. Co.*, 43 N. H. 590, 588.

If goods be sold and shipped on account and at the risk of the vendee, the bill of lading making the goods deliverable to him, on being assigned to him, transfers the legal title in the goods, to the perfection of which nothing is wanted but actual possession; but, until this be obtained, the vendor retains the equitable right to countermand the delivery of the goods, if the consideration has not been paid or the consignee has in the meantime failed. *Ryberg v. Snell* (U. S.) 21 Fed. Cas. 117.

The seller of goods, on discovering that the buyer is insolvent, may stop the goods in transit, before the buyer acquires possession, and retake them as his own. Three things must concur in order to confer the right of stoppage in transitu: (1) The buyer must be insolvent; (2) the goods must be unpaid for; (3) the goods must not have reached the possession of the buyer or his authorized agent. *Walsh v. Blakely*, 9 Pac. 809, 812, 6 Mont. 194.

Where there has been a constructive delivery, by putting property into the hands of a third person, to be delivered to the vendee, the vendor has the right of stoppage in transitu. *Newhall v. Vangas*, 15 Me. (3 Shep.) 314, 319, 33 Am. Dec. 617.

"Stoppage in transitu" is the exercise of a qualified right over the property of another, and exists only where the party entitled to exercise it has possession of the property. It is founded on equitable principles. *Slater v. Gaillard* (S. C.) 1 Treadw. Const. 248, 271.

Whatsoever doubt there may have been in former times as to the effect of stoppage in transitu, we think it is settled by the great weight of authority, English and American, that the true nature and effect of this remedy



of the vendor is simply to secure the goods to his possession, so as to enable him to exercise his rights as an unpaid vendor, not to rescind the sale. Such certainly is the law in this state. *Allyn v. Willis*, 65 Tex. 63, 73, 74.

When the right of stoppage in transitu is properly exercised, the effect is to restore the vendor to precisely the same position as if the goods had never left his possession. *Dlem v. Koblitz*, 29 N. E. 1124, 1126, 49 Ohio St. 41, 34 Am. St. Rep. 531.

So long as the vendor has the actual possession of the goods, or as long as they are in the custody of his agents and while they are in transit from him to the vendee, he has a right to refuse or countermand the final delivery, if the vendee be in failing circumstances. *McElwee v. Metropolitan Lumber Co.*, 69 Fed. 302, 307, 16 C. C. A. 232 (citing *White v. Welsh*, 38 Pa. [2 Wright] 420).

#### Exercise of right.

Where it is sought to stop goods in transitu, notice to the carrier not to deliver the goods is sufficient, and a demand of delivery is not essential. *Reynolds v. Boston & M. R. Co.*, 43 N. H. 580, 588.

What amounts to a stoppage in transitu in a particular case may be a question of difficulty; but it was very early held that where the consignee, being a purchaser of goods on credit, finds that he shall not be able to pay for them, and gives notice thereof to the vendor, and leaves the goods in possession of any person, when they arrive, for the use of the vendor, and the vendor, on such notice, expressly or tacitly assents to it, it is a good stoppage in transitu, although the bankruptcy of the consignee intervene, and the goods rest in the consignor. *Atkin v. Barwick*, 1 Strange, 165. This was approved and confirmed in the case of *Salte v. Field*, 5 Term R. 211. The same principle was adopted in this commonwealth, in *Lane v. Jackson*, 5 Mass. 157, though the facts led to a different result. *Grout v. Hill*, 70 Mass. (4 Gray) 361, 367.

Where goods purchased by an insolvent were attached by one of his creditors and sold, and proceeds thereof paid into court, the filing by the vendors of such goods of a claim in the attachment case to the proceeds of the goods was held a sufficient exercise of the right of stoppage in transitu. "It is not required," said the court, quoting from 2 Kent, Comm. pp. 540, 542, 543, "that the vendor should obtain actual possession of the goods before they come into the hands of the vendee, nor is there any specific formal request for the stoppage of goods in transitu, though it is well settled that the bankruptcy of the buyer is not of itself tantamount to the stoppage in transitu. Before the delivery of the goods by the carrier, the notice to him to stop the goods, or an assertion of the

vendor's right by an entry of the goods at the custom house, or a claim to endeavor to get possession, is equivalent to an actual stoppage of the goods." *O'Brien v. Norris*, 16 Md. 122, 130, 77 Am. Dec. 284.

#### Termination of right.

The right of stoppage in transitu terminates only with an actual delivery, unless the carrier consents to hold the goods for the consignee or wrongfully refuses to deliver them. *Reynolds v. Boston & M. R. Co.*, 43 N. H. 580, 588.

A vendor has the right of stoppage in transitu at any time before the actual or constructive delivery to the possession of the vendee, and the fact that the goods are sold on time does not affect it. Storage in a warehouse by an agent of the consignee terminates the right. *Clapp Bros. & Co. v. Peck*, 7 N. W. 587, 588, 55 Iowa, 270.

There can be no stoppage in transitu where the goods have been delivered to the vendee. *Newhall v. Vangas*, 15 Me. (3 Shep.) 314, 319, 33 Am. Dec. 617.

The nature and effect of the right to stoppage in transitu is simply to restore the goods to the possession of the vendor, so as to enable him to exercise his rights as an unpaid vendor, and not to rescind the sale. To enforce his rights the vendor is entitled to retake the possession of the property and hold it until the expiration of the credit, so as to be able to deliver it upon the payment of the price. When goods sold have left the hands of the carrier, reached their destination, and the purchaser has disposed of them to one who gives a bond for the payment of the customs duties and deposits them in his own name in a bonded warehouse, the seller's power to exercise the right of stoppage in transitu is gone. *Sheppard v. Newhall*, 54 Fed. 306, 309, 4 C. C. A. 352.

The right of stoppage in transitu of goods sold on credit, when the consignee is insolvent, exists against such consignee and all purchasers from him until there has been an actual delivery of the goods to the consignee, or to the purchaser under his order, and until such delivery has been made and possession of the goods obtained the title of the bona fide purchaser from the consignee without notice can only be made good against the exercise of such right by the assignment of the bill of lading. *Branan v. Atlanta & W. P. R. Co.*, 33 S. E. 836, 108 Ga. 70, 75 Am. St. Rep. 26.

The right of stoppage in transitu is cut off by the transfer of the bill of lading to a bona fide purchaser; but still, if the bill of lading be void for fraud, the holder can confer no better title than he had, and hence in such case of transfer he cannot shut off the right of stoppage in transitu. *Dows v. Perrin*, 16 N. Y. 325, 331.

"Stoppage in transitu," as the term imports, can only take place while the goods are on their way. If they arrive at their ultimate destination, and come into the possession of the vendee, there is an end of the vendor's right over them. Therefore the question in most of the cases on the subject has been whether the goods had or had not arrived at the termination of the journey. The rule, it is said, to be collected from all cases, is that they are in transitu so long as they are in the hands of the carrier, whether he was or was not appointed by the consignee, and so long as they remain in any place of deposit connected with their transmission. *Chandler v. Fulton*, 10 Tex. 2, 12, 60 Am. Dec. 188.

Where goods are sold on credit at a foreign port, and shipped on board a vessel of the vendee, consigned to him, and to be delivered to him at his port of residence, and the consignee becomes insolvent before payment is made, the vendor has the right to stop the goods in their transit at any time before they shall come into actual possession of the vendee. This right to stop the goods in transitu is not divested by the purchase of the goods of others by the vendor on his own credit for the vendee, nor by the vendor's taking bills of exchange drawn in his favor by the master of the vessel on the vendee, nor by charging a commission for doing the business; nor does the reception by the vendee of part payment take away the right. A claim made by the vendor on any person having charge of the goods before the transit ends is a sufficient exercise of the right of stoppage to revest the goods. *Newhall v. Vargas*, 13 Me. (1 Shep.) 93, 104, 29 Am. Dec. 489.

## STORAGE.

See "Cold Storage"; "Goods Held on Storage."

A deposit not gratuitous is called "storage." Rev. St. Okl. 1903, § 2849; Rev. Codes N. D. 1899, § 4024; Civ. Code S. D. 1903, § 1376; Civ. Code Mont. 1895, § 2490; *Walker v. Elkberry*, 54 Pac. 553, 554, 7 Okl. 599.

Lumber sawed and piled on the premises of another preparatory to shipment does not occupy a "place of storage," within the meaning of Michigan statutes excepting from the general rule of taxation, that personal property is regarded as belonging at the place of residence of the owner, those cases where the owner or person having control "hires or occupies a store, mill, or place for the sale of property, shop, office, mine, storage, manufactory, or warehouse therein, for use in connection with such goods and chattels." *Monroe v. Greenhoe*, 19 N. W. 569, 54 Mich. 9; *Osterhout v. Jones*, 19 N. W. 964, 54 Mich. 228.

Under Tax Law, 1882, providing that "all goods and chattels situate in some township other than where the owner resides shall be assessed in the town where situate, and not elsewhere, if the owner or person having control thereof hires or occupies a store, mill, \* \* \* storage, etc., for use in connection with such goods and chattels," lumber piled to dry and season, on ground hired by the owner, to remain there until seasoned and ready for sale, was stored there, not only in the common, but in the legal, acceptation of the term. *Hood v. Judkins*, 28 N. W. 689, 690, 61 Mich. 575.

## STORE.

See "Brick Store"; "General Store"; "In Store"; "Meat Store"; "Open Store"; "Secondhand Store."

"Store" is defined by Webster as any place where goods are sold, either by wholesale or retail. *Salomon v. Pioneer Co-operative Co.*, 21 Fla. 374, 385, 58 Am. Rep. 667; *Martin v. City of Portland*, 17 Atl. 72, 73, 81 Me. 293; *Petty v. State*, 22 S. W. 654, 655, 58 Ark. 1; *Sparrenberger v. State*, 53 Ala. 481, 483, 25 Am. Rep. 643.

"Store" is defined by Worcester as a building or room in which goods of any kind are kept for sale, and especially for the sale of goods. *Salomon v. Pioneer Co-operative Co.*, 21 Fla. 374, 385, 58 Am. Rep. 667.

"Store" is defined as a place where supplies, as provisions, ammunition, arms, clothing, or goods of any kind are kept for future use or distribution; a storehouse; a warehouse; a magazine; a place where goods are kept for sale by either wholesale or retail; a shop, as a book store, a dry goods store. *State v. Sprague*, 50 S. W. 901, 903, 149 Mo. 409. See, also, *State v. Wilson*, 47 N. H. 101, 104.

The word "store" as applied to a building is intended to designate a place where traffic is carried on in goods, wares or merchandise. *Boston Loan Co. v. City of Boston*, 137 Mass. 332, 335 (citing *Hittinger v. Inhabitants of Westford*, 135 Mass. 258).

The word "store" means a place where goods are sold, whether in a house or not, as used in Code 1880, § 585, levying a privilege tax on each store. *Folkes v. State*, 63 Miss. 81, 83.

The word "store," if used in connection with a description or designation of buildings on a street, might, and frequently would, be construed to mean the house in which goods were kept for sale, or a house erected for that purpose. *Burress v. Balir*, 61 Mo. 133, 140.

The word "store," as used in McClell Dig. p. 733, § 10, providing that an action on

an open account for goods sold and delivered and an action for any article charged in the store account shall be barred in four years, cannot be construed to mean merely a retail store. *Salomon v. Pioneer Co-operative Co.*, 21 Fla. 374, 385, 58 Am. Rep. 667.

The word "store" in 2 Hill's Code, p. 662, § 46, which defines burglary as an unlawful entry, with intent to commit a felony, of an office, shop, store, warehouse, malt-house, stillhouse, mill, factory, bank, church, schoolhouse, railroad car, barn, stable, ship, steamboat, and watercraft, or any building in which goods, merchandise, or valuable things are kept for use, sale, or deposit, means any store, without regard to whether any valuable things are kept therein or not, as the latter clause of the statute only refers to buildings not specifically designated. *State v. Sufferin*, 32 Pac. 1021, 6 Wash. 107.

A "store" will be considered a parcel of a mansion house if it is in a part of the house, or under the same roof, or if any of the family sleep in it. *State v. Ginns* (S. C.) 1 Nott & McC. 583, 585.

#### **Adjoining building.**

The board of supervisors ordered that an election in a certain precinct should be held in T.'s "store." The election was held in a building adjoining the store, and used in connection with it in the business, and it was contended that the election was not held in the place specified in the notice; but the court held that such building was included as a part of the place of the trading premises, and that it was apparent that no one who went to the store for the purpose of voting could possibly be deceived as to the place of voting. *Hayes v. Kirkwood*, 69 Pac. 80, 31, 136 Cal. 396.

#### **Bakery.**

The word "store" is commonly used in this country as the equivalent of the English word "shop," which is very generally applied to what we call a "bakery," as it is to any room or building where any kind of article of traffic is sold. The American word "store" applies to the building; the name more strictly belonging to the collection of wares within it. The English "shop" is the building itself, as distinguished from a place of sale, which is open like a "stall." Rich. Dict. "Shop." A "restaurant" has no more defined meaning, and is used indiscriminately for all places where refreshments can be had, from the mere eating house or cook shop to the more common shops or stores, where the chief business is vending articles of consumption and confectionery, and the furnishing of eatables to be consumed on the premises is subordinate. Where the premises insured are described as used for a residence and stores, the fact that a bakery and a restaurant were located in the building will

not render the policy void. *Richards v. Washington Fire & Marine Ins. Co.*, 27 N. W. 586, 587, 60 Mich. 420.

#### **Banking house.**

A banking house is a "store, shop, or warehouse," within Rev. St. tit. 4, c. 4, § 39, making it a crime to break and enter in the night season the "store, shop, or warehouse" of another, wherein any goods, wares, or merchandise are deposited, with intent to commit theft. *Wilson v. State*, 24 Conn. 57, 70.

#### **As building.**

"Store," as used in Gen. St. c. 11, § 12, providing that all goods, wares, and merchandise and other stock in trade shall be taxed in those places where the owners hire or occupy manufactories, stores, shops, or wharves, as applied to a building, is intended to designate a place where traffic is carried on in goods, wares, or merchandise. It includes any building or room used for carrying on any trade or business adapted to be carried on in a building or room and employing a stock in trade. *Boston Loan Co. v. City of Boston*, 187 Mass. 332, 333.

The word "store" has a settled, known meaning, and is not used otherwise than as and for the name of a building. *Commonwealth v. McMonagle*, 1 Mass. 517.

The use of the word "store" in an indictment charging breaking into a store is not sufficient to show the breaking and entering of a building, in violation of a statute making the breaking of certain designated buildings and other buildings criminal, but which does not include stores among the buildings specifically enumerated. *Commonwealth v. McMonagle*, 1 Mass. 517.

#### **Butcher shop.**

A butcher shop is a "store," within Mansf. Dig. § 1887, as amended by Act March 7, 1885, forbidding any person to keep open a store on Sunday. *Petty v. State*, 22 S. W. 654, 655, 58 Ark. 1.

#### **As dwelling house.**

See "Dwelling—Dwelling House."

#### **Factory distinguished.**

See "Factory."

#### **Inclosed park.**

"Store," as used in Gen. St. tit. 52, § 4, prohibiting the keeping open on Sunday of any shop, house, store, etc., in which intoxicating liquors are sold, does not include an inclosed park in which such liquors are sold. *State v. Barr*, 39 Conn. 40, 44.

#### **Junk shop.**

"Store," means generally a place where goods are kept and deposited, especially in

large quantities; a warehouse; also a place where goods are kept for sale in large or small quantities. It is a generic term, embracing any species of store dealing in any variety of property; so that, under a statute providing for a privilege tax on each store, a junk shop, the stock in trade of which consists of old chain, rope, iron, copper, parts of machinery, and other refuse, is taxable. *Pitts v. City of Vicksburg*, 16 South. 418, 419, 72 Miss. 181.

#### Land included.

A conveyance of a "store" held to convey the land on which the store stood. *Pottkamp v. Buss* (Cal.) 31 Pac. 1121, 1122.

A lease of a "store," together with the dwellings overhead, is a lease of the land on which it stands. *Lanpher v. Glenn*, 33 N. W. 10, 11, 37 Minn. 4.

A lease of a "store" includes the land under it and to the middle of a private way in the rear, the fee of which is in the lessor. *Hooper v. Farnsworth*, 128 Mass. 487, 488.

The word "stores," as used in a will whereby the testator devised property described as "the two stores recently erected by me on the northerly side of Michigan Grand avenue, in the city of Detroit," includes the land appurtenant to the stores. *Toms v. Williams*, 41 Mich. 552, 559, 2 N. W. 814.

#### Outer walls.

The term "store," in a lease thereof, is not limited to the mere interior of the store building, but includes the outer walls as well. *Riddle v. Littlefield*, 53 N. H. 503, 508, 16 Am. Rep. 388.

#### Plantation store.

"Store," as used in a statute levying a privilege tax upon the keepers of stores, includes a plantation store kept by the planter to furnish his tenants with necessary supplies, as required by his contracts with them; the goods being sold at the usual credit prices for a profit, and a staff of clerks being employed. *Alcorn v. State*, 15 South. 37, 71 Miss. 464.

A planter, keeping merchandise in considerable quantities and varieties at her residence for sale at retail for a profit, though to her tenants only, conducts a "store" within Code, § 3390, and is liable to a privilege tax. *Craig v. Pattison*, 74 Miss. 881, 884, 21 South. 756.

#### As public house.

See "Public House."

#### Room occupied as office.

The term "store," within the statute defining burglary in the third degree as breaking and entering any store, etc., in which any

goods, merchandise, or valuable thing shall be kept for sale, use, or deposit, does not include a room occupied as a mere business office of a board of underwriters, in which is kept only furniture and articles for their business, and no articles of any kind for sale. *People v. Marks*, 4 Parker, Cr. R. 153, 157.

#### Saloon.

A "store" is a place in which merchandise is kept for sale, and includes a saloon for sale of oysters and beer. *Commonwealth v. Whalen*, 131 Mass. 419, 421.

#### Shop synonymous.

The word "store" ordinarily refers to a place where goods and merchandise are bought and sold, whether by wholesale or retail. It is of larger import than "shop," since it also means a place of deposit, a storehouse. *Sparrenberger v. State*, 53 Ala. 481, 483, 25 Am. Rep. 643.

We usually understand by the word "store" a place where goods are exhibited for sale. The words "store" and "shop" are not synonymous. *State v. Canney*, 19 N. H. 135, 137.

The terms "store" and "shop" are interchangeable, and hence, where an indictment, under a statute punishing the offense of entering a shop with intent to steal, uses the word "store," instead of "shop," the variance is immaterial. *State v. Moore*, 38 La. Ann. 66, 68.

An indictment for "breaking and entering a store" justified a conviction under a statute against "breaking and entering a shop"; for the word "store" means the same thing as the word "shop." *State v. Smith*, 5 La. Ann. 340, 341.

A "store" kept for the sale of goods is to all intents a shop, the very definition of which is "a place where anything is sold" (Johnson). As used in St. 1846, § 2, prohibiting any person or persons, except taverners, from keeping any store, shop, or other place for the purpose of selling liquors, etc., is equivalent to the word "shop" as therein used; and therefore an allegation, in an indictment under such statute, that the defendant kept a certain store or shop, etc., though in the alternative form, is substantially an allegation, not that the accused kept one or another of two different places, but that he kept one place called a "store or shop." *Barth v. State*, 18 Conn. 432, 440.

A "store" is a place where goods are deposited, and in this country shops for the sale of goods are frequently called "stores." *Commonwealth v. Annis*, 81 Mass. (15 Gray) 197, 199.

Rap. & L. Law Dict. defines "store" as synonymous with "shop." *Petty v. State*, 22 S. W. 654, 655, 58 Ark. 1.

The word "store" is commonly used in this country as the equivalent of the English word "shop," which is very generally applied to what we call a "bakery," as it is to any room or building where any kind of articles of traffic is sold. The American word "store" applies to a building; the name more strictly belonging to a collection of wares within it. The English "shop" is the building itself, as distinguished from a place of sale, which is open, like a stall. *Richards v. Washington Fire & Marine Ins. Co.*, 27 N. W. 588, 588, 60 Mich. 420.

### STORE ACCOUNT.

The words "store account," as used in the statute limiting an action for any article charged in a store account to four years, apply as well to wholesale as to retail store accounts, and cover the case of all store-keepers selling goods and keeping accounts against purchasers, and relying on their books of account as evidence, and is not controlled by the mere locality of the store and use to be made of the goods purchased. *Salomon v. Pioneer Co-operative Co.*, 21 Fla. 374, 384, 58 Am. Rep. 667.

### STORE FIXTURES.

Within a fire policy containing clauses excepting from the insurance "store fixtures" and "store and other fixtures," the words "store fixtures" mean store fittings or fixed furniture, which are peculiarly adapted to make a room a store, rather than something else. *Thurston v. Union Ins. Co. (U. S.)* 17 Fed. 127, 128.

The term "store fixture" is a term of trade, commonly used among traders and insurers, and parol testimony is admissible to show what was understood by the parties to a written instrument in using this term. *Whitmarsh v. Conway Fire Ins. Co.*, 82 Mass. (16 Gray) 359, 362, 77 Am. Dec. 414.

"Store fixtures," within the meaning of a fire policy providing that store fixtures are not covered by the policy, does not include an awning attached to the front of the house. It is a fixture to the house as a house, and is in no sense a store fixture; that is, a fixture attached to the store, tributary to its use as a store. The shelving and office were store fixtures, and were not insured. The awning was a fixture, but a part of the building, and would have passed by a conveyance of the property as a house, and would have descended to the heirs by inheritance. *Commercial Fire Ins. Co. v. Allen*, 1 South. 202, 207, 80 Ala. 571.

### STORE FOR SALE OF MEAT.

In Acts 1881, c. 149, § 4, imposing a privilege tax on butchers, including all offices and "stores for the sale of meat" at retail, etc., the quoted phrase includes a family grocery,

kept under a merchant's license, where meat is sold at retail, though it is sold for only a small part of the year, and though the business is limited to a particular class of meats purchased from farmers, such as back bones, spare ribs, and sausages. *Eastman v. Jackson*, 78 Tenn. (10 Lea) 162, 163.

### STORE FURNITURE.

See "Furniture of Store."

### STORED—STORING.

The words "stored therein," as used in a fire insurance policy insuring agricultural implements usually kept in a retail stock and "stored therein," means kept therein. *Fuller v. Phoenix Ins. Co.*, 16 N. W. 273, 275, 61 Iowa, 350.

A statute making it larceny to feloniously take any goods from any "place where the same may be stored" means "any place where the same has been placed or located." *Moseley v. State*, 74 Ga. 404.

"Storing gunpowder," as used in an insurance policy providing that, if the building insured was used for the purpose of storing gunpowder, the contract would be suspended for the time, means a keeping within the building, and does not include the placing of gunpowder with a lighted match in the building by an incendiary for an express purpose of producing an explosion. *City Fire Ins. Co. v. Corlies (N. Y.)* 21 Wend. 367, 369, 34 Am. Dec. 258.

The term "storing" of contraband liquors, as used in the dispensary law, involves the idea of continuity or habit; the word meaning the laying away for future use. It involves more than mere possession. *Easley Town Council v. Pegg*, 41 S. E. 18, 19, 63 S. C. 98.

### Temporary presence for consumption.

"Storing," as used in a policy prohibiting the storing of hazardous articles, such as spirituous liquors, etc., within the building, means a keeping for safe custody, to be delivered out in the same condition substantially as received. It means that the storing for safe-keeping is the sole or principal object of the deposit, and does not include a merely incidental keeping for the purpose of consumption; and hence the keeping of spirituous liquors in the building insured, for the purposes of consumption, or for sale by retail to boarders and others, where no larger quantities were kept than the business required, is not a storing within the meaning of the policy. *Rafferty v. New Brunswick Fire Ins. Co.*, 18 N. J. Law (3 Har.) 480, 483, 38 Am. Dec. 525.

### Temporary presence for sale.

"Storing," as used in a condition in a fire policy prohibiting the storing of explosives,

means a deposit for preservation, and not a keeping for sale. *Renshaw v. Missouri State Mut. Fire & Marine Ins. Co.*, 15 S. W. 945, 947, 103 Mo. 595, 23 Am. St. Rep. 904.

Keeping an article in a general retail store in such quantities as it is usually kept in such a store for retail purposes is not storing such article, within the meaning of a policy stipulating that if the premises were used for the purpose of storing certain goods, except as agreed upon by the company, the policy should be void. *Phoenix Ins. Co. v. Taylor*, 5 Minn. 492, 502 (Gil. 393, 396).

The keeping of oil and spirituous liquors by a grocer in his store for the "purposes of ordinary retail" and "in quantities not unusually large" is not a "storing" of them, within the meaning of that clause of the policies of insurance against fire commonly used in the city of New York, which prohibits the appropriation of the building insured for the purpose of "storing therein any goods denominated hazardous or extrahazardous," in the memorandum of special rates annexed to the policies. *Langdon v. New York Equitable Ins. Co.*, 1 N. Y. Super. Ct. (1 Hall) 253; *New York Equitable Ins. Co. v. Langdon* (N. Y.) 6 Wend. 623, 628.

#### Temporary presence for use.

The word "store" is defined by Johnson and Webster to mean "to stock against a future time." In *O'Niel v. Buffalo Fire Ins. Co.*, 8 N. Y. 122, 127, it is defined as the keeping of merchandise in safe custody, or where keeping is the principal object of the deposit. Keeping naphtha in a pipe until required for use at a gas tank, and not forcing a sufficient quantity into the tank, shutting off the supply, leaving the conduit pipe full of naphtha until a special quantity is required, is storing, within a statutory prohibition of the keeping or storing of naphtha. *Lee v. Vacuum Oil Co.*, 7 N. Y. Supp. 428, 433, 54 Hun, 156.

"Storing," as used in an insurance policy prohibiting the storing of hazardous articles within the building insured, should not be construed to include the bringing into the building of paints, oils, and turpentine for the purpose of painting the inside of the building, and kept there while the work was going on. *O'Niel v. Buffalo Fire Ins. Co.*, 3 N. Y. (3 Comst.) 122, 127.

Where an insurance policy prohibited certain articles from being deposited, "stored," or kept in the insured building, the mere temporary presence of the articles was not a violation of the terms of the policy; a keeping of such goods permanently and for purposes of sale or storage being contemplated. *Phoenix Ins. Co. v. Lawrence*, 61 Ky. (4 Metc.) 9, 11, 12, 81 Am. Dec. 521.

The words "storing or keeping," in a fire policy prohibiting the storing or keeping of

petroleum oil, were construed to refer only to the storing or keeping in a mercantile sense, in considerable quantities, with a view to commercial traffic, and not to prohibit the storing or keeping of oil for use as medicine. *Williams v. Fireman's Fund Ins. Co.*, 54 N. Y. 569, 572, 13 Am. Rep. 620.

A policy of insurance contained a clause suspending the operation of the policy in case the premises insured should be appropriated, etc., for the purpose of "storing or keeping therein any of the articles denominated hazardous"; one of the buildings insured being occupied by a carding machine. Held, that allowing a small quantity of undressed flax, though a "hazardous article," to remain temporarily in the basement of the carding machine building, after the removal of the flax dressing machine from such basement a few days prior to the issuing of the policy, did not constitute a "storing or keeping," within the meaning of those words as used in the policy. *Hynds v. Schenectady County Mut. Ins. Co.* (N. Y.) 16 Barb. 119, 125; *Id.*, 11 N. Y. (1 Kern.) 554, 561.

#### STORES.

See "Sea Stores."

The word "stores," as used in 2 Rev. St. p. 493, § 1, providing for a lien on a vessel for provisions and stores furnished it, etc., embraces wood furnished the boat to supply her furnaces. *Crooke v. Slack* (N. Y.) 20 Wend. 177.

#### STOREHOUSE.

A storehouse is a house for the storage of goods, and a person contracting to repair a storehouse ought to expect its use for such purpose. Hence damage to goods stored therein by reason of poor workmanship are not remote or speculative. *Krebs Mfg. Co. v. Brown*, 18 South. 659, 108 Ala. 508, 54 Am. St. Rep. 188.

"Storehouse" is similar in meaning to the word "warehouse," signifying an apartment or building for the temporary reception and storage of goods and merchandise; and it has been held that, within the statute against gaming at a storehouse for retailing spirituous liquors, a room in the second story of a two-story house, which was accessible only by a flight of steps leading up to it on the outside, and which was used by one of the proprietors of the house as a sleeping apartment, the lower room being used by the proprietors jointly for retailing liquor, was a storehouse. *Andrews v. State*, 28 South. 522, 123 Ala. 42 (citing *Johnson v. State*, 19 Ala. 527).

"Storehouse," as used in Rev. St. c. 34, § 1, making the burning of a storehouse arson, probably was employed to mean a shop

er building in which goods are offered for sale. *State v. Sandy*, 25 N. C. 570, 573.

"Storehouse" means any house, not an office or a shop, or a room on a steam or other boat, in which goods, wares, and merchandise are usually deposited for safe-keeping or for sale. *Hunter v. Commonwealth (Ky.)* 48 S. W. 1077 (citing and approving *Ray v. Commonwealth*, 75 Ky. [12 Bush] 397).

The word "storehouse" has been defined as a building for keeping grain or goods of any kind; a warehouse. A common use of it is to designate a building in which domestic supplies are kept at a place of residence. It is also applied to places of business, and is there vulgarly used as synonymous with "shop," in one of its proper senses, meaning a building in which goods are offered openly for sale. *State v. Sandy*, 25 N. C. 570, 573.

"Storehouse" is a house in which things are stored; a building for the storing of grains, food stuffs, or goods of any kind; a magazine; a repository; a warehouse. *State v. Sandy*, 25 N. C. 570; *Ray v. Commonwealth*, 75 Ky. (12 Bush) 397; *Johnson v. State*, 19 Ala. 527 (citing Webster, Worcester, and Century). It seems that the use to which the structure is put, and not the purpose for which it is erected, is decisive as to its character; so that, under Code, § 3789, punishing the crime of larceny from a storehouse, it is not sufficient that the building in which the crime was committed was built for a storehouse, but it must at the time of the offense have been used for that purpose. *Jefferson v. State*, 14 South. 627, 100 Ala. 59.

A "storehouse" is a house in which things are stored; a building for the storing of grain, food, or goods of any kind; a magazine; a repository; a warehouse. *State v. Sprague*, 50 S. W. 901, 903, 149 Mo. 409.

The use of "storehouse" in a fire policy, in describing the insured building as a storehouse, is descriptive only, and not a warranty or representation that nothing shall be done in it but keeping a store or storehouse. *Franklin Fire Ins. Co. v. Brock*, 57 Pa. (7 P. F. Smith) 74.

The term "storehouse," in the statute making it criminal to play cards at any house for retailing spirituous liquors, storehouse, tavern, etc., is not used as a generic term, but to indicate one of the species of houses in which gaming is prohibited. The term is sufficient in itself in an indictment to designate the place of the commission of a crime, and it is not necessary to allege that the storehouse was a public place. *Sheppard v. State*, 1 Tex. App. 304, 306, 28 Am. Rep. 422.

"Storehouse," as used in an indictment for the breaking and entry of a building, is sufficient to identify the building as not be-

ing a dwelling house. *Rimes v. State*, 18 South. 114, 36 Fla. 90.

Under a statute naming the buildings that may be the subject of burglary, and using the words "shop," "warehouse," and "storehouse," there can be no doubt, that a store building or storehouse is included, and is made the subject of burglary. *McNutt v. State (Neb.)* 94 N. W. 143.

#### **Back room of office.**

The term "storehouse," in an act prohibiting gambling in storehouses, etc., includes the back room of a physician's office, in which he keeps his drugs and medicines. *Redditt v. State*, 17 Tex. 610, 612.

#### **As barn.**

See "Barn."

#### **Corncrib.**

"Storehouse" is a house in which things are stored; a building for the storing of grain, food stuffs, or goods of any kind. It is a wider term than "warehouse," and includes a storage for family, as well as for business, purposes, and is, as used in Cr. Code, § 48, broad enough to include a corncrib used for storing corn of the owner. *Metz v. State*, 65 N. W. 190, 191, 46 Neb. 547.

#### **As dwelling house.**

See "Dwelling—Dwelling House."

#### **Ginhouse.**

A storehouse is a building for keeping goods of any kind, especially provisions; a repository; a warehouse. Thus an indictment for breaking and entering a storehouse is not sustained by proof of breaking and entering a ginhouse, even though articles of different kind were sometimes stored in it, especially as the building generally known as the storehouse was at some distance. *Given v. State*, 23 So. 850, 851, 40 Fla. 200.

#### **Land included.**

A conveyance describing the property as "a storehouse," without the outhouse and office adjoining, held to include the lot on which the houses were situated. *Wise v. Wheeler*, 28 N. C. 196 (cited in *Indianapolis, D. & W. R. Co. v. First Nat. Bank*, 33 N. E. 679, 134 Ind. 127).

#### **Livery stable.**

A livery stable, in which bridles, buggies, and farming implements are kept, is a "storehouse" or "warehouse," within the meaning of the statute relating to burglary. *Webb v. Commonwealth (Ky.)* 35 S. W. 1038, 1039.

#### **Meat house**

"Storehouse," as used in Code 1887, §§ 3705, 3706 [1 Code Va. 1904, pp. 1981, 1982, §§

3705, 3706], forbidding the entering of a "storehouse" with intent to commit larceny, includes a meat house, wherein meat is stored and kept. *Benton v. Commonwealth*, 21 S. E. 495, 498, 91 Va. 782.

#### **As a public house.**

A "storehouse" in the country for selling dry goods is a public house, within the meaning of Code, § 3243, prohibiting gambling at a public house; and if the house consists of two rooms, the one in front being used as the dry goods store, and the other being a shed attached to it, and connecting with the store-room by a door, both rooms being under the control of the same person, it is *prima facie* an entirety. *Huffman v. State*, 29 Ala. 40, 42; *Brown v. State*, 27 Ala. 47, 50.

A "storehouse" at which goods are vend- ed is a public place, so long as it is kept open for that purpose, within the meaning of 1 Rev. Code, p. 563, c. 147, prohibiting the un- lawful playing of cards at a public place; but when the business of the day is ended, the storehouse *bona fide* shut up, and the doors closed, it ceases *prima facie* to be a public place, and in the absence of other proof is to be regarded, not as a public, but a private, place. When reopened, it again becomes a public place in point of fact and legal contemplation. Still it may be shown that, even when the doors are closed and all sales have ceased, the business of the day be- ing ended, it was in fact a public place. *Windsor v. Commonwealth*, 4 Leigh, 680, 681.

#### **Saloon.**

"Storehouse," as used in a statute defin- ing the crime of burglary as the breaking and entering in the nighttime of certain specified buildings, among which was designated a "storehouse," does not include saloon build- ings. *Harlan v. State*, 33 N. E. 1102, 134 Ind. 339.

#### **Shop synonymous.**

See "Shop."

#### **Storeroom.**

A small room, forming part of a cellar, in which a few jugs of wine are kept for family consumption, is not a "storehouse," within the meaning of Ky. St. § 1164, provid- ing a penalty for breaking a storehouse with intent to steal. *Mason v. Commonwealth*, 41 S. W. 305, 101 Ky. 397.

A storeroom is not necessarily either a storehouse or warehouse; so that an indict- ment charging that the prisoner broke into a storeroom is insufficient, under 74 Ohio Laws, p. 248, § 5, making it an offense to break into a storehouse. *Hagar v. State*, 35 Ohio St. 263, 270.

A room occupied as a news depot, in which papers, pamphlets, and the like are

kept for sale, communicating by a doorway with another room used as an outer hall or entrance to the building, is a "storehouse," within the meaning of the burglary act. *Bauer v. State*, 25 Ohio St. 70, 71.

#### **Warehouse.**

"Storehouse" includes a warehouse where goods are stored for the purpose of being sold, either in the warehouse itself or in a building near by in which trade is conducted; and there was no variance where the indict- ment charged larceny from a storehouse and the evidence showed it was from such a "warehouse." *Martin v. State*, 20 S. E. 271, 272, 95 Ga. 478.

A storehouse is a house in which things are stored; a building for the storing of grain, food stuffs, or goods of any kind; a magazine; a repository; a warehouse; a store. Where an indictment charges one with committing a burglary and larceny in a storehouse, and the evidence shows that it was a warehouse, there is no variance; the two terms being synonymous. *State v. Sprague*, 50 S. W. 901, 903, 149 Mo. 409.

### **STOREKEEPER.**

A "storekeeper," according to Webster, is a man who has care of a store; and ac- cording to Worcester he is one who takes care of a store. *Salomon v. Pioneer Co-op. Co.*, 21 Fla. 374, 384, 58 Am. Rep. 667.

The term "storekeeper" is indefinite. It may mean a wholesale merchant, or a petty dealer in toys and candies. It may imply a principal, or an agent or servant, or may be applied to one notoriously without capi- tal, and who lives by his wits, rather than by legitimate trade. In short, disconnected from all else, it can never indicate that the person who bears the designation is one who can safely be trusted with a loan. Yet one fraudulently representing himself as a storekeeper may be a false pretender, within the meaning of the statute punishing the obtaining of goods under false pre- tensions. *Higler v. People*, 6 N. W. 664, 665, 44 Mich. 299, 38 Am. Rep. 267.

### **STORM.**

A storm is wind blowing at the rate of 60 to 80 miles an hour. The Snap (U. S.) 24 Fed. 202, 293.

"Storm," as used in a policy insuring property against loss by fire or storm, has no legal sense or signification, and refers to the action of the elements. It is connected indissolubly with the idea of violent force, vehement action, or turbulent commotion and disturbance. Richardson defines the verb "to storm" as "to throw into commotion or tumult; to rave or rage; to move with vio-



lence, rage, or fury; to be or cause to be tempestuous." Johnson defines the noun "storm" as "a tempest; a commotion of the elements"—and the verb "to attack by open force; to rage." Walker says "storm" means "a tempest." Webster defines "storm" as "a violent wind; a tempest." "Tempest" is defined by Webster as "an extensive current of wind rushing with great velocity and violence; a storm of extreme violence." It means some preternatural action of the elements. A rain, a warm sound wind, and the water and ice freshet caused thereby, having nothing abnormal in their operation, or anything different from an ordinary elemental action, do not constitute a storm. Every rising of the water in the river is not necessarily a storm, or even a result of one. In the popular mind, "storm" is associated with the idea of unusual force, vehemence, violence, or disturbed action. *Stover v. Insurance Co. (Pa.)* 3 Phila. 38, 39.

### STORM TIDE LINE.

"Storm tide line," as used in a deed making the boundary to the seaward the storm tide line, cannot be taken as an absolute fixed boundary, but must be treated as relative, and as having relation to the condition of things as they are from time to time. *Camden & A. Land Co. v. Lippincott*, 45 N. J. Law (16 Vroom) 405, 415.

### STORY.

"Story" is in its etymology akin to "history," and is often defined as a statement, anything told, a falsehood, a lie, or a fib; but, when used in the statement of counsel as characterizing the account of the shooting given by prisoner, the implication that "story" was used in the sense that the account was false or fictitious will not be adopted, though counsel might have given an intonation implying a disbelief in the truth of the statement. *Carleton v. State*, 61 N. W. 699, 708, 43 Neb. 373.

#### Of building.

A description of a basement of a building as a "story" of a building is not inaccurate nor misleading. If the lower part of it was properly called a "basement," it was, according to the definition of lexicographers and the common understanding of the word, a story of a building. *Cleverly v. Moseley*, 19 N. E. 394, 395, 148 Mass. 280.

### STOVE WORKS.

"Stove works," as used in an indictment alleging that a person feloniously and burglariously broke and entered the stove works of a certain person with intent to steal, and did steal certain property, is not equivalent

to building, or a room or any part of a building, as used in Pen. Code, § 498, making it an offense to break and enter a building or room, or any part of a building, with intent to commit a crime therein. The words "stove works" do not necessarily imply a place inclosed by a fence. Still less do they imply of necessity a building. These words are used to mean all the grounds used by a manufacturer for the manufacture of stoves. They include the buildings, and also the grounds about the buildings, whether such grounds are fenced in or not. They are words of the most general meaning. *People v. Haight*, 7 N. Y. Supp. 89, 54 Hun, 8.

### STOWAWAY.

A stowaway is one who conceals himself on board a vessel about to leave port in order to obtain a free passage. *United States v. Sandrey* (U. S.) 48 Fed. 550, 551.

### STRADDLE.

The term "straddle," as applied to a stock option or privilege, means the double privilege of a "put" or "call," and secures to the holder the right to demand of the seller at a certain price within a certain time a certain number of shares of specified stock, or to require him to take at the same price within the same time the same shares of stock. The continuance of the option is fixed by the agreement. The value of a "straddle" depends upon the fluctuations of the stock selected. The wider the range of these fluctuations, whether up or down, the greater the amount which may be realized, and, of course, the longer the option continues, the greater the chance of such fluctuation during the period. *Harris v. Tumbridge*, 83 N. Y. 92, 95, 38 Am. Rep. 398.

"A 'straddle' is said to be a double privilege; in other words, a put and a call combined. In this instance it is, in plain language, an option possessed by one party either to demand from the other, or to sell and deliver to him, within 30 days from May 15th, 100 shares of stock at the rate of \$77.50 per share. An option has been pronounced valid in law when supported by a sufficient consideration. If the necessary and obvious meaning of the word 'straddle' is that the maker of it shall merely pay a difference, but not be bound to receive or deliver the stock, it is a gambling contract, and utterly illegal and void. If, however, such be not the unmistakable import, then whether or not it is a gambling contract will depend upon the actual intention of the parties. If they contemplated merely a payment of a difference, the straddle is illegal; but, if a delivery of stock, it is a valid contract. I cannot say; for I do not believe, that a

straddle always means, or that the parties to it always intend, that a difference only need be paid." *Story v. Salomon* (N. Y.) 6 Daly, 531, 538, 539.

## STRAIGHT.

Act Dec. 3, 1720, which divided the town of Watertown into two precincts by a certain described line, stating that such line was a straight line, is not to be construed as requiring an absolutely straight line, but one which is practically straight, or as straight as could be run under the circumstances. *Chenery v. Inhabitants of Waltham*, 62 Mass. (8 Cush.) 327, 333.

## STRAIGHT CUT.

The term "straight cut" designates that particular product of tobacco in which the plant has been so cut and treated at the time of cutting as to preserve the fibers long, even, straight, and parallel, when prepared for sale or use. The term, when applied to cigarettes, implies that they are made of straight cut tobacco, and is a term descriptive of the ingredients and characteristics of the article, which cannot be the subject of a trade-mark. *Ginter v. Kinney Tobacco Co.* (U. S.) 12 Fed. 782.

## STRAIGHT WHISKIES.

Straight whiskies are those produced directly from grain by process of distillation, without the use of any liquid save water, and are marketable when matured by age. *Block v. Lewis*, 5 Ohio S. & C. P. Dec. 370, 7 Ohio N. P. 543.

## STRAIT.

A body of water having a connection with the ocean at each end, and running between a long extent of land on two sides of it, such as Long Island Sound. *The Martha Anne* (U. S.) 16 Fed. Cas. 868.

## STRAND.

The word "strand" means the verge of the sea, or of any river. *Republica v. Le Caze* (Pa.) 1 Yeates, 55, 59.

"Strand" is synonymous with "shore," and is that portion of the land lying between ordinary high and low water mark. *Stillman v. Burfelnd*, 47 N. Y. Supp. 280, 281, 21 App. Div. 13 (citing 3 Kent, Comm. 431; *Town of East Hampton v. Kirk*, 68 N. Y. 459, 463; *Id.* [N. Y.] 6 Hun, 257; *Champlain & St. L. R. Railway Co. v. Valentine* [N. Y.] 19 Barb. 491; *Storer v. Freeman*, 6 Mass. 435, 4 Am. Dec. 155).

The word "strand," when used in reference to places anywhere in the vicinity

of the sea, or an arm of the sea, comprises the territory lying between high and low water mark, over which the tide ebbs and flows. *Doane v. Willcutt*, 71 Mass. (5 Gray) 328, 335, 66 Am. Dec. 369.

Webster says that "strand" is the shore or beach of the sea or ocean, or of great lakes. Other lexicographers say that "strand" is the sea beach. *Littlefield v. Littlefield*, 28 Me. (15 Shep.) 180, 184.

While in lexicons the word "strand" is defined to be the equivalent of "beach," which is a space on the shore between ordinary high and low water mark, it is well known that a strand on the ocean shore does not always continue to maintain its location within definite lines. High and low tide marks vary almost daily, and there is more or less erosion and increment on the shore. Where the word is used as a boundary in a deed, proof that the shore gained and lost by the action of the water authorized the admission of evidence of a practical location of the boundary by the parties in interest. *Bell v. Hayes*, 69 N. Y. Supp. 898, 901, 60 App. Div. 382.

## STRANDED—STRANDING.

See "Voluntary Stranding."

Stranding as peril of the set, see "Perils of the Sea."

The word "stranded" means run on ground. *Republica v. Le Caze* (Pa.) 1 Yeates, 55, 59.

Where a policy of insurance was on goods warranted free from general average, unless the ship were stranded, and during the voyage the ship was forced to take shelter in a harbor, and in entering it struck on an anchor, and, being brought to her moorings, was found leaky and in danger of sinking, and on that account was hauled higher up the harbor, where she took the ground and remained fast for half an hour, she was "stranded," within the meaning of the policy. *Barrow v. Bell*, 4 Barn. & C. 736.

The taking of the ground in a tide harbor in the ordinary way upon the ebbing of the tide, by a vessel, is not a "stranding," within the meaning of a policy of insurance making the insurance company liable for stranding, although in common language the vessel is on the strand. To constitute stranding, within such policy, the vessel must be on the strand under extraordinary circumstances or from extraneous cause. *Potter v. Suffolk Ins. Co.* (U. S.) 19 Fed. Cas. 1186, 1189.

The stranding of a ship, within the meaning of a marine policy insuring against stranding, etc., does not include the taking of the ground in tide harbor in the place where it is intended she should, resulting

in the bottom of the vessel striking against some hard substance, by which holes are made in the bottom of the vessel, resulting in damage to the cargo. *Kingsford v. Marshall*, 8 Bing. 458.

"Stranding," as used in a policy of marine insurance on a vessel, providing that the insurers are not liable for any derangement, breakage of the machinery, or bursting of the boilers, unless occasioned by stranding, is understood to be the striking of a vessel upon a rock, bank, reef, or the like. *Strong v. Sun Mut. Ins. Co.*, 31 N. Y. 103, 106, 88 Am. Dec. 242.

"Stranding," in its ordinary as well as legal meaning, is running upon the shore. *Lake v. Columbus Ins. Co.*, 13 Ohio, 48, 55, 42 Am. Dec. 183.

In speaking of the use of the word "stranded" in a marine policy, Mr. Justice Peckham of the United States Supreme Court says: "It is said that, if a ship touches and goes, she is not stranded (*McDougle v. Assurance*, 4 Camp. 282); but, if she touches and sticks, she is—that is, in places in which she, in the ordinary course of her navigation, is not suffered to touch. A distinction between what is regarded as a stranding and what is held not to be a stranding has been, in many cases, held to be a very narrow one." *The London Assurance v. Companhia de Moagens do Barreiro*, 17 Sup. Ct. 785, 788, 167 U. S. 149, 42 L. Ed. 113.

## STRANGER.

"Strangers," as used in the Laws of 1742, dividing the town and providing that land should be taxed in the town where the owner lived, but that land purchased by a stranger should be taxed in the town where it was situated, applies to those who were not then landowners in their town, but who became such by subsequent purchase. *Lamprey v. Batchelder*, 40 N. H. 522, 528.

The conclusive effect of judgments respecting the same cause of action and between the same parties rests upon the just and expedient axiom that it is for the interest of the community that a limit should be opposed to the continuance of litigation, and that the same cause of action should not be brought twice to a final determination. Parties, in that connection, include all who are directly interested in the subject-matter and who had a right to make defense, control the proceedings, examine and cross-examine witnesses, and appeal from the judgment. Persons not having those rights are regarded as "strangers" to the cause, but all who are directly interested in the suit, and have knowledge of its pendency, and who refuse or neglect to appear and avail themselves of those rights,

are equally concluded by the proceedings. So, where a suit was brought for injuries caused by an obstruction placed in a highway or in a sidewalk by the owner of the adjoining lot, such lot owner, if he has notice of the suit and fails to defend therein, is bound by the result thereof, and cannot contest the facts in an action brought against him by the city to recover the amount it may have been compelled to pay. *Robbins v. Chicago*, 71 U. S. (4 Wall.) 637, 672, 18 L. Ed. 427.

In its general legal signification the word "stranger" is opposed to the word "privy." Under 1 Rev. St. p. 744, § 3, providing that the attornment of a tenant to a stranger shall be absolutely void, and shall not in any wise affect the possession of his landlord, unless it be made, first, with the consent of the landlord, etc., one who acquires real estate pursuant to a tax sale is a stranger to the former owner, and an attornment made to such tax deed grantee is void as against the rights of such former owner. *O'Donnell v. McIntyre*, 118 N. Y. 156, 165, 23 N. E. 455, 456.

### As one not liable for the debt.

In *Arnold v. Green*, 23 N. E. 1, 116 N. Y. 566, it is said that the terms "stranger" and "volunteer," as used with reference to the subject of subrogation, mean one who in no event resulting from the existing state of affairs can become liable for the debt, and whose property is not charged for the payment thereof and cannot be sold therefor. The payment by one who is liable to be compelled to make it or lose his property will not be regarded as made by a stranger. When the person paying has an interest to protect, he is not a stranger. *Durante v. Eannaco*, 72 N. Y. Supp. 1048, 1051, 65 App. Div. 435.

In reference to the rule of subrogation, a "stranger" has been said to be, not necessarily one who has nothing to do with the transaction out of which the debt grew. Any one who is under no legal obligation or liability to pay the debt is a stranger, and, if he pays the debt, a mere volunteer. So that, where agents employed to invest money for a mortgagee, on failure of the mortgagor to pay the interest, remitted the amount of the interest coupons without the knowledge of the mortgagor or mortgagee, they were mere volunteers. *Bennett v. Chandler*, 64 N. E. 1052, 1055, 199 Ill. 97.

A "stranger," within the meaning of the rule that a mere stranger cannot, by paying a debt for which another is bound, become subrogated to the creditor's right in respect to a security, is not necessarily one who had nothing to do with the transaction out of which the debt grew. Any one, being under no legal obligation or liability to pay the debt, is a stranger, and, if he pays the debt,

he is a mere volunteer. *Mavity v. Stover* (Neb.) 94 N. W. 834, 836 (citing *Suppliger v. Garrels*, 20 Ill. App. [20 Bradw.] 629).

#### As one not a party.

"Strangers" are third persons generally; all persons in the world, except the parties. *Balfour v. Burnett*, 41 Pac. 1, 2, 28 Or. 72.

Code, § 2536, provides that goods taken on attachment may be replevied by defendant, or, in his absence, by a stranger. Held, that the word "stranger" meant merely a person not a party to the suit. *Kirk v. Morris*, 40 Ala. 225, 228.

"Stranger," as used in a rule that a deed can never be an escrow unless it is delivered to a stranger, to hold until the condition is performed, and then to be delivered to the grantee, is a person not a party to the deed. *Tyler v. Cate*, 45 Pac. 800, 802, 29 Or. 515 (citing *Gaston v. City of Portland*, 16 Or. 255, 19 Pac. 127).

Strangers to a suit are those who are not directly interested in the subject-matter in issue, and who have not a right to make a defense, control the proceedings, or appeal from the judgment. *United States v. Henderlong* (U. S.) 102 Fed. 2, 4.

### STRATAGEM.

Stratagem implies artifice, trickery, and deception. *Fortune v. Watkins*, 94 N. C. 304, 317.

A stratagem is an artifice, particularly in war; a plan or scheme for deceiving an enemy; a trick by which some advantage is intended to be obtained; an artifice. The fact that a woman, because of sleepiness, thought that a man who had sexual intercourse with her was her husband, did not show a stratagem. *Mooney v. State*, 15 S. W. 724, 29 Tex. App. 257 (citing *Webst. Dict.*).

"Stratagem," necessary to constitute rape by the use of some stratagem by which the woman is induced to believe that the offender is her husband, is some artifice or trick, intending to deceive the prosecutrix and make her believe that he is her husband at the time the act is committed, and by this means gains her consent to the copulation. *Payne v. State*, 38 Tex. Cr. R. 494, 498, 43 S. W. 515, 70 Am. St. Rep. 757.

### STRATEGY.

"Strategy" is a term ordinarily used in the operation of armies, conducted by a skillful commander, and implying tact and art in military maneuvering, and is not very appropriate to the transactions of civil life; but, as used by a jury in finding that the plaintiff employed "strategy in bringing about the agreement," meant acts and perhaps repre-

sentations not in themselves unlawful, but such as are common to persons entering into contract relations, each endeavoring to make the best terms for himself in the transaction. *Fortune v. Watkins*, 94 N. C. 304, 317.

### STRAW BAIL.

"Straw bail" means that bail that has no real estate, or where there is in fact no such man, and that he is not to be found. *People v. Bogart* (N. Y.) 3 Parker, Cr. R. 143, 163.

### STRAW HATS.

Hats made of straw, as used in 4 Stat. 25, fixing a duty on hats made of straw, chip, or grass, does not include hats made of palmetto leaf. *United States v. Goodwin* (U. S.) 25 Fed. Cas. 1362.

### STRAW LACES.

"Straw laces" is an article, known in trade and commerce, which is used for the manufacture of hats, bonnets, etc. *Rheimer v. Maxwell* (U. S.) 20 Fed. Cas. 630.

### STRAWSTACK.

A stack, of which the lower part consists of cole seeds and the upper part of wheat stubble, is not a "stack of straw," within St. 7 & 8 Geo. IV, c. 29, § 17, and therefore the burning of such stack is not a capital offense. *Rex v. Tottenham*, 7 Car. & P. 237.

A stack of stubble, called "haulm," was not a "stack of straw"; and proof of setting fire to the haulm would not support a conviction under an indictment for burning a "stack of straw." *Rex v. Reader*, 4 Car. & P. 245.

### STRAY.

A "stray" is an animal found in an unusual place for such an animal, or an animal that has roved for a certain time in a certain place, whose owner is unknown. *E. Imbeaux Co. v. Severt*, 9 La. Ann. 124, 125.

The law relating to "strays" does not apply to hogs left by some one unknown in the pens of a company engaged in the business of receiving and caring for live stock brought to market. The strays spoken of in such statute are those which are running at large. *Mill Creek Tp. v. Brighton Stockyards Co.*, 27 Ohio St. 435, 440.

"Stray" is used in Gen. St. c. 105, § 5, providing that no person shall take up any unbroken animal as a stray, unless the same

be found within his lawful inclosure, in the sense of wandering or roving, meaning to play free and unconfined, and does not mean cattle whose owner is unknown. *Wood v. Davis*, 12 Kan. 575, 577.

As used in Rev. St. tit. 59, § 5, providing that any stray beast in a suffering condition may be taken up and cared for, etc., means one that has left an inclosure and wanders at large without its owner and beyond his control. Whether an animal is a stray beast does not depend on the question whether the owner is known or not, but whether it is wandering out of the inclosure to which it was committed without and beyond the control of its owner, and roving about at its own will. *Sturges v. Raymond*, 27 Conn. 473, 477.

## STREAM.

See "Floatable Stream"; "Head of Stream"; "Natural Stream"; "Private River or Stream"; "Subterranean Streams"; "Surface Streams"; "Underground Stream."

"Streams of water" are divided into several distinct classes: (1) Arms of the sea, in which the tide ebbs and flows. These belong to the public. (2) Streams which are navigable for vessels, boats, lighters, and, it has also been held, for rafts. In these the people have the right of eminent domain for the purposes of navigation and commerce, and the riparian owner has also a qualified right to the bed of the stream and the water which flows over it, subordinate to the superior rights of the public. To this class may perhaps be added such streams as have been declared by statute to be public highways. (3) Streams which are so small, shallow, or rapid as "not to afford a passage for the king's people," as Lord Hale expresses it. Such streams as are not navigable for boats or vessels or rafts. These are altogether private property. *Munson v. Hungerford* (N. Y.) 6 Barb. 265, 270.

"Stream," as used in Laws 1850, p. 81, c. 72, relating to harbor masters in the harbor of New York, embraces all west of the East and North rivers lying within the limits of the city; and a vessel lying at a wharf is in the stream "as fully as a vessel lying in the center of the river." *Adams v. Farmer* (N. Y.) 1 E. D. Smith, 588, 590.

"Stream" means simply water; and hence authority to construct a bridge over a stream authorizes the construction of a bridge over water, though it is not running water. *Long v. Boone County*, 36 Iowa, 60, 64 (citing *Webst. Dict.*).

"Stream" means "a river, brook, or rivulet; anything in fact that is liquid and

flows in a line or course." It does not cease to be a stream because its course may be opposed by some obstruction, natural or artificial, which causes its water to be deepened or its flow diminished in velocity. *French v. Carhart*, 1 N. Y. (1 Comst.) 96, 107.

### As a boundary.

Whether a grant of land bounded by a street, highway, or running stream extends to the center of such street, highway, or stream, or is limited to the exterior line or margin of the same, depends upon the intent of the parties to the grant, as manifested by its terms; so that the question as to the true boundary is in all cases only the interpretation of the deed or grant. Learned judges have contended, and in some of the states it has been substantially held, that in such cases the question of boundary is rather to be determined by reasons of public policy than intent, determined by the ordinary rules of construction, although in no instance is it claimed that a grantor may not restrict his grant, so as to exclude the soil of the street, highway, or stream. The most that can be claimed by any one is that nothing short of the intention expressed in *ipsis* verbis to exclude the soil in such cases would exclude it. The rule, however, in this state is well settled that no particular words or form of expression is necessary to restrict the grant to the exterior line of the street or margin of the stream, and exclude the soil of each; but, while the presumption is in every case that the grantor does not intend to retain the fee of the soil within the line of the street or under the water, such presumption may be overcome by the use of any terms in describing the premises granted which clearly indicate an intent not to convey the soil of the street or stream. *White's Bank of Buffalo v. Nichols*, 64 N. Y. 65, 70.

The popular understanding of a description of land, describing one boundary as being upon the margin of the stream, or on the stream itself, would doubtless limit the grant to the land adjacent to the stream; but the legal construction of such words has by repeated adjudications been established otherwise, and held to fix the boundary to the center of the stream. *Varick v. Smith* (N. Y.) 9 Paige, 347, 551.

The use of the word "stream," in a boundary of land situated on a stream in which the tide ebbs and flows, and the boundary being described as on the stream, operates to pass the title to the center of the stream, if the grantor owns to the center of the stream. *City of Boston v. Richardson*, 95 Mass. (13 Allen) 146, 155.

The word "stream," in a deed describing the premises conveyed as bounded by a line beginning at a point on the bank of a stream, thence by courses and distances

around the tract to said stream, and down the stream as it winds and turns to the place of beginning, is to be construed to mean "bank of the stream," and not the center thereof, though the general rule is that a course described as running to the stream will carry the line to the center thereof. *Babcock v. Utter* (N. Y.) 1 Abb. Dec. 27, 40.

#### **Continuous flow.**

A stream or water course consists of bed, banks, and water, and to maintain the right to a water course it must be made to appear that the water necessarily flows in a certain direction and by regular channel, with banks or sides and having a substantial existence; but it need not be shown that the water flows continually, as it may be dry at times, and water percolating through the ground in no definite or visible channel is not a stream. *Miller v. Black Rock Springs Imp. Co.*, 40 S. E. 27, 30, 99 Va. 747.

A "stream of water" flowing over a man's land is a current of water flowing in one line or course between the banks or sides in a certain direction and by a regular channel, and there is a broad distinction between a stream and those occasional outbursts of water which in times of freshets fill up low, marshy places, and run over and inundate adjoining land. A stream need not be shown to flow continuously. It may be dry at times, but it must have a well-defined and substantial existence. *Armfield v. State*, 61 N. E. 693, 27 Ind. App. 488.

#### **Defined channel.**

A stream does not cease to be a water course, and become mere surface water, because at a certain point it spreads over a level meadow and flows for a distance without defined banks, before flowing again in a definite channel. *Calro, V. & C. Ry. Co. v. Brevoort* (U. S.) 62 Fed. 129, 133, 25 L. R. A. 527 (citing *Gould, Waters*, § 264).

#### **Ice included.**

A lease of land, including a stream the bed of which is owned by the lessor, passes the ice forming on such stream, and the lessee, and not the landlord, is entitled thereto. *Marsh v. McNider*, 55 N. W. 469, 88 Iowa, 390, 21 L. R. A. 333, 45 Am. St. Rep. 240.

#### **Inlet of sea.**

In its ordinary signification, "stream" implies a continuous current in one direction, and would hardly be understood to describe a creek or inlet in which the tide ebbs and flows twice in each day on the same level. *Murdock v. Stickney*, 62 Mass. (8 Cush.) 113, 117.

A "stream," as defined by *Bouvier*, is a current of water; a body of water having a continuous flow in one direction. As defined

in *Black's Law Dictionary*, it is a current of water; a body of flowing water. In its ordinary signification the word "stream" certainly seems to imply a body of running water and a continuous current, and an estuary or inlet of the ocean is not a "stream"; and an indictment under Pen. Code, § 588, for removing oysters from a private oyster bed in a stream, is not supported by proof showing that the accused persons took oysters from a bed situated between high-water mark and low-water mark upon a shore of an inlet of the sea. *Johnson v. State*, 40 S. E. 807, 808, 114 Ga. 790.

#### **Pond or lake distinguished.**

A body of water, about half a mile long and a quarter of a mile wide in the broadest part, fed by two streams, which has no current, and the bed of which is shaped like the bowl of a spoon, with a depth of 16 feet in places and a sluggish outlet 4 feet in depth, is a "pond" or "lake," as distinguished from a "stream" or "river." *Gouverneur v. National Ice Co.*, 11 N. Y. Supp. 87, 89, 57 Hun, 474.

The controlling distinction between a stream and a pond or lake is that in a stream the water has a natural motion, or a current, while in a pond or lake the water is, in its natural state, substantially at rest. This is so, independent of the size of the one or the other. *Trustees of Schools v. Schroll*, 12 N. E. 243, 246, 120 Ill. 509; *Hardin v. Jordan*, 11 Sup. Ct. 838, 839, 140 U. S. 371, 35 L. Ed. 428.

A "stream" is a course of running water, river, rivulet, or brook, and as used in *Priv. Laws 1851*, p. 61, authorizing a railroad to take and use any lands, streams, and materials belonging to the state for the location of depots and construction of bridges, etc., cannot be construed to include the waters of a great lake like Lake Michigan. *Illinois Cent. Ry. Co. v. City of Chicago*, 50 N. E. 1104, 1108, 173 Ill. 471, 53 L. R. A. 408.

## **STREET.**

See, also, "Road."

"Street" is a general term, including all urban ways which can be, and are generally, used for the ordinary purposes of travel. *Kalteyer v. Sullivan*, 46 S. W. 288, 290, 18 Tex. Civ. App. 488; *Duval County Com'rs v. City of Jacksonville*, 18 South. 339, 351, 36 Fla. 196, 29 L. R. A. 416; *State v. Moriarty*, 74 Ind. 103, 104.

Webster defines a street to be "a city road." *Mobile & O. R. Co. v. State*, 51 Miss. 137, 140.

A "street" is a way upon land, more properly a paved way, lined, or proposed to

be lined, by houses on each side. *United States v. Bain* (U. S.) 24 Fed. Cas. 940, 943.

The term "street" means any public way, and embraces a town way, and is not confined to a county way; and an indictment for the obstruction of a "common highway and public street" is sustained by proof of the obstruction of the town way. *State v. Beeman*, 35 Me. 242, 245.

A "street" is a road or public way in a city, town, or village, and, as used in an ordinance for the improvement of a street, indicates that it is not an ordinary public highway which was to be improved, but a highway within a town, etc. *Pittsburg, C., C. & St. L. Ry. Co. v. Hays*, 45 N. E. 675, 676, 17 Ind. App. 261.

Strictly, a "street" is a paved way or road; but the term is used for any way or road in a city or village. It is defined by Bouvier as "a road in a village or city." *Brace v. New York Cent. R. Co.*, 27 N. Y. 269, 271.

"Street," strictly defined, is a paved way or road. A highway or road is an open way or public passage. It is ground appropriated for travel, forming a connection between one city or town and another. *Hutson v. City of New York*, 7 N. Y. Super. Ct. (5 Sandf.) 289, 312.

In common parlance, the word "streets" is supposed to relate entirely to the avenues and thoroughfares of cities and villages, and not to roads and highways outside of municipal corporations; and it would be placing a very liberal construction on this word to hold that it meant a highway or a road, within the meaning of the Constitution, when it is not named or included within its express terms. In *re Woolsey*, 95 N. Y. 135, 138.

"Streets and alleys" ordinarily relate exclusively to the ways or thoroughfares of towns or cities. They are laid out and dedicated to public use, and especially for the use and convenience of the property holders of the towns or cities, by the proprietor thereof, or laid out and established for the same purposes by the corporation authorities. While every street is a highway, every highway is not a street. *Debolt v. Carter*, 31 Ind. 355, 367.

The term "street or other public place" naturally includes the highway outside the compact part of a town. Such a highway is a public place, in the sense that a street is one. *State v. McConnell*, 47 Atl. 267, 268, 70 N. H. 294.

The use of the words "street" and "alley," in exclusion of the more general term "highway," in Rev. St. c. 113, § 9, which enacts that any person found drunk in any street, alley, or other place shall be punished

therefor, indicates that the public road of the country was not intended, but only the avenues of the compact part of the town. *State v. Stevens*, 36 N. H. 59, 63.

"Street" is ordinarily defined as the means of affording passage, transportation, light, ventilation, and access to the particular dwellings abutting upon it. The right of user is not limited to the surface, but extends to the soil beneath the surface. *Johnston v. City of Charleston*, 3 S. O. (3 Rich.) 232, 240, 16 Am. Rep. 721.

In the construction of statutes the word "highway," "road," or "street" may include any road laid out by the authority of the United States, or of this state, or of any town or county of this state, and all bridges upon the same. *Hurd's Rev. St. Ill.* 1901, p. 1720, c. 131, § 1, subd. 16.

The term "street," for the purposes of the provisions relating to betterments in cities, shall include highways, town ways, footways, private ways, courts, lanes, alleys, and passageways. *Rev. Laws Mass.* 1902, p. 524, c. 50, § 26.

"Street," as used in Code, § 464, which provides that municipal corporations shall have the power to authorize or forbid the location and laying down of tracks for railways and street railways on all streets, alleys, and public places, but no railway track can be thus located and laid down until after the injury to the property abutting upon the street, alley, or public place upon which such railway track is proposed to be located and laid down has been ascertained and located, etc., means only so much of the street as the company occupies with its track.—*Morgan v. Des Moines & St. L. Ry. Co.*, 21 N. W. 96, 98, 64 Iowa, 589, 52 Am. Rep. 462.

The word "street," in a statute authorizing the construction of street passenger railways, describes the character of the company, and not the highway to be used, so that under such act an electric passenger railway can be built on a public road in a township. *Pennsylvania R. Co. v. Montgomery County Pass. Ry. Co.*, 9 Montg. Co. Law Rep'r, 202, 203.

#### Dedication and acceptance required.

A city charter, extending the limits of the city and providing that the land and improvements thereon situate should not be taxed for municipal purposes until a street should be laid out and opened through the same, does not mean a street which has been merely dedicated, but one the dedication of which has been accepted according to law. *Valentine v. City of Hagerstown*, 38 Atl. 931, 932, 86 Md. 486.

To constitute a street, it must appear that the street in controversy is a public way, used by the public for street purposes

and accepted by the city authorities for public use; and the acceptance may be shown by proof of long-continued use as a public way, or by evidence that the city authorities have by its workmen or laborers made repairs in its corporate capacity on the alleged street for the purpose of improving it as a street. *City of Rock Island v. Starkey*, 59 N. E. 971, 973, 189 Ill. 515.

"Streets," as used in Pub. Laws, c. 807, authorizing the construction of sewers only in streets, means the public streets, which have become such either by layout or by dedication and expediency. *Bishop v. Tripp*, 8 Atl. 692, 693, 15 R. I. 466.

"Street," in a town or city, signifies a public highway. No particular form of ceremony is necessary in a dedication of land to the use of the public as a street. In *re Penny Pot Landing*, 16 Pa. (4 Harris) 79, 89.

#### **Alley.**

See, also, "Alley."

"Street," as used in Pub. Acts 1887, pp. 345, 346, No. 264, requiring municipal corporations to keep in repair all public highways, streets, bridges, sidewalks, crosswalks, and culverts, and abrogating the common-law liability for injuries sustained thereon, cannot be construed to include alleys which have become public by user. An alley is different from a street. *Face v. City of Ionia*, 51 N. W. 184, 186, 90 Mich. 104.

#### **Avenue or boulevard.**

Especially in a park act, and where the context does not show a more restricted meaning, the term "street" is broad enough to include a boulevard. *West Chicago Park Com'rs v. Farber*, 49 N. E. 427, 433, 171 Ill. 146.

A boulevard is not technically a street, avenue, or highway, though a carriageway over it is a chief feature. *People v. Green* (N. Y.) 52 How. Prac. 440, 445.

The word "street," as used in the chapter relating to special taxes in cities, includes "boulevard" and "avenue." *Rev. St. Utah* 1898, § 261.

#### **As a boundary.**

Whether a grant of land bounded by a street, highway, or running stream extends to the center of such street, highway, or stream, or is limited to the exterior line or margin of the same, depends upon the intent of the parties to the grant, as manifested by its terms; so that the question as to the true boundary is in all cases only the interpretation of the deed or grant. Learned judges have contended, and in some of the states it has been substantially held, that in such cases the question of boundary is rather to

be determined by reasons of public policy than intent, determined by the ordinary rules of construction, although in no instance is it claimed that a grantor may not restrict his grant, so as to exclude the soil of the street, highway, or stream. The most that can be claimed by any one is that nothing short of the intention, expressed in ipsissimis verbis, to exclude the soil in such cases, would exclude it. The rule, however, in this state is well settled that no particular words or form of expression is necessary to restrict the grant to the exterior line of the street or margin of the stream, and exclude the soil of each; but, while the presumption is in every case that the grantor does not intend to retain the fee of the soil within the line of the street or under the water, such presumption may be overcome by the use of any terms, in describing the premises granted, which clearly indicate an intent not to convey the soil of the street or stream. *White's Bank of Buffalo v. Nichols*, 64 N. Y. 65, 70.

In *Kimball v. City of Kenosha*, 4 Wis. 321, it was decided that the grantee of a lot bounded by a street or streets in a village, laid out, platted, and recorded in conformity to the statute, took to the center of the street on which the lot abutted, subject to public easement. *Mariner v. Schulte*, 13 Wis. 692, 705.

#### **Bridge.**

Laws 1872, p. 215, § 24, providing that no new street on newly laid out or newly mapped lands shall be adopted, laid out, opened, and worked, or graded, in the city by the common council, unless the same shall be 60 feet wide, cannot be construed to include bridges, but means a street strictly so called, because it speaks of opening, working, laying out, and grading, expressions not applied to bridges. *Langlois v. City of Cohoes*, 11 N. Y. Supp. 908, 910, 58 Hun. 226.

The term "street" includes a bridge, across a river or stream, which forms a continuation of the same. *Floyd County v. Rome St. R. Co.*, 77 Ga. 614, 618, 3 S. E. 3.

A street is only an approved public way through a town or city, and whether the way rests immediately upon the solid ground, or is supported above it, like a bridge, it may still be called a "street." No doubt the Legislature may use the terms "street," "road," and "highway" in a sense which excludes bridges in their route; but since, in the act of 1874, the power to change the grades of streets and highways was evidently conferred, in order that travel thereon might pass over or under intersecting railroads, the Legislature must have intended to include bridges as a part of the streets and highways at their new grades. *Read v.*



City of Camden, 54 N. J. Law, 347, 349, 373, 24 Atl. 549, 550.

The words "street or highway," in Act May 14, 1889 (P. L. 211), authorizing the formation of companies for the purpose of constructing and operating street railways on "any street or highway," include the bridges connected with and constituting part of such streets and highways. *Pittsburg & W. E. Pass. Ry. v. Point Bridge Co.*, 30 Atl. 511, 512, 165 Pa. 37, 26 L. R. A. 323, 512.

#### Canal.

The term "street," as used in a statute prescribing regulations for railroads crossing streets, will include a canal. *Lehigh Valley R. Co. v. Dover & R. R. Co.*, 43 N. J. Law (14 Vroom) 528.

#### Crosswalk included.

A street includes a crosswalk, and therefore a duty to keep a street in repair includes the duty of keeping a crosswalk in repair. *Hines v. City of Lockport (N. Y.)* 60 Barb. 378, 381.

#### Country highway.

Pub. St. c. 264, § 2, provides that no person shall address any offensive, derisive, or annoying words to any other person who is lawfully "in any street or other public place," etc. Held, that as the purpose of the statute was to preserve the public peace, and as a breach of the peace would be as likely provoked whether third persons were present or not, such words addressed to one on a public highway constituted the offense, though such highway was not a city street. *State v. McConnell*, 47 Atl. 267, 268, 70 N. H. 294.

#### Cul de sac.

"Street," as the term is used in the law of streets and highways, includes a mere cul de sac; that is, a street open at one end only. True, in *Holdane v. Village of Cold Spring (N. Y.)* 23 Barb. 123, two of the three judges held that such a street could not be a highway. They based their decision upon what they supposed to be the common law. In this they were mistaken. It has been laid down by Lord Kenyon in *Rugby Charity v. Merryweather*, 11 East, 376, note, that a mere cul de sac might be a highway; that otherwise such place would be traps to catch trespassers; and in *Bateman v. Bluck*, 14 Eng. Law & Eq. 69, the question was fully considered, and the court held that it was no objection to a highway that it was a mere cul de sac, and not a thoroughfare; and in *People v. Kingman*, 24 N. Y. 559, the Court of Appeals very pointedly condemned the decision in *Holdane v. Village of Cold Spring (N. Y.)* 23 Barb. 123, and held that upon principle, as well as authority, it is no objection to the highway or public street that it is a cul de sac, and that public ways with an out-

let at one end may and often do exist. *Bartlett v. City of Bangor*, 67 Me. 460, 467.

#### De facto public way.

Where a statute imposed a penalty on any person who should smoke, or have in his possession any lighted pipe or cigar, in any street, lane, or passageway, it was held that the terms "street," "lane" and "passageway" include any way which was actually open and used for the ordinary purposes of an open way. *Commonwealth v. Thompson*, 53 Mass. (12 Metc.) 231, 232.

#### Gutter ways included.

"Gutter ways," properly speaking, constitute a part of the roadway of a street; and hence there is no occasion to distinguish them in the passage of a resolution for the paving of a street, unless the intention be that they are to be constructed differently from the rest of the streets. *City St. Imp. Co. v. Taylor*, 71 Pac. 446, 138 Cal. 364.

#### As equivalent to highway or road.

See "Highway"; "Road."

#### Levee distinguished.

See "Levee."

#### Park distinguished.

A street is a place of passage, while a park is a place of rest or recreation; and hence places which have become public parks, in the strictest sense of the term, and are to be maintained as such, cannot be said to be in any proper sense parts of a street. Streets and parks, while they are both devoted to the uses of the public, are set apart for widely different purposes. *Bennett v. Seibert*, 35 N. E. 35, 38, 10 Ind. App. 369.

#### Parking included.

In the front of a continuous line of houses was a paved public footway 15 feet wide, then a space 33 feet wide, then a public carriageway 50 feet wide, then an intermediate space 58 feet wide, then a paved public way 10 or 12 feet wide, immediately in front of another continuous line of houses. The intermediate space had always been used by the owners of the houses opposite same, having erected their own permanent structures. Held, that such spaces were not a part of the "street," within the meaning of the statute permitting the vestry to remove obstructions from the street. *Le Neve v. Hamlet of Mile End Old Town*, 8 Bl. & Bl. 1054, 1063.

#### Private way.

"Street" is commonly used in the statutes to designate a public way, and as used in Pub. St. c. 112, § 169, a penal statute relating to the obstruction of a street by a railway company, does not include the ob-

struction of a private way. *Commonwealth v. Boston, B. & G. R. Co.*, 135 Mass. 550, 551.

#### Public pier.

A public pier in the city of New York is part and parcel of its public streets, and the public have the right to enter upon such a pier in the same manner as they have a right to enter upon and pass over the public streets of the city. *Gluck v. Ridgewood Ice Co.*, 9 N. Y. Supp. 254, 56 Hun, 642.

#### As public way.

The primary purpose for which a street is laid out and maintained is for a highway—a place common to all for passing and re-passing on foot and in vehicles, at their pleasure or as their needs may require. *State v. Towers*, 42 Atl. 1083, 1086, 71 Conn. 657; *Smith v. McDowell*, 35 N. E. 141, 143, 148 Ill. 51, 22 L. R. A. 393; *City of Denver v. Clements*, 3 Colo. 472; *Ward v. Farwell*, 6 Colo. 66, 72; *City of Quincy v. Jones*, 76 Ill. 231, 244, 20 Am. Rep. 243; *Heselton v. Harmon*, 14 Atl. 286, 287, 80 Me. 326; *Dorman v. City Council of Lewiston*, 17 Atl. 316, 817, 81 Me. 411.

A street is a road or public way in a city, town, or village. It is a generic term, and includes all urban ways, which can be and are generally used for ordinary purposes of travel. It is, in the strictest sense, a highway free to all, and maintained, not for private gain, but public benefit (*Elliott, Roads and Streets*, p. 12), and will be included in the generic term of "highway." *Sachs v. City of Sioux City*, 80 N. W. 336, 337, 109 Iowa, 224.

A street is a public thoroughfare or highway, established for the accommodation of the public generally in passing from place to place, and for such other incidental uses as are ordinarily made of public streets, such as laying drains, sewers, gas and water pipes, and the like. *Theobald v. Louisville, N. O. & T. Ry. Co.*, 66 Miss. 279, 285, 6 South. 230, 4 L. R. A. 735, 14 Am. St. Rep. 564.

A street is a public highway or thoroughfare in a city or village, and is embraced in the term "highway" as used in Railroad and Warehouse Act, §§ 77, 78, providing that railroad corporations shall not obstruct public highways by trains or cars, except to receive or discharge passengers or to take fuel or water; for the term "highway," as used in these sections, includes all kinds of public ways. *Ohio, I. & W. Ry. Co. v. People*, 39 Ill. App. 473, 474.

A street is a public thoroughfare or highway in a city or village. *Black, Law Dict. tit. "Street."* A street is something more than a highway; for, besides its use as a highway for travel, it may be used for the accommodation of drains, sewers, aqueducts, water and gas pipes, and for other purposes

conductive to the general police, sanitary, and business interests of a city. *Bouv. Law Dict.* It is a public highway of a city or village, over which all the citizens of the land have a right to pass and repass at pleasure. *State v. Mariarty*, 74 Ind. 104; *Perrin v. New York Cent. R. Co.*, 36 N. Y. 126; *Kelsey v. King (N. Y.)*, 33 How. Prac. 43; *City of Quincy v. Jones*, 76 Ill. 244, 20 Am. Rep. 243. When plaintiff in its complaint averred the passage of a resolution to pave and curb New High street in a certain city, it was as comprehensive as the definition of the term "street," and was tantamount to an averment that it was an open public street in such city. *Bituminous Lime Rock Paving & Improvement Co. v. Fulton (Cal.)* 33 Pac. 1117, 1118.

A street is a public road or way in a city, village, or town; so that it is not necessary to allege that injuries sustained on the street were sustained on a public street. *City of Ottawa v. McCreery*, 61 Pac. 986, 987, 10 Kan. App. 443.

In *Koch v. North Ave. Ry. Co.*, 75 Md. 229, 23 Atl. 463, 15 L. R. A. 377, it was held that a street is a way set apart for public travel, and that new and improved motive power, not inconsistent with the uses and purposes for which it was opened, could be employed. *Offutt v. Montgomery County*, 50 Atl. 419, 420, 94 Md. 115.

*Bouvier* defines a "street" as "a public thoroughfare or highway in a city or village." The primary and fundamental purpose of a street is to accommodate the public travel, and to afford citizens and strangers an opportunity to pass and repass on foot or in vehicles, with such movable property as they may have occasion to transport; and every man has the right to use thereon a conveyance of his own at will, subject to such proper regulations as may be prescribed by authority. The easement for public travel is not to be limited to the particular modes of travel in use at the time the easement was acquired, but it extends to and includes all such new and improved methods of travel, the utility and general convenience of which may be afterwards discovered or developed, as are in aid of the identical use for which the street was acquired. The construction and operation of an ordinary railroad in a public street is a new use of the street, and therefore an additional burden on the soil. *Carl v. Stillwater St. Ry. & Transfer Co.*, 10 N. W. 205, 28 Minn. 373, 41 Am. Rep. 290.

The doctrine of dedication has its origin in public convenience. Public streets are essential for the accommodation of town or city communities, and a proprietor, platting his lands for town or city purposes, must be presumed to intend what is essential for its proper enjoyment in this respect. The term "street," used upon a map of a town or city,

imports a public way for the free passage of its trade and commerce. Such is its natural and usual signification, and it is inconceivable, having reference to the ordinary course of business, that a party so surveying and mapping his lands, without any express reservation, should intend that the streets thereon designated as such should be regarded as mere private ways, for the use only of those purchasing. The effect of the levy and collection of taxes on land platted as a street does not estop the city to assert the dedication. *City of Denver v. Clements*, 3 Colo. 484-486.

A street is a public highway, and hence the obstruction thereof is a misdemeanor, under Rev. St. § 1904, making it an offense to obstruct a highway. *Byber v. State*, 94 Ind. 443, 446, 48 Am. Rep. 175.

#### **Railroad distinguished.**

A street or road is a public highway in a much broader sense than a railroad. It is laid out and opened by the public authorities for the general use of the public, built and kept in repair at public expense, and all persons have the right of free access thereto, with the right to travel thereon. To obstruct it is made a criminal offense. By necessity, one who owns property abutting on or locates his buildings adjacent to a street or road enjoys, not alone the right of access thereto with the right to travel thereon, but in addition thereto the light, air, and view which come to his property over the same. To deprive him of such right would be to destroy the thing itself out of which the right grows. Therefore of necessity the right exists. A railroad company, when invested with the fee title, except in the discharge of its duties as a common carrier, is the owner of and entitled to the exclusive use, possession, and control of its right of way, the same as a private person, and holds and owns its property disincumbered of any right therein of its abutting or adjoining neighbors as fully and completely as does the individual owner of property. The public do not have the right of access to its right of way, except at designated places, and abutting owners do not build adjacent to its right of way with a view of access thereto and the enjoyment of light, air, and view therefrom. *Kotz v. Illinois Cent. Ry. Co.*, 59 N. E. 240, 241, 188 Ill. 578.

#### **Sidewalk included.**

The word "street" includes a sidewalk. *Town of Rosedale v. Ferguson*, 30 N. E. 156-157, 3 Ind. App. 596.

A street includes the whole width of a public way. It is customary in a city to set apart a portion of it for foot passengers, but there is no rule of law absolutely requiring this. *Breveoort v. City of Detroit*, 24 Mich. 822, 825.

A street is a highway in a city or town, used by the public for the purposes of travel, either by means of vehicles or on foot; the portion used by vehicles and that used by pedestrians being distinct and separate. As used in the city charter of Denver, giving the board of public works management and control of the streets for certain purposes, the street includes the part used for sidewalk. *City of Denver v. Hayden*, 56 Pac. 201, 204, 13 Colo. App. 36.

The word "street," as it is generally used, includes the roadway, the gutters, and the sidewalks, though it is no doubt often used in a more restricted sense, so as to include only the roadway. *Knapp, Stout & Co. Company v. St. Louis Transfer Ry. Co.*, 28 S. W. 627, 629, 126 Mo. 26; *In re Burmeister*, 76 N. Y. 174, 181, 56 How. Prac. 416, 426; *City of Little Rock v. Fitzgerald*, 28 S. W. 32, 33, 59 Ark. 494, 28 L. R. A. 496 (citing *Elliott, Roads & S. p. 17*).

"Street," as used in Ord. 1870, p. 810, making it unlawful for the department of highways to enter into contracts for the repairing of any street, but requiring that all repairing of the streets shall be done under their supervision by the supervisors of the district, means that part of the cartway between the curbs, and does not include that used for footway or sidewalk. *City of Philadelphia v. Lea (Pa.)* 9 Phila. 106, 109, 30 Leg. Int. 52.

Strictly speaking, a street is a paved way or road; but as commonly understood it means a public highway in a town, between houses or lots, for travel of all persons on foot, on horseback, or in carriages. The term ordinarily includes both the sidewalk and the roadway. *Heiple v. City of East Portland*, 8 Pac. 907, 909, 13 Or. 97.

A street of a city includes the sidewalks, and any obstruction of the sidewalk is therefore an obstruction of the street. *Marini v. Graham*, 7 Pac. 442, 443, 67 Cal. 130.

The word "street" embraces sidewalks, and the statute requiring compensation for damages resulting from a change of grade applies to changes in the grade of a sidewalk. It would be a perversion of the language of the statute to hold that it applies only where the grade of the part of the street used for passage by horses and vehicles is changed. Such a construction would defeat the purposes of the statute. It is too well settled to admit of debate that the term "street," in its ordinary acceptation, includes sidewalks, and that it is always given that meaning, unless the language with which it is associated changes or restricts its signification. *City of Kokomo v. Mahan*, 100 Ind. 242, 243.

"Streets," as used in Act April 27. 1869, providing for improvements of streets upon

petition, in its ordinary acceptation, includes sidewalks, and it is always given that meaning unless the language with which it is associated changes or restricts its signification. *Wiles v. Hoss*, 16 N. E. 800, 804, 114 Ind. 371, *Dooley v. Town of Sullivan*, 14 N. E. 566, 112 Ind. 451, 2 Am. St. Rep. 209.

A public street is a public highway, and a sidewalk is a part of the street. Such highways belong, from side to side and from end to end, to the public, and there is no such thing as a rightful, private, permanent use of a public highway. If one person can permanently use the highway for his private business purposes, so may all. Once the right is granted, there can be no distinction made, and no line drawn. All persons may build their shops and exhibit and sell their wares within the boundaries of a public highway. There is no right in any person to permanently appropriate to private use any part of a public street or alley. The court held that where the defendant was occupying and maintaining, on a sidewalk, a building of a permanent nature, of the length of 23 feet, and of the width of 3 feet 11 inches, and of the height of 7 feet, the sidewalk being 15 feet wide, except where said building was situated, and there reduced by such building to the width of 11 feet, he was maintaining a public nuisance. *State v. Berdett*, 73 Ind. 185, 188, 194, 38 Am. Rep. 117.

The word "street" is a generic one, and embraces sidewalks. Under an authority to improve streets, a municipal corporation may improve sidewalks. *Taber v. Grafmiller*, 9 N. E. 721, 722, 109 Ind. 206.

"Street," as used in Act 1847, giving cities the power to grade, pave, or macadamize any public street, and to make regulations concerning the deposit of lumber, building material, or other articles on any of the footways, sidewalks, or other portions of the streets or alleys, includes the whole of the land laid out for public use as a highway. *McDevitt v. People's Natural Gas Co.*, 28 Atl. 948, 952, 160 Pa. 367.

"Street" includes a sidewalk, and the city's authority over the street extends over the sidewalk as a part of the street. *City of Frankfort v. Coleman*, 49 N. E. 474, 475, 19 Ind. App. 368, 65 Am. St. Rep. 412.

"Street" is sometimes employed to denote merely that part of the street which is devoted to carriage travel. *Dickinson v. City Council of Worcester*, 138 Mass. 553, 562.

"Street" is generally understood, as used in contracts for grading of streets, to mean the traveled way between sidewalks. *Town of Elma v. Carney*, 37 Pac. 707, 708, 9 Wash. 466.

"Streets," as used in Laws 1866, c. 220, § 54, providing that, for the purpose of providing the means of sustaining the several

village "departments and defraying the expenses of the corporation, the board of trustees are authorized to levy and collect an annual tax in amounts and for the purposes as follows: (1) Not exceeding \$7,500 for the support of roads, bridges, culverts, streets, lanes, and alleys within the village"—is used in its broad sense, and includes, not only the roadway for teams, but sidewalks for pedestrians. *In re Burmeister*, 76 N. Y. 174. The word "streets" should be held to mean the entire space between the outer line of the streets, including the sidewalks, and the money authorized to be raised under that section could be used as well for the repair of the sidewalks as of the roadbed in the center of the streets. *Pomfrey v. Village of Saratoga Springs*, 11 N. E. 43, 46, 104 N. Y. 459.

In an action against a city to recover damages for an injury alleged to have been occasioned to the plaintiff by a defective sidewalk, the court said: "The first question that arises in this case, as counsel have argued it, is, what should be and are known and considered as 'streets' of a city? In appropriating a tract of land or lot of ground for the purpose of a city or town or village, the owner first marks out the streets, specifying their width, and usually bestowing upon each street a name. These streets, of the designated width, are dedicated to the public use. Lots abutting on the streets are measured and marked on the plat by numbers usually, the town receives a name, the plat is recorded, and in due time municipal authority is organized and in operation over it. No recorded plat of any town or city can be found wherein sidewalks are established as adjuncts to the public streets, nor are they so established. The town is incorporated, with its streets and alleys, as the case may be, of a certain width, over which the municipal authorities exercise supreme control. The establishment of sidewalks is the act of the authorities; they by ordinance requiring along certain streets, on both sides, a certain width to be left, to be used as sidewalks for pedestrians. Vehicles drawn by four-footed animals are prohibited from the use of this space; but it is no less a part of the street as originally established, and therefore, in a grant by the Legislature of control over the streets of a city to the city authorities, control over the sidewalk passes to them, they being a part of the street. The charter of the city of Bloomington, giving control over the streets to the authorities of that city, also imposed upon them the duty of keeping them in repair; and, as sidewalks are a part of the streets, a like duty is imposed to keep them in repair." *City of Bloomington v. Bay*, 42 Ill. 503, 506, 507.

By authoritative definitions, as well as by common usage, the term "street" applies to the whole public thoroughfare, including sidewalks; the latter constituting parts of

the street reserved for pedestrians. The term, however, may be employed to designate the way between the sidewalks; and it should be understood, for a given case may be dependent on the connection in which it is used. *City Council of Montgomery v. Foster*, 32 South. 610, 611, 133 Ala. 587.

#### **As referring to surface of street.**

"Streets," as used in a city charter empowering the common council to give a permit to railroad companies to lay their tracks in, under, and across the streets of the city, means the surface of the streets as they exist. *Reining v. New York, L. & W. R. Co.*, 13 N. Y. Supp. 238, 240.

#### **Turnpike or toll road.**

"Street," as used in *Paterson City Charter* 1852, § 5, authorizing the council to take up and vacate "any of the streets or highways of said city, and to relay same," does not apply to a road owned by a turnpike company. *Quinn v. City of Paterson*, 27 N. J. Law (3 Dutch.) 35, 42.

As used in Act April 1, 1870, authorizing the city of Allegheny to lay out, open, widen, and grade streets, the word "streets" does not include a chartered toll road within the city. *Wilson v. Allegheny City*, 79 Pa. (29 P. F. Smith) 272, 276.

#### **Water way.**

A street is a public highway in a town between houses or lots, for travel of all persons on foot or on horseback or in carriages. It is a way on land, and hence it can be laid out, opened, graded, paved, macadamized, curbed, ditched, and drained. In no sense can it be said that a street applies to a water way in a lake running between water lots 1,200 feet out in the bay. *Reed v. City of Erie*, 79 Pa. (29 P. F. Smith) 346, 352.

#### **Determined by use.**

The mere use by the public does not constitute a way a street or highway, so as to cast the burden of keeping it in repair on the public authorities. *Dowend v. Kansas City*, 56 S. W. 902, 905, 156 Mo. 60, 51 L. R. A. 170.

An unfinished road, containing inhabited houses along part of it, and communicating at one end only with another road, containing houses placed singly at long intervals, the soil of which road was private property and had not been dedicated, was not a street, within the meaning of a lease which fixed the meaning of that word, and the vestry of the parish might refuse to light same. *Reg. v. Vestry of St. Mary Islington, El., Bl. & El.* 743, 745.

A highway within the corporate limits of a city, designated as a street, used as such for more than 20 years, having a well-defined roadway and sidewalk, and water main,

lamps, and sewers, paid for by the city, which has been improved by the city, and which has 100 or more residents thereon, is a "street," for whose defective condition the city will be liable to persons injured. *McCormick v. City of Amsterdam*, 18 N. Y. Supp. 272, 273, 63 Hun. 632.

#### **STREET CAR.**

As carriage, see "Carriage."

As vehicle, see "Vehicle."

#### **STREET COMMISSIONER.**

By the term "commissioner of streets and highways," in *Nashua City Charter*, § 22, *Street Commissioner Act* 1878, c. 165, § 11, and *Street Commissioner Act* 1889, c. 248, is meant an officer charged with powers and duties of highway surveyor, except as enlarged by the greater necessities of a larger municipality. The office existed in England before the settlement of this state. He is given authority to require each person on his list, upon notice, to work out his tax; to allow him for his labor, and to levy his tax by distress, if the taxpayer does not attend to labor; to work out a portion of his list in another district, when necessary; to purchase materials for repairs at the expense of the town; and to remove gravel and other materials from one part of his district to another for purpose of repairs. *Gen. Laws*, c. 72, §§ 7-9, 11, 13, 14, 16, 17. *Eaton v. Burke*, 66 N. H. 306, 309, 22 Atl. 452, 453.

#### **STREET CROSSING.**

A crossing is the intersection of two streets, and from the nature of the term can have no property fronting upon it. *City St. Imp. Co. v. Laird*, 70 Pac. 916, 917, 138 Cal. 27.

An ordinance requiring a bell to be rung by a street car 25 feet from any "street crossing" should be held to include the junction of two streets, though one of them terminates at that point. *Schneider v. Market St. Ry. Co.*, 66 Pac. 734, 736, 134 Cal. 482.

#### **STREET IMPROVEMENT.**

"Street improvement" implies special benefit to the abutting property after the improvement is made. It is supposed to enhance its market value, and, where the property itself is improved, as a rule it enhances its value for use. *Walsh v. Sims*, 62 N. E. 120, 121, 65 Ohio St. 211.

"Improvement," as used with respect to streets and sidewalks in a general sense, will include any repairs upon a street or a sidewalk; but as used in a city charter, authorizing the city to improve the highways and providing that it shall not be liable for fail-

ure to exercise such power, "improve" refers to the betterment of streets and sidewalks, where they have been already established and put in proper condition, and not to such repairs and improvements as are necessary to make and keep them reasonably safe for travel. *City of Birmingham v. Starr*, 20 South. 424, 427, 112 Ala. 98.

The statutes authorizing assessments for local "improvements," etc., have reference to the specific thing of definite location which is done or added to the street, whereby it is improved. The term is not to be applied indiscriminately to any part of the street, because it may have been improved, in the sense of having been benefited by a change or addition made elsewhere on the street. *City of Cincinnati v. Butsche*, 40 N. E. 21, 24, 52 Ohio St. 324.

#### Change of grade.

Laws 1881, c. 40, § 2, providing that cities of the second class in their corporate capacity are authorized and empowered to enact ordinances for the following purposes, in addition to the other powers granted by law: To open and improve streets, avenues, and alleys within the city—should be construed to include the power to alter the grade or change the level of the land on which the streets are laid out. If the city has once fixed a grade, which it afterwards finds improper or insufficient, it has not exhausted its power, and therefore has the authority to change the grade or improve the streets. There is the same reason and the same justification for changing the grade once established, when the public convenience is found to require it, that there is for fixing it in the first place. Therefore the power to open and improve streets, which includes the power to grade them, may be exercised from time to time as the wants of the city may require. *Methodist Episcopal Church v. City of Wyandotte*, 3 Pac. 527, 529, 31 Kan. 721.

#### Establishment or vacation.

Act 1867, § 2, providing that, before the commissioners of any county shall order any "improvement" of a road, a petition should be presented, signed by a majority of the landholders resident within the county, whose lands would be assessed for the expense of the same, means not only the improvement of an existing road, but also the establishment and construction of a new road. *Putnam County Com'rs v. Young*, 36 Ohio St. 288, 292.

"Improvement," as used in Laws 1872, § 25, providing that the common council shall cause notice to be given of the proposition for making any improvement or doing any work under the preceding section, authorizing the council to lay out, accept, and open any street, and to order and cause any street

already laid out to be vacated, etc., includes the vacation of a street, as well as the opening. *Cook v. Borough of Chambersburg*, 39 N. J. Law (10 Vroom) 257, 259.

Act March 23, 1883 (Supp. Revision, p. 548, § 263), which provides that hereafter, in assessing the cost and expenses of "street improvements" of any town or township of this state, the commissioners, etc., shall assess the said costs and expenses upon the land and real estate benefited by such improvements, etc., means the grading and paving and any other work upon them for which an assessment may be levied. It does not include the laying out and opening of new streets. *Cherry v. Town of Keyport*, 20 Atl. 970, 972, 52 N. J. Law, 544 (cited and approved in *State v. Town of West Hoboken*, 24 Atl. 477, 478, 54 N. J. Law, 508).

#### Construction of sewer.

A sewer is not a "street improvement," and the city council has not the power, by calling a sewer a street in an ordinance, to construct the one under pretense of repairing the other, so as to lay a burden of taxation, which should have been borne by the public at large, upon a few adjacent property holders. *Clay v. City of Grand Rapids*, 60 Mich. 451, 456, 27 N. W. 596, 598.

"Street improvement," as used in the Hoboken city charter, providing for the collection of assessments for street improvements, does not include the building of sewers; and an officer employed to collect assessments for street improvements is not authorized to collect sewer assessments. *City of Hoboken v. Harrison*, 30 N. J. Law (1 Vroom) 73, 79.

#### Sprinkling.

The word "improvement" means "that by which the value of anything is increased, its excellence enhanced, or the like, or an amelioration of the condition of property effected by the expenditure of labor or money, for the purpose of rendering it useful for other purposes than those for which it was originally used, or more useful for the same purposes"; thus including the sprinkling of streets with the term "local improvement." *State v. Reis*, 38 N. W. 97, 98, 38 Minn. 371.

#### STREET OPENED AND GRADED.

A charter provision requiring all streets which may have been opened and graded to be kept open and in repair does not make the duty to keep open and in repair dependent upon the establishment of what is known as the grade of the street, or upon the final completion of grading in conformity to such established grade, or upon a formal opening of the street, as, for instance, by a resolution of the common council. But if a portion of such street has been opened and graded by

the city, to whatever extent, for the express and avowed purpose, and with the result of inviting and accommodating public travel thereon, as the same is opened and graded, it is the duty of the city to keep such portion open and in repair. *Lindholm v. City of St. Paul*, 19 Minn. 245, 248, 249 (Gil. 204, 208).

### STREET RAILROAD.

Other street railway, see "Other."

"Street railway" means a railroad or railway, generally operated by manual power, according to the express provisions of Pub. St. c. 112. *Holland v. Lynn & B. R. Co.*, 11 N. E. 674, 676, 144 Mass. 425.

A "street railway" has been variously defined. As the name indicates, the primary meaning is one constructed and operated on and along the streets of a city or town, for the carriage of persons from one point to another in such city or town, or to and from its suburbs. It is peculiarly an institution for the accommodation of people in cities or towns. Its tracks are ordinarily laid to conform to street grades. Its cars run at short intervals, stopping at street crossings to take on and discharge passengers. In its business it is confined to the carriage of passengers, and not freight. *Hannah v. Metropolitan St. R. Co.*, 81 Mo. App. 78, 82 (citing *Williams v. City Electric Ry.* [U. S.] 41 Fed. 556; *Funk v. St. Paul City Ry. Co.*, 61 Minn. 435, 63 N. W. 1099, 29 L. R. A. 208, 52 Am. St. Rep. 608).

A "street railroad" is one the rails of which are laid to conform to the grade and surface of the street, and which is otherwise constructed so that the public is not excluded from the use of any part of the street as a public way, which runs at a moderate rate of speed compared to the speed of traffic railroads, which carries no freight, but only passengers, from one part of the thickly populated district to another in a town or city and its suburbs, and for that purpose runs its cars at short intervals, stopping at the street crossings to receive and discharge its passengers, and which is operated either by manual or mechanical power. *Williams v. City Electric St. Ry. Co.* (U. S.) 41 Fed. 556, 557; *Bloxham v. Consumers' Electric Light & St. R. Co.*, 18 South. 444, 446, 36 Fla. 519, 29 L. R. A. 507, 51 Am. St. Rep. 44.

A "street railway" is a public utility. It is an appropriate and necessary method of using the highway, and municipalities may permit them to occupy and use portions of the street. Such occupancy is in common with that of the general public; all persons being at liberty to drive upon and over them, where they are laid in the traveled portion of the street. *City of Detroit v. Detroit United Ry.* (Mich.) 95 N. W. 736, 737.

The grant of power to construct and operate street railways implies authority to acquire electricity therefor, as fully as authority to acquire electricity for lighting is implied in the grant to construct and operate gas and other works for lighting. *Riverside & A. R. Co. v. City of Riverside* (U. S.) 118 Fed. 736, 745.

A railroad corporation, whose lines extend beyond municipal control, and whose corporate existence, authority, and powers are not derived from or subject to the municipal regulations, is not a street railway corporation, within the meaning of the Constitution, providing that "no street passenger railway shall be constructed within the limits of any city or town without the consent of its civil authorities," and Code 1886, § 1603, providing that "corporations for constructing, maintaining, and operating street railways in a town or city may be formed in the mode prescribed, and of the capacity and powers in this chapter expressed." *Birmingham Min. R. Co. v. Jacobs*, 92 Ala. 187, 200, 9 South. 320, 12 L. R. A. 830.

The term "street railway," or "railway," as used in the chapters relating to railroads and street railways, means a railroad or railway, including poles, wires, or other appliances, and equipment connected therewith, of the class operated by motive power other than steam, and usually constructed in, under, or above the public ways and places. *Rev. Laws Mass. 1902*, p. 978, c. 111, § 1.

The words "street railway," as used in the provision relating to the power of a street railway to borrow money and issue bonds, embrace all street railways built and operated for the convenience of passengers along the streets, alleys, and public thoroughfares of cities in the state. The motor power by which the same shall be operated shall be limited to horses, mules, and electric and cable power. *Cobbey's Ann. St. Neb. 1903*, § 10,089.

#### As city purpose.

See "City Purpose."

#### As common carrier.

See "Common Carrier."

#### Elevated road.

An elevated road is not a "street railway," within the meaning of Code, § 464, providing for the compensation of owners of roads abutting on a street in which a railway, but not a street railway, may be laid. *Freiday v. Sioux City Rapid Transit Co.*, 60 N. W. 656, 657, 92 Iowa, 191, 26 L. R. A. 246.

#### Freight belt road.

A street railroad is a street railway passenger carrier, whose road lies along and up-

on the streets of a city, town, or village. *Thompson-Houston Electric Co. v. Simon*, 20 Or. 60, 25 Pac. 147, 10 L. R. A. 251, 23 Am. St. Rep. 86; *Carll v. Stillwater St. Ry. & Transfer Co.*, 28 Minn. 373, 10 N. W. 205, 41 Am. Rep. 290. Authority to construct a street railroad does not authorize the construction of a freight belt railroad. *South & N. A. R. Co. v. Highland Ave. & B. R. Co.*, 24 South. 114, 117, 119 Ala. 105.

#### **Horse railway.**

In holding that the grant of a franchise of a horse railway was not a grant of a franchise to operate any kind of a street railway, the court said: "If the Legislature had used the words 'street railway,' instead of the term 'horse railway,' a very pertinent question would arise whether it intended to grant an exclusive right to any other than that form of street railway, to wit, horse railway, with which it was familiar." We are bound to assume that the Legislature is dealing with the known, and not with the unknown, and that, when it grants a franchise, it only intends to grant that of which it has knowledge. *Omaha Horse R. Co. v. Cable Tramway Co.* (U. S.) 30 Fed. 324, 329.

#### **Horses included.**

"Railway," within the meaning of an exemption from taxation of a railway chartered to operate horse cars in a city street, includes the horses by which such cars are propelled. *Northampton Co. v. Passenger Ry. Co.*, 8 Pa. Co. Ct. R. 442, 443.

A "railroad," within the meaning of the statute exempting a company chartered to operate a horse street railway, does not include horses used to operate the car, as they may at any moment be employed for other use than those designated in the charter of the company; nor does it include the horse barns of the company, but includes its tracks and turntables. *People's St. Ry. Co. v. Scranton*, 8 Pa. Co. Ct. R. 633, 634.

#### **Railroad distinguished.**

A railroad is for the use of the universal public in the transportation of persons, baggage, and other freight. A "street railway" is dedicated to a more limited use of the local public, for the mere transient transportation of persons only, and within the limits of the city. In the technical sense, therefore, a street railway is not a railroad, and the court held that it was not included within the provisions of the statute authorizing the condemnation of lands for railroad purposes. *Thompson-Houston Electric Co. v. Simon*, 25 Pac. 147, 149, 20 Or. 60, 10 L. R. A. 261, 23 Am. St. Rep. 86.

A railroad and a street railroad or way are, in both their technical and popular import, as distinct and different things as a

road and a street, or as a bridge and a railroad bridge. A street railway is not, in either the popular or legislative sense, a railroad. *Front St. Cable Ry. Co. v. Johnson*, 25 Pac. 1084, 1085, 2 Wash. St. 112, 11 L. R. A. 693 (citing *Louisville & P. R. Co. v. Louisville City Co.*, 63 Ky. [2 Duv.] 175).

"Street railway" is defined as a railway laid down upon roads or streets for the purpose of carrying passengers. The distinctive and essential feature of a street railway, considered in relation to other railroads, is that it is a railway for the transportation of passengers, and not of freight. *Montgomery v. Santa Ana Westminster Ry. Co.*, 37 Pac. 786, 787, 104 Cal. 186, 25 L. R. A. 654, 43 Am. St. Rep. 89 (citing *Elliot, Roads & S.* p. 557).

A city railroad, or street railroad, is a mere omnibus upon rails. Like an omnibus, it stops everywhere along its route to enable passengers to come in or go out. It is required to run during night and day as often as public convenience requires, and does not engage to carry property at all, but to carry passengers only. It has no apartment for the reception, safe-keeping, and transit of the trunks of passengers, but is composed of a number of separate vehicles run by horses and provided only with seats for passengers. It is not practicable or possible to fix the rate of fare at so much per mile, and the only practicable course is to have one fixed rate of fare, which the passenger is supposed to pay, whether he goes the entire distance or not. Therefore a provision of the statute providing that railroads shall not charge to exceed three cents per mile, and imposing a penalty for charging a greater sum, does not apply to such city railroad. *Hoyt v. Sixth Ave. R. Co.* (N. Y.) 1 Daly, 528, 530.

At the time of the adoption of the new Constitution of Pennsylvania there was a clear distinction, known and recognized by lawyers and courts, between the terms "railroads" and "railways," and this distinction is recognized in the Constitution, which provides that "no railroad, railway, or other transportation company shall grant free passes to any person except officers or employés of the company," and the court held that article 17 of the Constitution, relating to railroads and canals, and prohibiting the consolidation of parallel or competing lines, did not apply to "street passenger railways." *Shipley v. Commonwealth R. Co.* (Pa.) 13 Phila. 128, 130.

Ordinarily, when we speak of a "railroad," we mean a railroad over which freight and passengers are transported from one town or city to another. When we speak of these roads on which passengers are transported over the street of a town or city, we call them "street railways." Const. art. 10,



§ 5, forbidding the acquisition of railroad properties by parallel or competing lines, applies to railroads proper, and not to street railways. *Scott v. Farmers' & Merchants' Nat. Bank (Tex.)* 75 S. W. 7, 16.

#### Railway in park.

A "street railway" *ex vi termini* imports a railway in a street, whether it be propelled by horses or electricity, and has no relation to a passenger railway in a park, where there are no streets. *City of Philadelphia v. McManes*, 84 Atl. 331, 333, 175 Pa. 28.

#### As limited to railways in streets.

"Street railways" are railways on and along the streets of a city or town. They must conform to the grades of the streets they occupy. They may diverge for a short distance, where the conformation of the surface or the position of streams make it necessary in order to avoid discomfort or danger to the traveling public; but that a street railway may, like a steam railway, locate its route, not for the accommodation of local travel along the highways, but to reduce time and distance for passengers traveling from city to city or town to town across the country, is a proposition not to be entertained. It involves a perversion of the character and object of street railways. *Rahn Tp. v. Tamaqua & L. St. Ry. Co.*, 31 Atl. 472, 167 Pa. 84.

A "street railway" differs from the ordinary railway running from one state or town to another, part of which may chance to be located on a highway, in certain essential characteristics. Its tracks conform to the established grade of the highway. It has no exclusive privilege as to their use. *Laufer v. Bridgeport Traction Co.*, 68 Conn. 475, 37 Atl. 379, 37 L. R. A. 533. Its mode of using the street does not necessarily or naturally render that part of it which it occupies, whether with its tracks or its poles and wires, impassable or seriously inconvenient for ordinary travel. A street railway without a street to run on, and to serve and accommodate as it runs, would be an anomaly. *Canastota Knife Co. v. Newington Tramway Co.*, 36 Atl. 1107, 1108, 69 Conn. 146.

"Street railway," as used in Acts 1882, c. 229, and Acts 1894, c. 550, imposing a tax on the gross receipts of street railway companies, in the city of Baltimore, cannot be construed to include railways that, though operated like street railways, are in fact not built upon and do not occupy streets at all. *City of Baltimore v. Baltimore, C. & E. M. Pass. R. Co.*, 35 Atl. 17, 18, 84 Md. 1, 83 L. R. A. 508.

#### Underground railway.

"Street railway," as used in Const. art. 8, § 18, providing that no law shall author-

ize the construction or operation of a street railroad, except on certain conditions, includes an underground railway in a city or village, following the lines of the streets. *In re New York Dist. Ry. Co.*, 14 N. E. 187, 189, 107 N. Y. 42.

#### STREET RAILROAD TRACK.

In the act relating to the assessment of street railways, and providing that the track shall be assessed as personal property, the word "track" will be construed to include not only the ties, spikes, rails, and switches, but also the right to use the bed on which they are placed. *Detroit Citizens' St. Ry. Co. v. Common Council of Detroit*, 85 N. W. 96, 100, 125 Mich. 673, 84 Am. St. Rep. 589 (citing *Detroit City Ry. Co. v. City of Detroit*, 76 Mich. 428, 43 N. W. 477).

#### STREET RAILWAY CAR.

"Street railway cars" are omnibuses or vehicles in the nature of omnibuses, within the meaning of a statute authorizing the licensing of omnibuses or vehicles in the nature thereof. *Frankfort & P. Pass. Ry. Co. v. City of Philadelphia*, 58 Pa. (8 P. F. Smith) 119, 125, 98 Am. Dec. 302.

#### STREET RAILWAY COMPANY.

"Street railway companies" are public carriers of passengers, and are given corporate existence to enable them to provide the means of rapid transportation for the convenience of the people and the promotion of the public welfare. *North Chicago Electric Ry. Co. v. Peuser*, 60 N. E. 78, 79, 190 Ill. 67.

A "street railway company" is a corporation by which a street railway is constructed, maintained, or operated, under the express provisions of Pub. St. c. 112. *Holland v. Lynn & B. R. Co.*, 11 N. E. 674, 676, 144 Mass. 425.

"Street railway companies" are modern local conveniences, the location and construction of which are subject to the will of the public they are intended to serve. This will is expressed through the local authorities. Such companies cannot force themselves into neighborhoods where they are not wanted. When permission is given them to occupy a public street, they acquire thereby, not an exclusive right upon its surface, but a right concurrent with that of the general public. Their cars are a substitute for the private carriage and the public omnibus. They must move them along their tracks upon the surface of the street, to the grade on which they are required to conform. They have no right to grade or fill, or in any manner interfere with the access to, private property from the highway, or so to construct the road as to interfere with public travel or disturb adjacent landowners.

They are not endowed with the right of eminent domain, because they do not need it. *Hellman v. Lebanon & A. St. Ry. Co.*, 37 Atl. 119, 120, 180 Pa. 627.

The term "street railroad company," as used in the chapter relating to the listing of personal property for taxation, includes any person or persons, joint-stock association, or corporation, wherever organized or incorporated, when engaged in the business of operating a street, suburban, or interurban railroad, either wholly or partially within this state, whether the cars used in such business be propelled by animals, steam, cable, electricity, or other motor. *Bates' Ann. St. Ohio* 1904, § 2780-17.

As used in the chapter relating to street railway companies, the words "street railway company" include all railway corporations authorized to lay and use any part of their railway tracks in public highways, otherwise than for crossing purposes. *Pub. St. N. H.* 1901, p. 528, c. 27, § 2.

#### STREET RAILWAY FRANCHISE.

A "street railway franchise," while not a corporate franchise, is a special privilege granted by sovereign authority, and the state may always inquire into the title by which it is held, and render judgment of ouster if the party assuming to exercise it has no title thereto. *State v. Milwaukee, B. & L. G. R. Co.*, 92 N. W. 546, 548, 116 Wis. 142.

#### STREET USE.

The construction of a viaduct to carry the street at a higher level, for the benefit of the public, is a "street use," and not a taking of public property. *Sauer v. City of New York*, 83 N. Y. Supp. 27, 28, 40 Misc. Rep. 585.

#### STREET-WALKING.

"Street-walking" is the offense of a common prostitute offering herself for sale upon the streets at unusual or unreasonable hours, endeavoring to induce men to follow her for the purpose of prostitution. *Pinkerton v. Verberg*, 78 Mich. 573, 577, 44 N. W. 579, 580, 7 L. R. A. 507, 18 Am. St. Rep. 473.

#### STREET WORK.

"Street work," as used in Municipal Corporation Act, § 777, amended by St. 1891, p. 54, providing that all street work shall be done by contract, let after notice by publication, cannot be construed to include the lighting of streets by electric arc lights, placed above the intersection of streets. "Street work" is a phrase of common parlance, and has a well-defined signification. The words mean exactly what they indicate, namely,

work upon the street, or work in repairing or making the street. *Electric Light & Power Co. v. City of San Bernardino*, 34 Pac. 819, 100 Cal. 348.

#### STRETCHING.

The word "stretching," in its common use in grants during the early periods of the English colonial government here, was applied either to the extent of a single line, or of a rolling location, in which the breadth, being described by lines on surfaces, was carried with such breadth to the object described as its terminl. *Van Gorden v. Bogardus* (N. Y.) 5 Johns. 440, 462.

A patent of land, described as "stretching along the bay," carries the land down to ordinary high-water mark. *Cortelyou v. Van Brundt* (N. Y.) 2 Johns. 357, 362, 3 Am. Dec. 439.

#### STRICT.

The word "strict" is defined as follows: "Strenuously enjoined and maintained; observed, kept, or enforced with rigid exactness; as strict order, strict silence, strict honesty, in strict confidence. \* \* \* Accurate; not wide or loose; as a strict ruling. \* \* \* Intimately; close; as friendship." *People v. Gardiner*, 53 N. Y. Supp. 451, 453, 33 App. Div. 204.

#### STRICT CARE.

The term "strict care," as used in an accident policy, has no technical significance, but is to be interpreted as the language is usually understood. *Hayes v. Continental Casualty Co.*, 72 S. W. 135, 138, 98 Mo. App. 410.

#### STRICT CONSTRUCTION.

In legal phrase, "strict construction" of the statute means such construction as presumes the Legislature to have intended the least innovation on previous law. *Shorey v. Wyckoff*, 1 Wash. T. 348, 349, 351.

The rule requiring penal statutes to be "construed strictly" means that, in cases of doubtful construction, that interpretation should be adopted which restricts the operation and enforcement of the forfeiture. *Stan-yan v. Town of Peterboro*, 46 Atl. 191, 194, 69 N. H. 372.

"Strict construction" is that which refuses to expend the law by implications or equitable considerations, and confines its operation to cases which are clearly within the letter of the statute, as well as within its spirit or reason. When the sense of the law is manifest, and leads to nothing absurd, there can be no reason not to adopt

it. Statutes exercising the power of taxation in any of its forms, or delegating that power to political subdivisions, are to be strictly construed. *Barber Asphalt Pav. Co. v. Watt*, 26 South. 70, 72, 51 La. Ann. 1345.

The rule that the contract of the surety is to be construed strictly is to be construed as meaning that the extent of the liability to be incurred must be expressed by the surety or necessarily comprised in the terms used in the obligation or contract; that is, the obligation is not to be extended to any other subject, to any other person, or to any other period of time than is expressed or necessarily included in it. In this sense only is the rule to be construed, and the surety contract is subject to the same rules of construction and interpretation as every other contract. *Burge, Sur.* (1st Am. Ed.) 40; *Warner v. Connecticut Mut. Life Ins. Co.*, 3 Sup. Ct. 221, 223, 109 U. S. 357, 27 L. Ed. 962.

### STRICT FORECLOSURE.

"Strict foreclosure" is a proceeding devised to extinguish the mortgagor's right to redeem. *Lightcap v. Bradley*, 58 N. E. 221, 223, 186 Ill. 510.

The remedy by strict foreclosure in the case of common-law mortgages is closely analogous to actions to quiet title, where the plaintiff holds the legal title and seeks to remove some claim asserted against it. So strict foreclosure is often resorted to in cases of land contracts, where the vendor has retained the title and the vendee has failed to perform his contract. In such case the court finds the amount unpaid, and decrees that it be paid on or before a day stated, and, on failure to make the payment, that defendant's equity be foreclosed. Generally speaking, in cases of strict foreclosure, plaintiff must have title against which the defendant has or asserts some equity. *Warner Bros. Co. v. Freud*, 72 Pac. 345, 138 Cal. 651.

### STRICT GUARANTY.

The term "strict guaranty" does not include a promise of the guarantor to do what another is bound to do, if he shall not do it himself; but such an obligation is distinguished as an original undertaking in the nature of a suretyship. *Woody v. Haworth*, 57 N. E. 272, 273, 24 Ind. App. 634.

### STRICT INTERPRETATION.

*Bish. St. Crimes*, § 194, in regard to the meaning of "strict interpretation" of statutes relating to crime, says: "Such statutes are to reach no further in meaning than their words. No person is to be made subject to them by implication, and all doubts

concerning their interpretation are to preponderate in favor of the accused. Only those transactions are covered by them which are within both their spirit and their letter." *State v. Burke*, 52 S. W. 226, 227, 151 Mo. 136.

### STRICTEST VIGILANCE.

An instruction that a carrier, in conveying passengers to their respective destinations, was bound to exercise the "strictest vigilance," was not erroneous. It does not require more vigilance than an instruction requiring a carrier to exercise the utmost vigilance; the word "utmost" being quite as comprehensive in its scope as the word "strictest." *Waller v. Hannibal & St. J. R. Co.*, 83 Mo. 608, 616.

### STRICTLY CHOICE.

In a case involving a warranty of evaporated apples, evidence was admitted that the term "strictly choice" means that the apples were of good color, cut in rings, had been properly evaporated, and would keep in good condition throughout the following summer. *Long v. J. K. Armsby Co.*, 43 Mo. App. 253-260.

### STRICTLY CONFIDENTIAL RELATION.

A "strictly confidential relation," within *Laws 1896, c. 821, § 1*, providing that no honorably discharged Union soldier shall be removed from any position, except for incompetency or misconduct, after a hearing on notice and charges, except such as occupy a strictly confidential relation, means much more than the imposition of important duties, requiring the exercise or intelligence of trained ability or integrity. It necessarily implies personal contact between the officer and his superior, where the officer occupying the position holds toward his superior a position of confidence and trust, where the person occupying the position has the power, or in consequence of the relation that exists between himself and his superior, to impose on the superior liabilities and obligations which the superior is bound by law to discharge. *People v. Palmer*, 152 N. Y. 220, 46 N. E. 329; *Chittenden v. Wurster*, 152 N. Y. 368, 46 N. E. 861, 37 L. R. A. 809. So that a person holding the position of subpoena server in the office of the district attorney does not occupy a strictly confidential relation. *People v. Gardiner*, 53 N. Y. Supp. 451, 453, 33 App. Div. 204 (reversed in 52 N. E. 564, 565, 157 N. Y. 520).

### STRICTLY IN REM.

A judgment in rem is generally said to be a judgment declaratory of the status of

some subject-matter, whether this be a person or a thing. Thus the probate of a will fixes the status of the document as a will. So a decree establishing or dissolving a marriage is a judgment in rem, because it fixes the status of the person. A judgment or forfeiture against specified articles of goods for violation of the revenue laws is a judgment in rem. In such case the judgment is conclusive against all the world; and, if the expression "strictly in rem" may be applied to any class of cases, it should be confined to such as these. Chief Justice Marshall says: "I have always understood that where a process is to be served on the thing itself, and where the mere possession of the thing itself, by the service of a process and making proclamation, authorizes the court to decide upon it without notice to any individual whatever, it is a proceeding in rem, to which all the world are parties. \* \* \* The claimant is a party, whether he speaks or is silent, whether he asserts his claim or abandons it." *Bartero v. Real Estate Sav. Bank*, 10 Mo. App. 78, 78, 79.

## STRICTI JURIS.

A license to trade with the enemy in time of war is said to be "stricti juris," and by this is meant that the license granted to the person is to be construed strictly as to the extent of the power granted by it in respect to the manner in which he may exercise it, the objects in which he may trade, and the persons with whom and means and circumstances under which he may exercise the power. *Graham v. Merrill*, 45 Tenn. (5 Cold.) 622, 629.

## STRIFE.

The word "strife," in Gen. St. tit. 12, § 123, making it a crime to disturb or break the peace, or stir up and provoke contention and strife by following and mocking any person, etc., does not necessarily imply blows. It may be evidenced by passionate looks, words, and gestures. Thus the use of abusive language toward another was held to be a stirring up of contention and strife, within the meaning of the act. *State v. Warner*, 34 Conn. 276-279.

## STRIKE.

See "General Strike"; "Legal Strike"; "Sympathetic Strike."

Boycott distinguished, see "Boycott."

A "strike" is a combined effort among workmen to compel the master to the concession to a certain demand by preventing the conduct of his business until compliance with the demand. *Farmers' Loan & Trust*

*Co. v. Northern Pac. R. Co.* (U. S.) 60 Fed. 803, 819.

A "strike" is popularly defined as a simultaneous cessation of work on the part of the workmen, and its legality or illegality must depend on the means by which it is enforced, and upon its objects. *Farrer v. Close*, L. R. 4 Q. B. 602, 612. A combination among employes having for its object their orderly withdrawal in large numbers, or in a body, from the service of their employer on account simply of a reduction in their wages, is not a strike within the meaning of the word as commonly used. *Arthur v. Oakes* (U. S.) 63 Fed. 310, 327 (quoted in *State v. Kreutzberg*, 90 N. W. 1008, 1100, 114 Wis. 530).

"A strike is a combination among laborers employed by others to compel an increase of wages, a change in the hours of labor, some change in the mode or manner of conducting the business of a principal, or to enforce some particular policy in the character or number of the men employed, and the like." *Delaware, L. & W. R. Co. v. Bounds*, 58 N. Y. 573, 582.

A "strike" is defined as the act of quitting work; specifically, such an act by a body of workmen, done as a means of enforcing compliance with demands made on their employer. It is applied commonly to a combined effort on the part of a body of workmen employed by the same master to enforce a demand for higher wages, shorter hours, or some other concession, by stopping work in a body at a prearranged time, and refusing to resume work until the demanded concession shall have been made, and is not necessarily unlawful, and does not necessarily engender breach of the peace. *Longshore Printing Co. v. Howell*, 38 Pac. 547, 551, 26 Or. 527, 28 L. R. A. 464, 46 Am. St. Rep. 640 (citing *Delaware, L. & W. R. Co. v. Bowna*, 58 N. Y. 582).

### In mining law.

The term "strike," as used in the mining law, designates the direction of a vein or lode across and through the country. *King v. Amy & Silversmith Con. Min. Co.*, 24 Pac. 200, 202, 9 Mont. 543.

## STRIKE OUT.

See "Motion to Strike Out."

## STRIKING.

In a prosecution for robbery, it was shown that the prisoners ran after the prosecutor, put their arms around his neck, and threw him on the ground, and one of them held him jammed down to the ground while the other rifled his pockets. In holding that this did not bring the case within the provi-

sion of the statute, providing that "if any person shall assault another, and shall feloniously rob, steal, and take from his person any money or other property, being armed with a dangerous weapon, with intent, if resisted, to kill or maim the person robbed, or if, being so armed, he shall wound or strike the person robbed, he shall suffer," etc. The court said: "Here was force undoubtedly, enough to do considerable violence to the man's person, and to produce the feeling of stiffness, of which he complained the next day. But it was not the particular violence which is expressed by the term 'striking,' which implies force applied with an impetus; a blow. The pressing with their arms and throwing him down, and holding him down, were neither of them a blow. The words 'jammed down,' in the way in which they are used, do not come up to the idea of striking. The terms are that 'they held him jammed down to the ground,' from which we understand that they held him down firmly, and pressed on him forcibly, so that he could not extricate himself." *Commonwealth v. Gallagher*, 47 Mass. (6 Metc.) 565-568.

A verdict of guilty of "striking with intent to kill" will not authorize a sentence for striking with a dangerous weapon with intent to kill. "We are forbidden, in construing the verdict, to go beyond the words used by the jury, giving the words their natural significance; that is, in this case, we cannot read the verdict as guilty of striking with a dangerous weapon, when the verdict is simply guilty of striking." *State v. Bellard*, 23 South. 504, 505, 50 La. Ann. 594, 69 Am. St. Rep. 461.

## STROKED.

"Stroked," as used in a statement by a man that he had stroked a certain woman, does not convey the idea of carnal knowledge. Whatever obscure meaning the word may convey in particular sections of the country or in particular companies, it is certain that, as it is generally understood by the well-educated part of the community, it has no bad meaning. *Adams v. Hannon*, 3 Mo. 222, 223.

## STRONG.

"The words 'strong' and 'weak' are relative terms, both having reference to the medium of the class to which they are applied; one being above and the other below it." *People v. Crilley* (N. Y.) 20 Barb. 246, 248.

"Strong," as used in a representation for the purpose of securing credit that the company was strong, means financially strong or able. *People v. Jeffery*, 31 N. Y. Supp. 267, 271, 82 Hun, 409.

## STRONG BEER.

As strong liquor, see "Strong Liquor."

"Strong beer," as used in an indictment, means a malt inebriating liquor, and is synonymous with "Dutch beer." *People v. Wheelock* (N. Y.) 3 Parker, Cr. R. 9, 15.

"Strong beer" is within the meaning of the term "strong and spirituous liquors," in chapter 628, Laws 1857, to suppress intemperance. *Board of Excise Com'rs v. Taylor*, 21 N. Y. 173, 175.

## STRONG CORROBORATING CIRCUMSTANCES.

Under Rev. St. 712, c. 32, § 19, providing that juries shall never convict any one for the crime of receiving a bribe for his vote upon the testimony of a single witness, unless sustained by strong corroborating circumstances, one cannot be convicted for receiving a bribe for his vote on the testimony of a single witness. *Russell v. Commonwealth*, 66 Ky. (3 Bush) 469, 470.

## STRONG HAND.

See "With Strong Hand."

## STRONG LIQUOR.

"Strong or spirituous liquors," as used in a law providing that whoever shall sell any strong or spirituous liquors, less than a certain quantity, at a time, without having a license therefor, shall forfeit a certain amount, should be construed to include ale or strong beer. *Tompkins County Excise Com'rs v. Taylor* (N. Y.) 19 How. Prac. 259, 264; *Nevin v. Ladue* (N. Y.) 3 Denio, 43, 44; *Schwab v. People* (N. Y.) 4 Hun, 520, 524.

The prohibition against the sale on Sunday of "strong and spirituous liquors" includes lager beer, if it is proved to be intoxicating. *Dillman v. People* (N. Y.) 4 N. Y. Wkly. Dig. 251, 252.

## STRONGLY CORROBORATED.

"Strongly corroborated," as used in a statute authorizing a conviction on the testimony of one credible witness, strongly corroborated, means that the corroborating evidence must relate to a material matter; that is, it must tend to show the falsity of the defendant's testimony, if he has testified, and, taken together, it must be, in the opinion of both the court and the jury, strong—that is, cogent, powerful, forcible, calculated to make a deep and lasting impression on the mind. This character, however, of corroborating evidence, may be produced by proof of independent facts and circumstances, which, when considered separately, would not be sufficient, but, when considered in the concrete, would be strong. In other

words, the corroboration may be by circumstantial evidence, consisting of proof of independent facts, which together tend to establish the main fact—that is, the corpus delicti—and which together strongly corroborate the truth of the testimony of the single witness who has testified thereto. *Hernandez v. State*, 18 Tex. App. 134, 150, 51 Am. Rep. 295.

## STRUCK JURY.

"Struck jury" means a special jury. *Wallace v. Wilmington & N. R. Co. (Del.)* 18 Atl. 818, 819, 8 Houst. 529.

In Act Feb. 12, 1852, enacting that, upon the trial of any indictment, the prosecutor shall be entitled to challenge peremptorily three of the panel of the jurors summoned, but that the act shall not apply to struck juries, the term "struck juries" is used in its technical and common-law sense. *Cook v. State*, 24 N. J. Law (4 Zab.) 843, 847.

## STRUCK OFF.

"Struck off," as used in Code Pub. Loc. Laws, art. 4, §§ 74-80, imposing a duty or tax on real estate sold at auction each time such real estate shall be struck off, should be construed in its usual and accepted sense, and not in a narrow, contracted, or literal one. In common parlance and in the language of the auction room, property is understood to be struck off or knocked down when the auctioneer, by the fall of his hammer or by any other audible or visible announcement, signifies to the bidder that he is entitled to the property on paying the amount bid according to the terms of the sale. *Sherwood v. Reade (N. Y.)* 7 Hill, 439. The design of the legislation being to raise revenue by the imposition of a tax or duty on sales, and not on ineffectual efforts to sell, the term "struck off" must be treated as signifying a consummated sale. *State v. Second Nat. Bank of Hoboken*, 35 Atl. 889, 890, 84 Md. 325.

## STRUCTURE.

See "Lawful Structure"; "Permanent Structure."

Other structure, see "Other."

"Structure" is defined to be that which is built or constructed; an edifice or a building of any kind; in the widest sense, any production or piece of work, artificially built up or composed of parts and joined together in some definite manner; any construction. *Favro v. State*, 46 S. W. 932, 39 Tex. Cr. R. 452, 73 Am. St. Rep. 950.

"Building, structures, and improvements," within the meaning of Code Civ.

Proc. § 2134, providing that the interest in the land, building, structure, or other improvement in a leasehold interest shall be subject to lien, although the lease is forfeited, is to be construed to mean such building, structures, and improvements put upon the premises by the lessee as can be removed. *Stenberg v. Liennemann*, 52 Pac. 84, 85, 20 Mont. 457, 63 Am. St. Rep. 636.

When a building has been torn down, it ceases to be a "building or structure," within the meaning of Pen. Code, art. 652, defining a house which can be the subject of arson as a "building or structure," etc. It has lost the arrangement of its parts—its form, make, and construction. *Mulligan v. State*, 25 Tex. App. 199, 7 S. W. 604, 8 Am. St. Rep. 435.

A railway consists of the bed or foundation, which is made of earth, stone, or trestle work, on which are laid the ties or rails, and is included in the term "other structure" in a lien law giving liens on buildings, flumes, tunnels, and other structures. *Giant Powder Co. v. Oregon Pac. R. Co.*, 42 Fed. 470, 473, 8 L. R. A. 700.

The words "structure or other improvements," as used in the mechanic's lien laws, means any building, bridge, wharf, dock, pier, bulkhead, vault, subway, tramway, toll road, conduit, tunnel, mine, coal breaker, flume, pump, screen, tank, derrick, pipe line, aqueduct, reservoir, viaduct, telegraph, telephone, railway or railroad line, canal, mill race, works for supplying water, heat, light, power, cold air, or any other substance furnished to the public, well for the production of gas, oil, or other volatile or mineral substance, or other structure or improvement, of whatsoever kind or character the same may be. 4 P. & L. Dig. Laws Pa. 1897, col. 1149, § 1.

The term "structure," as used in the provisions of the Code defining and punishing arson, shall be held to mean and shall include in meaning any house, edifice, building, cabin, tent, vessel, boat, water craft, or erection, capable of affording, or designed to afford, or intended when completed to afford, shelter for any human being, any barn, stable, outhouse, shed, mill, millhouse, dryhouse, hophouse, distillery, manufactory, shop, store, office, office building, bank building, or any building in which property is placed or stored, or which is used or intended to be used for the purpose of transacting any kind of business therein, any public building, courthouse, jail, city hall, guardhouse, college building, university building, seminary, poorhouse, market house, pesthouse, public bridge, any infirmary, asylum, schoolhouse, engine house, hospital, theater, hall, church, meeting house, depot, station house, railway car, street car, roundhouse, railroad bridge, railroad trestle, any wharf, dock or

landing, or any building or shed, of whatever kind or description, which is used, or intended to be used, for the shelter of any human being, animal, or thing. Ballinger's Ann. Codes & St. Wash. 1897, § 7095.

#### **Aqueduct.**

An aqueduct is a "structure," within the meaning of Pub. St. c. 191, § 1, for which a lien for labor performed and furnished and for materials furnished and used may be established. Nash v. Commonwealth, 54 N. E. 865, 174 Mass. 335.

#### **Bay window.**

As used in Pub. St. c. 77, § 8, providing that any structure erected or continued upon or over any highway, so as to obstruct the same or lessening the full breadth thereof, shall be deemed a public nuisance, the term "structure" should be construed to include a bay window erected and continued over the highway, lessening the full breadth of the highway at a point eight feet above the ground. State v. Kean, 45 Atl. 256, 257, 69 N. H. 122, 48 L. R. A. 102.

#### **Boiler and engine.**

A boiler and engine, built in the basement of the building and constructed upon permanent foundations, the boiler being inclosed by a brick wall, described in the policy as "one boiler, engine, and apparatus pertaining thereto, contained in the five-story and basement brick metal-roof building," etc., constituted "a structure," within the meaning of Rev. St. § 3643, providing that, in case of a total loss of a structure, the insurer must pay the full insured value of the property. Phoenix Ins. Co. v. Luce, 11 Ohio Cir. Ct. R. 476, 483, 5 O. C. D. 210, 211.

#### **Bridge.**

See "Bridge."

#### **Building.**

The term "structure" unquestionably includes or comprehends a building. Collins v. Drew (N. Y.) 50 How. Prac. 477, 479.

#### **Canal.**

The word "structure" held to include a canal partially constructed, within Code Civ. Proc. § 1183, entitling a furnisher of materials for a completed structure to a mechanic's lien thereon. Pacific Rolling Mill Co. v. Bear Valley Irr. Co., 120 Cal. 94, 98, 52 Pac. 136, 137, 65 Am. St. Rep. 158.

#### **Fence.**

In its broadest sense a "structure" is any production or piece of work artificially built up or composed of parts joined together in some definite manner, and in such sense

a fence is a structure. Karasek v. Peier, 81 Pac. 33, 35, 22 Wash. 419, 50 L. R. A. 345.

"Structure," as used in Pen. Code, § 476, providing for the punishment of any person who displaces, removes, or destroys a rail, sleeper, switch, bridge, viaduct, culvert, embankment, or structure appertaining to or connected with a railway, cannot be construed to include the fences inclosing the right of way of the railroad. The fences bounding and inclosing the land used for railroad purposes are obviously not ejusdem generis with the things specified, constituting parts of the railroad property. State v. Walsh, 45 N. W. 721, 43 Minn. 444.

#### **Mine.**

Code Civ. Proc. § 1185, giving a mechanic's lien upon the building, improvement, or structure separate and distinct from the land upon which it is erected or constructed, should be construed to include a mine or pit sunk within a mining claim. Helm v. Chapman, 5 Pac. 352, 68 Cal. 291.

The use of the phrase "other structure," in a statute providing that mechanics, etc., performing any labor upon or furnishing materials to be used in the construction, etc., of any building, wharf, bridge, ditch, flue, aqueduct, tunnel, fence, machinery, railroad, wagon road, or other structure shall have a lien, etc., shows that the word "structure" comprehends all the properties specifically enumerated, and is broad enough to include any similar things constructed, should the enumeration prove incomplete. The term does not seem to include a mine. Williams v. Mountaineer Gold Min. Co., 34 Pac. 702, 704, 102 Cal. 134.

#### **Office in building.**

"Structure," as used in Pen. Code, art. 709, defining a house to be any building or structure erected for public or private use, of whatever material it may be constructed, should be construed to include a place, office, apartment, or room in one corner of a hardware room, made of pickets, four feet high, one inch square, and three inches apart, on the top of which there was a plank, in which the account books, money, etc., of a lumber company were kept, and where the business of such company was transacted by their agent or clerk; it being partitioned off and used separately from any other portion of a hardware house for a particular business, and commonly understood as a room therein. Webster defines "structure" to be a building of any kind, but chiefly a building of some size or magnificence; an edifice. Bouvier defines a building to be an edifice erected by art and fixed upon or over the soil, composed of brick, stone, marble, wood, or other proper substance connected together, and designed for use in the posi-

tion it is so fixed. *Anderson v. State*, 17 Tex. App. 805, 810.

#### Oil well and machinery.

The term "structure," when applied to a material thing made by human labor, means something composed of parts or portions which have been put together by human exertion; and hence an oil well, together with the derrick, engine, boiler, pumps, piping, and appliances attached thereto, is a "structure," within *Burns' Ann. St.* 1894, § 7255, giving to materialmen a lien on a house, mill, etc., or other structure. *Haskell v. Gallagher*, 50 N. E. 485, 20 Ind. App. 224, 67 Am. St. Rep. 250.

#### Poles and wires.

"Structure," as used in *Mills' Ann. Code*, § 3869, giving every person performing labor upon, or furnishing materials of any kind in the construction, alteration, or repair of, any building, aqueduct, or any other structure a lien upon the same for the work done or materials furnished, should be construed to include poles set in the ground, connected together by wire in the usual way for the transmission of electricity for the purpose of light and power. *Forbes v. Willamette Falls Electric Co.*, 23 Pac. 670, 19 Or. 61, 20 Am. St. Rep. 793.

#### Railroad.

"Structure," as used in an Ohio statute giving a laborer's lien upon a structure, does not include a railroad. *Massillon Bridge Co. v. Cambria Iron Co.*, 52 N. E. 192, 193, 59 Ohio St. 179 (citing *Rutherford v. Cincinnati & P. R. Co.*, 35 Ohio St. 559, 561).

"Structure," as used in the act of 1885, giving a lien for labor and materials furnished in the construction of any building, ditch, flume, tunnel, and any other structure, meant anything that may be attached or built upon the realty, and hence included a railroad. *Giant Powder Co. v. Oregon Pac. R. Co.* (U. S.) 42 Fed. 470, 473, 8 L. R. A. 700.

The term "other structures," as used in the mechanic's lien law of Oregon of 1885, giving a lien on materials furnished for any building, bridge, fence, machinery, or any other structure, includes a railway. *Ban v. Columbia Southern R. Co.* (U. S.) 117 Fed. 21, 31, 54 C. C. A. 407.

#### Railroad tracks.

"Structure," as used in a statute providing an action for injuries sustained by reason of defective roads and bridges, and enacting that, when the injury is caused by a structure legally placed on such road by a railroad company, it, and not the party bound to keep the road in repair, shall be liable therefor, should be construed to include the tracks of a railroad. *New York, N. H. & H. R. Co.*

*v. City of New Haven*, 39 Atl. 597, 599, 70 Conn. 390.

#### Reservoir.

A reservoir for an electric light plant, for the purpose of storing water sufficient to supply the steam engines operating such plant, is a part of the main structure thereof, and an appurtenance to the property. *Brush Electric Works v. Warwick Electric Mfg. Co.* (Ohio) 6 Lower Ct. Dec. 475, 4 Ohio N. P. Rep. 279, 6 Ohio S. & C. P. Dec. 475, 478.

#### Swings or seats in dancing hall.

"Structures," as used in Code, §§ 1183, 1192, authorizing a mechanic's lien on buildings or "structures," etc., does not include swings or seats in a dancing hall. *Lothian v. Wood*, 55 Cal. 159, 163.

#### Train.

Rev. 1875, p. 232, § 10, providing that, when an injury is caused by a structure legally placed on a road by a railroad company, it, and not the party bound to keep the road in repair, shall be liable therefor, refers to some permanent stationary erection, rather than to a moving car or locomotive engine. The railroad track would be a structure, but a moving train on the track cannot well be construed as a part of the structure. *Lee v. Town of Barkhamsted*, 46 Conn. 213, 217.

#### Vessel.

The word "structure," measured by its derivation, means something that is arranged built, or constructed. *Webst. Dict.* *Bouvier* defines it to mean "that which is built or constructed." A vessel in the course of construction is a structure, within the meaning of *Laws 1897, c. 415*, providing that a person employing another in the erection or repairing of a house, building, or structure shall not erect unsafe scaffolding. *Chaffee v. Union Dry-Dock Co.*, 73 N. Y. Supp. 908, 911, 68 App. Div. 578.

#### STRUCTURE CONNECTED WITH WHARF.

"Structure," as used in *Laws 1872, c. 669, § 1*, giving a mechanic's lien on wharves, piers, bulkheads, and bridges, and materials furnished therefor, and labor performed in constructing such wharves, piers, bulkheads, and bridges, and other structures connected therewith, unquestionably includes or comprehends a building, and is not limited to mean only appendages to a pier or wharf, such as stairs, gangways, etc. *Collins v. Drew* (N. Y.) 6 Daly, 234, 236.

#### STUBBLE.

In a lease requiring that the premises should be sowed to wheat, oats, or barley,



and hay, and providing that all the "stubble" on the land should belong exclusively to the landlord, "stubble" includes whatever is left on the ground after the harvest time. *Callahan v. Stanley*, 57 Cal. 476, 478.

The roots from which sugar cane has been cut are called "stubble." *Viterbo v. Friedlander*, 7 Sup. Ct. 962, 976, 120 U. S. 707, 80 L. Ed. 776.

## STUDIO.

Where premises were leased to be occupied as a "studio and salesroom," and for no other purpose, a sublease to a person occupying the premises as a dramshop was a breach of the contract; the court saying that while we often hear dramshops spoken of as "saloons," and see them so mentioned in city ordinances, and signs upon them often read "sample room," "family resort," and other designations, yet no one has ever, we believe, yet endeavored to attract custom by calling a dramshop a "studio" or a "salesroom." *Bryden v. Northrup*, 58 Ill. App. 233, 235.

## STUFF.

The meaning of the word "stuff," as used in a question to a witness, as asking him if it is going to benefit him to tell that stuff, means trash, nonsense, foolish or irrational language, or a falsehood; and an objection to the question containing such words was properly sustained, since any answer would compel an admission of the falsity of his testimony. *State v. Weema*, 65 N. W. 387, 393, 96 Iowa, 426.

## STUFFING THE BALLOT BOX.

Where officers of election fraudulently and clandestinely put in place in the ballot box ballots which had not been voted at such election before the ballots lawfully deposited in such ballot box had been counted, with intent thereby to affect the election and its result, they are guilty of an offense commonly known as "stuffing the ballot box." *Ex parte Siebold*, 100 U. S. 371, 379, 25 L. Ed. 717.

## STUMP.

A stump is that part of a tree or plant remaining in the earth after the stem or trunk is cut off; the stub. *Webst. Dict.* It was held that an averment that an injury was caused by a stump in a highway was a sufficient allegation that the stump was attached to the soil and of its existence for some time. *Cremer v. The Town of Portland*, 36 Wis. 92, 96.

## STUMPAGE.

"Stumpage" is timber standing in the tree. *Nitz v. Bolton*, 39 N. W. 15, 16, 71 Mich. 388.

The standing timber on land is commonly called "stumpage." *Gordon v. Grand Rapids & L. R. Co.*, 61 N. W. 549, 550, 103 Mich. 379.

"Stumpage" is the value of the timber in a standing tree. *United States v. Mills* (U. S.) 9 Fed. 684, 687; *Skeels v. Starrett*, 24 N. W. 98, 101, 57 Mich. 350.

"Stumpage" is the term used to express the compensation paid by the purchaser for standing timber to be cut and removed by him. *Baker v. Whiting* (U. S.) 2 Fed. Cas. 495, 499.

A written agreement whereby defendant promised to convey to the plaintiff an interest in certain timber land when he had received his advances and certain costs and expenses from the "stumpage cut on the land" meant money received or expected to be received from the sale of licenses to cut and remove timber from the land. *Blood v. Drummond*, 67 Me. 476, 478.

## STUMP-TAIL.

"Stump-tail" means depreciated currency. *Webster v. Pierce*, 85 Ill. 158, 159, 163.

## STUPOR.

"Stupor" means a different thing from excitement. It signifies a suspension or great diminution of sensibility; a state in which the faculties are deadened or dazed. *Baldrige v. State* (Tex.) 74 S. W. 916, 919.

## STYLE.

In an action for loss of support against liquor sellers, the court instructed that the term "means of support" included such means as would enable the plaintiffs to live in the style and condition becoming their station in life. The use of the term "style" was criticised as being a matter purely of individual taste; but the court held that the word "style" meant mode or manner, and that its use was not therefore prejudicial. *Gorey v. Kelly*, 90 N. W. 554, 555, 64 Neb. 605.

## SUB CONDITIONE.

For a time out of mind, conditions have usually been preceded by such words as "proviso," "ita quod," and "sub conditione," or their modern equivalents. *Graves v. Deterling*, 24 N. E. 655, 657, 120 N. Y. 447 (quoted in *Trustees of Union College v. City of*

New York, 73 N. Y. Supp. 51, 53, 65 App. Div. 553).

## SUBCONTRACT.

"Subcontract," as used in Laws Ky. 1888, giving a lien to persons furnishing labor or materials for the construction of railroads and other public improvements, by contract with the owner, or by subcontract thereunder, means a contract made under a contract with the owner, or a contract made with the principal contractor. *Central Trust Co. v. Richmond, N. I. & B. R. Co.* (U. S.) 54 Fed. 723, 724.

The term "subcontract thereunder," as used in the Kentucky act providing that all persons performing labor or furnishing material by contract or by subcontract thereunder shall have a lien, could not be intended to make the lien of the subcontractor a subrogated one, taking simply the place of the contractor, since, if such was the intention, the limitation of the lien to original contract rights would be without meaning, and it gives the subcontractor a direct lien. *Central Trust Co. v. Richmond, N. I. & B. B. Co.* (U. S.) 68 Fed. 90, 96, 15 C. C. A. 273, 41 L. R. A. 458.

## SUBCONTRACTOR.

As contractor, see "Contractor."

A "subcontractor" is one who has entered into a contract, express or implied, for the performance of an act with a person who has already contracted for its performance. *Lester v. Houston*, 8 S. E. 366, 369, 101 N. C. 605 (citing *Phil. Mech. Liens*, § 44).

"Subcontractor," as used in *Mansf. Dig.* § 4422, providing that all persons furnishing things or doing work, except such as shall have contracts therefor directly with the owner, proprietor, or agent, shall be considered subcontractors, includes one who works for the contractor, and authorizes a mechanic's lien in his behalf. *Buckley v. Taylor*, 11 S. W. 281, 51 Ark. 301.

"Subcontractor," within the meaning of the Kentucky lien act, is one who contracts under and with the principal contractor. *Richmond & I. Const. Co. v. Richmond, N. I. & B. R. Co.* (U. S.) 68 Fed. 105, 109, 15 C. C. A. 289, 34 L. R. A. 625.

The word "subcontractor," as used in the mechanic's lien law, means one who directly contracts with the original contractor. *Nixon v. Cydon Lodge*, No. 5, K. P., 43 Pac. 236, 238, 56 Kan. 298.

The "subcontractor" is an undercontractor—one who takes under the original contract, and presumably with knowledge of the terms and conditions thereof. A subcon-

tractor is not within the meaning of the Nebraska statute requiring county boards to take from contractors erecting public buildings a bond for "the payment of all laborers and mechanics for their labor," etc., and cannot maintain an action on such bond for a balance due him from the principal contractor for materials furnished and wages paid to laborers. *Erath v. Allen*, 55 Mo. App. 107, 115.

All persons furnishing things or doing work provided for by the act relating to mechanics' liens shall be considered subcontractors, except such as have contracts therefor directly with the owner, proprietor, or his agent or trustee. *Ind. T. Ann.* St. 1899, § 2889; *Code Iowa* 1897, § 3097; *Rev. Codes N. D.* 1899, § 4800; *Code Civ. Proc. S. D.* 1903, § 712.

Whoever shall do work or furnish materials by contract, express or implied, with the owner, as provided in the mechanic's lien law, shall be deemed an original contractor, and all other persons doing work or furnishing materials shall be deemed subcontractors. *Rev. St. Utah* 1898, § 1383.

The word "subcontractor," as used in the mechanic's lien laws, means one who by contract or agreement, express or implied, with the contractor or with one who acts for him, superintends the structure or other improvement, or any part thereof, or furnishes labor, skill, or superintendence thereto, or supplies or hauls material reasonably necessary for and actually used therein, or any or all of them, whether as superintendent, builder, or materialman, excluding, however, architects and those contracting with materialmen. 4 P. & L. Dig. Laws Pa. 1897, col. 1150, § 4.

## As laborer or operative.

See "Laborer"; "Operative."

A laborer, working by the day as materialman, who delivers ties or lumber to a railroad construction contractor, is not a subcontractor, within the lien law. We suppose a subcontractor to be one who takes from the principal contractor specified parts of the work, as, for instance, one who agrees with the principal contractor to construct 10 miles of a railroad out of a line of 20 or more miles, which the principal contractor has undertaken to build. *Farmers' Loan & Trust Co. v. Canada & St. L. Ry. Co.*, 127 Ind. 250, 257, 26 N. E. 784, 785, 11 L. R. A. 740.

## Materialman.

"Subcontractor," as used in *Gen. St.* 1878, c. 90, § 2, providing that all persons performing work of a specified character or furnishing any materials therefor, whether such work was performed as a subcontractor

or otherwise, should have a lien upon the property, etc., does not include one who simply furnishes materials, but takes no part in the work of construction. *Merriman v. Jones*, 44 N. W. 526, 527, 43 Minn. 29 (cited in *Hightower v. Bailey*, 56 S. W. 147, 149, 108 Ky. 198, 49 L. R. A. 255, 94 Am. St. Rep. 350).

A lumber merchant, furnishing lumber for the erection of an elevator to builders and contractors, who were to erect a building for the owners of land, is not a "subcontractor," within Ky. St. § 2463, giving a lien to the person who furnishes material in the erection of the building by contract with a subcontractor, so as to give the person from whom such lumber merchant purchased lumber a lien on the building. *Hightower v. Bailey*, 56 S. W. 147, 149, 108 Ky. 198, 49 L. R. A. 255, 94 Am. St. Rep. 350.

Under Pub. Acts 1885, No. 45, requiring a contractor on a public building to furnish a bond for payment for materials, one who furnished brick, not for a lump sum, as under a contract, but who was to supply them as would any other materialman supply the lime, sand, or other articles to be used in the building, at so much per thousand, etc., is not a "subcontractor." *Staffon v. Lyon*, 104 Mich. 249, 251, 62 N. W. 354, 355.

## SUBDISTRICT.

"Subdistrict," as used in Act 1867 in relation to common schools, does not include the subordinate territorial divisions of separate school districts, in which a suit or overcharge may be subdivided under the provisions of Act March 14, 1853, § 33. That applies exclusively to township or county subdistricts, outside of the limits of any city or village, as established by Act March 14, 1853. *Anders v. Spargur*, 19 Ohio St. 577, 578.

## SUBDIVIDE.

Where Gen. Laws 18th Gen. Assem. (Sp. Sess.) p. 43, providing for a system of free schools, provided that it should be the duty of the county commissioners' court of all counties not exempted from this section to subdivide their respective counties into convenient school districts, the word "subdivide" should be construed as used with reference to the existing division of the state into counties. *Reynolds' Land & Cattle Co. v. McCabe*, 12 S. W. 165, 72 Tex. 57.

## SUBDIVISION.

See "Judicial Subdivision"; "Legal Subdivision."

The word "subdivision" means division into smaller parts of the same thing or sub-

ject-matter. *Kansas City v. Neal*, 26 S. W. 695, 696, 122 Mo. 232.

"Subdivision," as used in *Sayles' Civ. St. art. 4592*, providing that, on the petition of "twenty freeholders of any subdivision of a county, the commissioners' court of such county shall order an election to be held in said \* \* \* subdivision, on some day named in the order," to determine whether hogs, sheep, goats, etc., shall be permitted to run at large in such subdivision, applies to a town within the county. *Gilley v. Had-dox* (Tex.) 15 S. W. 714, 715.

Whenever the terms "county," "subdivision," or "judicial subdivision," as employed in the Code of Criminal Procedure, in defining or describing the territorial or local jurisdiction of any magistrate or court, or in restraining, enlarging, or otherwise conferring authority upon any court, officer, or person of this state, are deemed to be employed in the same sense and interchangeably, except when a different sense plainly appears, as, for example: (1) The term "county," when so employed, includes an organized county, or an organized county and such unorganized counties, or other territory or parts of this state, as now are or as may be hereafter by law attached to such organized county for judicial purposes; (2) the term "subdivision," when so employed, includes an organized county, or an organized county and such unorganized county or counties, or other territory or parts of this state, as now are or as may be hereafter by law attached to such organized county for judicial purposes. *Rev. Codes N. D. 1899, § 8511.*

## SUBJECT.

See "Chinese Subjects"; "Foreign Subject."

"Subject" is defined as that of which anything is affirmed or predicated; the theme of a proposition or discourse; that which is spoken of. *State v. Superior Court of King County*, 68 Pac. 957, 960, 28 Wash. 317, 92 Am. St. Rep. 831; *In re Mayer*, 50 N. Y. 504, 507.

One of the meanings of the word "subject" as defined by Webster is: "That which is brought under thought or examination; that which is taken up for discussion." *People v. Parvin* (Cal.) 14 Pac. 783, 784.

The word "subject" (which is from the Latin "subjectus," participle of "subjicio," to lie under) signifies the thing forming the groundwork. It may contain many particu-

lars, which grow out of it and are germane to it, and which, if traced back, will lead the mind to it as the generic head. For instance, in legislation, the incorporation of a bank, college, etc., the subject and such particulars as will be subservient to such an incorporation are germane to it and properly included in the law. *O'Leary v. Cook County*, 28 Ill. 534, 537 (citing *Crabb*, *Synonyms*, p. 325).

The subject is that concerning which something is done; hence an agreement by a husband to pay his wife a certain sum in consideration of her signing a deed is within the provisions of Code 1873, § 2203, providing that, when property is owned by either the husband or wife, the other has no interest therein that can be the subject of contract between them. *Miller v. Miller*, 73 N. W. 484, 485, 104 Iowa, 186.

A bankrupt law is a law for the benefit and relief of creditors and their debtors in cases in which the latter are unable or unwilling to pay their debts; and a "law on the subject of bankruptcies," in the sense of the Constitution, is a law making provision for cases of persons failing to pay their debts. 4 Elliot, Deb. Fed. Const. 282. The laws upon that subject in a general sense concern the relation of debtor and creditor, a relation existing largely between citizens of different states, and in fact constituting a branch of those great commercial relations over which the power of Congress is also extended. The expression has also a limited signification; that is, that it concerns the relation of debtor and creditor in cases where the debtor is unable or unwilling to pay his debts. Such laws have for their object the appropriation, either voluntarily or by compulsion, of the debtor's property to the payment of his debts, pro tanto or in full as the case may be, and the relief of honest debtors. To accomplish this object these laws are made to operate upon, affect, and control the relations of the parties, so as to limit and circumscribe the rights of the debtor in and his control over his property, in many particulars before any proceedings in bankruptcy shall have been commenced. Under these principles section 44 of the bankrupt act of 1867, providing for the punishment of any debtor or bankrupt who fraudulently disposes of his goods within three months next before the commencement of proceedings in bankruptcy, is a "necessary and proper" law on the subject of bankruptcies, as provided for by the Constitution. It is as though Congress had made the commencement of bankruptcy proceedings conclusive proof that the debtor contemplated bankruptcy in disposing of the property. *United States v. Pusey* (U. S.) 27 Fed. Cas. 631, 632.

There is a difference between the subject of the court's jurisdiction and the subject-

matter of the particular action; for the subject of the court's jurisdiction is a class, but the subject-matter of a particular case is a single thing, not a multitude of things. *Jackson v. Smith*, 120 Ind. 520, 522, 22 N. E. 431.

#### As citizen.

The word "subject" means a subjection to some sovereign power, and is not barely connected with the idea of territory. It refers to one who owes obedience to the laws and is entitled to partake of the elections into public office. *Respublica v. Chapman* (Pa.) 1 Dall. 53, 60, 1 L. Ed. 33.

The word "subjects," as used in a treaty between the United States and a foreign monarchical state, must be construed in the same sense as the term "citizens" or "inhabitants" when applied to persons owing allegiance to the United States, and extends to all persons domiciled in the foreign state. *The Pizarro*, 15 U. S. (2 Wheat.) 227, 245, 4 L. Ed. 226.

A person domiciled in a country, enjoying the protection of its sovereign, is deemed a "subject" of that country. *United States v. Chong Sam* (U. S.) 47 Fed. 878, 885.

Dicey, *Conf. Laws*, pp. 173-177, 741, says: "The term 'British subject' means any person who owes permanent allegiance to the crown; the words 'permanent allegiance' being used to distinguish the allegiance of a British subject from the allegiance of an alien, who, because he is within the British dominions, owes temporary allegiance to the crown. A 'natural-born British subject' means a British subject who has become a British subject at the moment of his birth. Subject to the exceptions herein mentioned, who, whatever the nationality of the parents, is born within the British dominions, is a natural-born British subject. The exceptions are only two: (1) Any person who, his father being an alien enemy, is born in a part of the British dominions which at the time of such person's birth is in hostile occupation, is an alien; (2) any person whose father, being an alien, is at the time of such person's birth an ambassador or other diplomatic agent, accredited to the crown by the sovereign of a foreign state, is, though born within the British dominions, an alien. The exceptions are due to the fact that, though a common-law nationality or allegiance in substance depended on the place of a person's birth, it, in theory, at least, depended, not upon the locality of a man's birth, but upon his being born within the jurisdiction and allegiance of the king of England, and it might occasionally happen that a person was born within the dominion without being born within the allegiance, or, in other words, under the protection and control, of the crown." *United States v.*

Wong Kim Ark, 18 Sup. Ct. 456, 459, 169 U. S. 649, 42 L. Ed. 890.

In construing an indictment for the crime of "disturbing the peace of the neighborhood, and of all faithful subjects of this commonwealth," the court stated that it knew of no such term as "subject" in this country by which to designate the people, or as constituting a part of the living, intelligent, and rational members of the body politic. *Commonwealth v. Hutchinson* (Pa.) 5 Clark, 321, 322.

#### **SUBJECT (Of Action).**

The "subject" is that on which any operation, either mental or material, is performed, as a subject for contemplation or controversy. The subject of an action is either property, as illustrated by a real action, or violated rights. *Glen & Hall Mfg. Co. v. Hall*, 61 N. Y. 226, 236, 19 Am. Rep. 278.

The words "subject of the action," as found in Gen. St. Minn. 1894, § 5024, subd. 3, which requires the plaintiff, who desires to serve a summons by publication to make affidavit, among other things, that the court has jurisdiction of the subject of the action, relate to the controversy between the parties, and not to the property of the defendant that has previously been seized on attachment. *Hartzell v. Vigen*, 69 N. W. 203, 204, 6 N. D. 117, 35 L. R. A. 451, 66 Am. St. Rep. 589.

"Subject of the action," as used in Code Civ. Proc. § 982, requiring an action for a nuisance to be tried in the county in which the subject of the action or some part thereof is situated, means that "which is to be directly affected in case the relief demanded by the plaintiff is granted, as, in an action of ejectment, the land described in the complaint, or, in an action for nuisance, the object or structure mentioned and alleged to have been unlawfully constructed or erected, or the acts, practice, or doings of the defendant which are charged as illegal and are stated in the complaint as the foundation of the relief demanded." *Horne v. City of Buffalo*, 9 N. Y. Supp. 801, 802, 49 Hun, 76.

In an action charging the wrongful conversion of the proceeds of goods sold by defendant on commission, the tort is the subject of the action and sole foundation of the plaintiff's claim, within the meaning of Rev. St. c. 125, § 11, subd. 1, authorizing the defendant to plead as a counterclaim a cause of action connected with the subject of the action; and therefore in such action defendant cannot set up a counterclaim for damages caused by plaintiff's breach of stipulations contained in the agreement under which the goods were delivered, but not having any reference to the very goods in question. *Scheunert v. Kaehler*, 23 Wis. 523, 528.

The term "subject of the action or some part thereof," as contained in Code Proc. §

146, providing for the trial of causes in the county in which the subject of the action or some part thereof is situated, would authorize the trial of an action in the county where property, both real and personal, of a deceased debtor, was situated, though a portion of the real estate was situated in another county. *Barrett v. Watts*, 13 S. C. 441, 443.

#### **As cause of action.**

The words "subject of the action," as used in Code, § 135, subd. 4, providing that an order for publication may be had in an action where the subject of the action is real or personal property in the state, and the defendant has or claims a lien or interest, actual or contingent, therein, or the relief demanded consists fully or partly in excluding the defendant from any interest therein, cannot be construed as identical with the words "cause of action," and are not satisfied when the court has before it merely an obligation of a contract. They seem to have relation to some property or thing concerning which the proceeding is instituted and carried on, and the changes to be effected by it. The phrases "cause of action" and "subject of action" are not used interchangeably or as synonyms. It is not easy to define their precise meaning, but it seems that they relate, not to an action at law, though to one which formerly would have proceeded in equity; the object being to give some specific relief, rather than a suit or judgment against the person, as in an action to cancel a mortgage on the ground of usury, or to enforce specific performance, or to obtain such relief as by the rules of the common law was denied to the suitor in its forum, and certainly not an action where the only relief sought was a judgment upon a contract for the payment of money. There might be jurisdiction of the cause of action, but there must also be jurisdiction over the "subject of the action"; and until the thing or property to be affected by it has been seized or taken by legal process it is difficult to see how it can be said that the court has jurisdiction over it. *McKinney v. Collins*, 88 N. Y. 216, 221.

The subject of an action is what is primarily understood as the subject-matter of the action, and, as Mr. Pomeroy says, "finds its primary and modern application in equitable, rather than legal, proceedings. The cause of action is the right claimed or wrong suffered by the plaintiff on the one hand, and the duty or delict of the defendant on the other, and these appear by the facts of each separate case." *Rodgers v. Mutual Endowment Ass'n*, 17 S. C. 406, 410.

#### **As facts constituting cause of action.**

The words "subject of the action," in Code, § 150, providing that a counterclaim must be connected with the subject of the action, mean the facts constituting plaintiff's

cause of action. *Lehmaier v. Griswold*, 40 N. Y. Super. Ct. (8 Jones & S.) 100, 101; *Hall v. Werney*, 46 N. Y. Supp. 33, 34, 18 App. Div. 565; *Sugden v. Magnolia Metal Co.*, 68 N. Y. Supp. 809, 812, 58 App. Div. 236 (citing *Rothschild v. Whitman*, 30 N. E. 858, 132 N. Y. 472).

The words "subject of the action," in the statute providing that a counterclaim must relate to the subject of the action, must be construed, not as relating to the thing itself about which the controversy has arisen, but as referring rather to the origin and ground of plaintiff's right to recover or obtain the relief asked. *Collier v. Ervin*, 3 Mont. 142, 145.

#### As subject-matter.

The phrase "subject of the action," in Code, § 452, providing that where a person not a party to the action is interested in the subject thereof, or in real property the title of which may in any manner be affected by the judgment, and makes application to the court to be made a party, it must direct him to be brought in by a proper amendment, means the subject-matter of the action. *Merchants' Nat. Bank of Norwich v. Hagemeyer*, 38 N. Y. Supp. 626, 628, 4 App. Div. 52.

"Subject of the action," as used in a statute authorizing a defendant to set up as a counterclaim any cause of action arising out of the transaction set forth in the complaint or connected with the subject of the action, means the thing or subject-matter to which the litigation pertains; and hence in an action for conversion of a schooner, the schooner was the subject of the action, and a demand for wages for taking care of the schooner prior to and at the time of the alleged conversion was connected with the subject of the action, and was properly pleaded as a counterclaim. *Revere Fire Ins. Co. v. Chamberlin*, 8 N. W. 338, 339, 56 Iowa, 508; *Lapham v. Osborne*, 18 Pac. 881, 884, 20 Nev. 168.

The phrase "subject of the action," as used in Code Civ. Proc. § 89, providing that a defendant may demur to the petition when it appears that the court has no jurisdiction of the subject of the action, is employed as synonymous with "subject-matter," which Bouvier defines to be the cause, the object, the thing in dispute. *Parker v. Lynch*, 56 Pac. 1082, 1088, 7 Okl. 631.

#### SUBJECT (Of Statute).

The subject of a law is the matter to which it relates and with which it deals. *State v. Ferguson*, 28 South. 917, 918, 104 La. 249, 81 Am. St. Rep. 123; *McNeeley v. South Penn Oil Co.*, 44 S. E. 508, 518, 52 W. Va. 616, 62 L. R. A. 562.

"Subject," as used in a constitutional requirement that laws shall contain but one

subject, which shall be plainly expressed in their title, is a very indefinite word. A phrase may state the subject in a very general or indefinite manner, or with minute particularity. The subject of laws with such titles as the following, "to adopt a Penal Code," "to adopt a code of laws," or "to ratify the by-laws of a corporation," would be expressed in a general way, and very little knowledge of the specific provisions of the laws could be gained from the title, yet it would nevertheless be true that the subject was described in the title. *Ex parte Thomas*, 21 South. 369, 370, 113 Ala. 1.

Webster, in his definition of the word "subject," uses two quotations to illustrate its meaning: "This subject for heroic song." "Make choice of a subject, beautiful and noble, which shall afford an ample field of matter whereon to expatiate." The author of an essay or lecture, in choosing and announcing his subject, does not ordinarily declare in its title his proposed treatment thereof, but he simply states upon what he is to write or speak, and he who would know more must read or hear what is written or spoken upon that topic. Precisely this the framers of the Constitution had in mind in providing that the subject of a bill passed by the Legislature should be expressed in the title. *Hurlburt v. Banks* (N. Y.) 1 Abb. N. C. 157, 164.

The constitutional provision that no bill shall contain more than one subject, which shall be expressed in its title, is not violated where the general title is not used as a cloak for legislating upon different matters, and where incongruous matters are not joined. *City of St. Louis v. Green*, 7 Mo. App. 468, 472.

The title of the act (St. 1901, p. 117) "to revise the Code of Civil Procedure of the state of California by amending certain sections, repealing others, and adding certain new sections," is repugnant to Const. art. 4, § 24, providing that every act shall embrace but one subject, which shall be embraced in the title, since many different subjects are embraced in the Code of Civil Procedure and the title does not indicate to what subject the act relates. The word "subject" is used in the Constitution in its ordinary sense, and when it says that an act shall embrace but one subject, it implies that there are many subjects of legislation, and declares that only one of them shall be embraced in one act. *Lewis v. Dunne*, 66 Pac. 478, 480, 134 Cal. 291, 55 L. R. A. 833, 86 Am. St. Rep. 257.

In construing the constitutional provision that the title to each act shall express its subject, the court (*In re Mayer*, 50 N. Y. 504) says that the Constitution does not require that the title of the act should be the most exact expression of the subject which could be given. It is enough if it fairly and reasonably announces the subject of the act. A subject is that of which anything may be af-

firmed or predicated. *Yellow River Improvement Co. v. Arnold*, 46 Wis. 214, 226, 227, 49 N. W. 971, 974.

The term "subject," as employed in Const. art. 2, § 20, declaring "every act . . . shall relate to but one subject, and that shall be expressed in the title," must receive a liberal interpretation, not only as employed in imposing limitations on the legislative authority, but in furtherance of the particular object disclosed by the section in which it occurs. Its object is in part to secure a systematic treatment of matters for legislation, by drawing whatever appertains to either a particular or general subject into consideration separate and apart from all matters not appertaining to such subject; experience having shown that neglect of such systematic treatment exposes a legislative body to imposition by the surreptitious introduction of irrelevant matters, and tends to impair the completeness of their work. *State v. County Treasurer*, 4 S. C. 520, 528.

The word "subject," as used in Const. art. 4, § 27, providing that no law shall embrace more than one subject, which shall be expressed in the title, is to be given a broad and extended meaning, so as to allow the Legislature full scope to include in one act all matters having a logical or natural connection. To constitute duplicity of subject, an act must embrace two or more dissimilar and discordant subjects that by no fair intendment can be considered as having any legitimate connection with or relation to each other. All that is necessary is that the act should embrace some one general subject; and by this is meant merely that all matters treated of should fall under one general idea, and be so connected with or related to each other, either logically or in popular understanding, as to be parts of, or germane to, one general subject. *Johnson v. Harrison*, 47 Minn. 575, 577, 50 N. W. 923, 28 Am. St. Rep. 382.

In the constitutional provision that every act shall embrace but one subject and matters properly connected therewith, it is held that the words "subject" and "matters" are as nearly synonymous as it is possible for two English words to be, and that they both are used simply to avoid repetition; the only difference between them being created by the offices which they are respectively made to perform in the clause in question. "It is quite evident," says the court, "that the word 'subject' is here used to indicate the chief thing about which legislation is had, and 'matters' the things which are secondary, subordinate, and incidental." *Hingle v. State*, 24 Ind. 28, 32; *State v. Roby*, 41 N. E. 145, 151, 142 Ind. 168, 33 L. R. A. 213, 51 Am. St. Rep. 174; *State v. Arnold*, 38 N. E. 820, 821, 140 Ind. 628; *State v. Gerhardt*, 44 N. E. 469, 475, 145 Ind. 439, 33 L. R. A. 313;

*Clarke v. Darr*, 60 N. E. 688, 690, 156 Ind. 692.

#### As matter acted on.

"Subject," as used in Const. art. 3, providing that no bill shall contain more than one subject, which shall be expressed in its title, means that which is to be dominated or controlled by particular law. *Day Land & Cattle Co. v. State*, 4 S. W. 865, 872, 68 Tex. 526.

The "subject" of a statute is the matter of public or private concern for which the law is enacted. *Allopathic State Board of Medical Examiners v. Fowler*, 24 South. 809, 813, 50 La. Ann. 1358.

Under Const. art. 3, § 16, declaring that "no private or local bill which may be passed by the Legislature shall embrace more than one subject, and that shall be expressed in the title," the subject is the thing legislated upon. What the act proposes to do with the subject need not be stated in its title, nor the machinery to be put in operation therein disclosed. It is enough if the subject of the legislation be stated. *Hurlburt v. Banks* (N. Y.) 52 How. Prac. 196, 202, 203.

#### As object.

Instead of the word "subject," in Const. art. 5, § 21, providing that no bill, except the general appropriation bill, shall contain more than one subject, which shall be clearly expressed in its title, the Constitutions of some of the states have in like provisions the word "object." "Some states, as Texas and New York, give to 'subject' a less restricted meaning than 'object.' Others, like Michigan, regard these words as substantially synonymous." In re House Bill No. 168, 39 Pac. 1096, 1098, 21 Colo. 46.

The word "subject" is synonymous with "object" as used in the organic act of Washington Territory, providing that every law shall embrace but one object, and that shall be expressed in the title. If there is any distinction between the words, "object," in the connection in which it is used, is obviously of broader significance than the word "subject." "Object" may be used as having the sense of effect—the thing intended to be accomplished, not the means by which it is to be accomplished, which is properly the subject. "For instance, the object of an act is to confer the elective franchise on females. Its subject is the subject-matter on which, in accomplishing that object, the legislative will operated—namely the section of the Code defining the qualification of electors." *Harland v. Territory*, 13 Pac. 453, 457, 8 Wash. T. 131.

"Subject," as used in Const. art. 3, § 21, providing that no law shall embrace more than one subject, which shall be expressed

in its title, is the matter of public or private concern for which the law is enacted, and is not synonymous with "object," which is the aim or purpose of the enactment. *State v. Morgan*, 48 N. W. 314, 315, 2 S. D. 32.

In considering the constitutional provision that the subject of an act must be embraced in the title, it must not be overlooked that the Constitution demands that the title of an act shall express the "subject," and not the "object," of the act. It is the matter to which the statute relates and with which it deals, and not what it proposes to do, which is to be found in the title. It is no constitutional objection to a statute that its title is vague or unmeaning as to its purpose, if it be sufficiently distinct as to the matter to which it refers. *People v. Lawrence* (N. Y.) 36 Barb. 177, 192.

#### As purpose.

"Subject," as used in Const. art. 5, § 21, providing that no bill shall be passed containing more than one subject, is substantially equivalent to "purpose." In re House Bill No. 168, 39 Pac. 1096, 1098, 21 Colo. 46.

#### As what the act is to prevent.

"Subject," as used in Const. art. 3, § 17, providing that every law enacted by the Legislature should embrace but one subject, which should be described in the title, when applied to a penal law, may generally be perceived by ascertaining what mischief or evil the law was designed to embrace or to prevent. Where the plain and obvious meaning of the language of the title of an act clearly manifests an intention to prohibit or restrain minors and people of color from obtaining intoxicating liquor in the city of Annapolis, or within five miles thereof, prohibiting the sale of it to them is only one of the means by which the chief intention of the Legislature was to be accomplished. Employing other means, as giving or bargaining, designed to effect the same purpose, cannot be properly considered the introduction of another or different subject, within the meaning of the constitutional restriction. *Parkinson v. State*, 14 Md. 184, 194, 74 Am. Dec. 522.

#### Provision distinguished.

The word "subject," as used in Const. art. 3, § 35, which provides that no bill shall contain more than one subject, which shall be expressed in its title, is not synonymous with the word "provision"; and where the different provisions of a statute refer directly to the same subject, and are not foreign to the subject expressed in the title, the statute is not in violation of the constitutional provision. Laws 1897 (Sp. Sess.) p. 14, entitled "An act to prescribe and define the liability of persons, receivers, or corporations operating railways, or street railways, for injuries to their servants and employes, to define who

are their fellow servants, and to prohibit contracts between employer and employe based on the contingency or death of the employe, limiting the liability of the employer for damages," does not contain a plurality of subjects, within the meaning of the constitutional provision. *Mexican Nat. R. Co. v. Jackson* (U. S.) 118 Fed. 549, 552, 55 C. C. A. 315.

#### Related matters included.

Those things which have a proper relation to each other, which fairly constitute parts of a scheme to accomplish a single general purpose, relate to the same subject or object, within Const. Pa. 1790 (as amended) art. 11, § 8, providing that an act of the Legislature shall not contain more than one subject. *Payne v. School Dist. of Borough of Coudersport*, 81 Atl. 1072, 1074, 168 Pa. 386.

"Subject," as used in Const. art. 2, § 6, providing that no bill shall contain more than one subject, which shall be clearly expressed in its title, has a large signification, often embracing different kinds, different classes, and various modes of belonging to the general subject. The word "estates" is itself an example, embracing fees, fee tails, estates for life, and estates for years, commonly called "leaseholds." *Ballentyne v. Wickersham*, 75 Ala. 533, 537 (citing *Dorsey's Appeal*, 72 Pa. [22 P. F. Smith] 192).

As used in a constitutional provision that every legislative enactment shall contain but one subject, which shall be expressed in its title, "subject" may include innumerable minor subjects, provided they are all capable of being combined, so as to form only one comprehensive subject, and in this manner the subject may be as broad and comprehensive as the Legislature may choose to make it, but the bill will contain but one subject, if its title is comprehensive enough to include all minor subjects as parts of the one subject. *Bell v. State*, 22 South. 453, 454, 115 Ala. 87 (citing *In re Division of Howard County*, 15 Kan. 194; *Ballentyne v. Wickersham*, 75 Ala. 533, 536, 537).

#### SUBJECT-MATTER.

"Subject-matter" is defined by Bouvier as the cause, the object, the thing in dispute. *Parker v. Lynch*, 56 Pac. 1082, 1088, 7 Okl. 631.

By jurisdiction over the subject-matter is meant the nature of the cause of action and of the relief sought, and power to adjudge concerning the general question involved. It is the power to act on the general, and, so to speak, abstract, question, and to determine and adjudge whether the particular facts presented call for the exercise of the abstract power. *Hughes v. Cumming*, 58 N. E. 794, 795, 165 N. Y. 91.



The subject-matter of a suit, when reference is made to questions of jurisdiction, is defined to mean "the nature of the cause of action or the relief sought." *Hope v. Blair*, 16 S. W. 595, 597, 105 Mo. 85, 24 Am. St. Rep. 366 (citing *Cooper v. Reynolds*, 77 U. S. [10 Wall.] 316, 19 L. Ed. 931).

There is a difference between the subject of the court's jurisdiction and the subject-matter of the particular action. For the subject of the court's jurisdiction is a class, but the subject-matter of a particular case is a single thing, not a multitude of things. *Jackson v. Smith*, 120 Ind. 520, 522, 22 N. E. 431.

#### Cause of action synonymous.

"Subject-matter," as used in 2 Rev. St. p. 301, § 50, providing that section 49 shall not extend to suits over the subject-matter of which a court of equity has peculiar and exclusive jurisdiction, and which subject-matter is not cognizable in the courts of common law, is synonymous with the term "cause of action," contained in section 49, providing that, whenever there is a concurrent jurisdiction in courts of common law and in courts of equity in any cause of action, the provisions limiting the time for the commencement of suit in such cause of action in a court of common law shall apply to all suits hereafter to be brought for the same cause in the court of chancery. *Borst v. Corey*, 15 N. Y. 505, 509.

"Subject-matter" and "cause of action" are not synonymous. A judgment in an action on a note for the purchase price of property sold by an agent of the state authorized only to sell for cash is not a bar to a recovery on the note after the unauthorized sale has been ratified by the Legislature. The cause of action was created by the act of ratification, and only accrued at that date, which was subsequent to the rendition of the judgment in the former action. Therefore, though the subject-matter of the litigation in both actions was the same—that is, the note—yet the causes of action were different, and therefore the former judgment was not *res judicata*. *State of Wisconsin v. Torinus*, 9 N. W. 725, 730, 28 Minn. 175.

The "subject-matter" of an action is not the act or acts which constitute the cause of action, but it should be given a broader scope and a more general meaning. *Bouvier* defines it as the cause, the object, the thing in dispute; and *Webster*, as the matter or thought presented for consideration in some statement or discussion. *Hunt v. Hunt*, 72 N. Y. 217, 229, 28 Am. Rep. 129.

#### As class of cases.

By "jurisdiction of the subject-matter" is not meant simply jurisdiction of the particular case occupying the attention of the

court, but jurisdiction of the class of cases to which the particular case belongs; and by "subject-matter" is meant the abstract thing, and not the particular case. *State v. Wolever*, 26 N. E. 762, 765, 127 Ind. 306.

#### As foundation of suit.

"Subject-matter," as used in the statement of the rule that jurisdiction means a power to hear and determine the subject-matter in controversy between the parties, means the foundation of the suit; that there has been a violation of some right by the commission of some act against the law, which therefore becomes a wrong. *United States v. Crawford* (U. S.) 47 Fed. 561, 565.

#### As matter put in issue.

The subject-matter referred to in Gen. St. c. 129, §§ 51, 74, providing that, when answers to an interrogatory are filed, the party interrogated may require the whole of the answer on any one subject-matter to be read, is not the particular fact covered by any one or more interrogatories, but the matter put in issue by the pleadings and thus inquired of. *Churchill v. Ricker*, 109 Mass. 209, 211.

#### As right claimed.

The "subject-matter" involved in a litigation is the right which one party claims as against the other and demands the judgment of the court upon it. *Jacobson v. Miller*, 1 N. W. 1013, 1015, 41 Mich. 90.

Within the rule that jurisdiction is the power to hear and determine the subject-matter in controversy, the subject-matter is the right which one party claims against another and demands judgment of the court upon. In an action for personal injuries, it is the right which plaintiff has to compensation for injuries received through the negligence of the defendant. *Reed v. City of Muscatine*, 73 N. W. 579, 104 Iowa, 183.

#### SUBJECT-MATTER INVOLVED.

In the statute providing that the prevailing party in a difficult and extraordinary case is entitled to an extra allowance of an amount not exceeding 5 per cent. of the value of the subject-matter involved, the word "involved" means "affected." *Williams v. Western Union Telegraph Co.* (N. Y.) 61 How. Prac. 305, 308.

The word "involved," as so used, means the possession, ownership, or title to the property or thing which is to be determined by the result of the action. *Dr. Jaeger's Sanitary Woolen System Co. v. Le Bouillier*, 63 Hun, 297, 299, 17 N. Y. Supp. 786. That which is to be directly affected by the action. *Coleman v. Chauncey*, 30 N. Y. Super. Ct. (7 Rob.) 578. It does not mean the property which may be either directly or remotely

affected by the result, as such a rule would, from its vagueness and uncertainty, be impracticable in application. *Conaughty v. Saratoga County Bank*, 92 N. Y. 401, 404; *Spofford v. Texas Land Co.*, 41 N. Y. Super. Ct. (9 Jones & S.) 228, 230; *Parish v. New York Produce Exch.*, 66 N. Y. Supp. 613, 614, 54 App. Div. 323.

In an action on contract for the destruction of an easement, the easement is the subject-matter involved, so that its value is the proper basis for an extra allowance. *Lattimer v. Livermore*, 72 N. Y. 174, 183.

Where plaintiff sued to determine the validity of a lease of a railroad, the "subject-matter involved" was the lease, and its value, and not the value of the road, should be considered as the basis for extra allowance. *Ogdensburg & L. C. R. Co. v. Vermont & C. R. Co.*, 63 N. Y. 176, 179.

An action was brought to restrain the carrying on of certain business and for \$1,000 damages. No damages were recovered, but the action was sustained for the injunction. Held, that the value of the premises and machinery was not the "subject-matter involved" in the action. *Atlantic Dock Co. v. Libby*, 45 N. Y. 499, 504.

#### SUBJECT OF TAXATION.

The general term "subject of taxation," in statutes, embraces all property as such and all other items on which a tax rate may be laid. *Capital City Water Co. v. Montgomery County*, 117 Ala. 303, 309, 23 South. 970.

#### SUBJECT TO.

See "Under and Subject to."

The words "subject to," when used in an assignment subject to a deed of trust, mean charged with. *Walker v. Goodsill*, 54 Mo. App. 631; *Jackson v. Isaacson*, 27 Law J. Exch. 392; *Clyde v. Simpson*, 4 Ohio St. 445; *Skinner v. Shepard*, 130 Mass. 180. Thus an assignment of rents subject to a deed of trust charges the payment of the interest notes against the rents. *Bredell v. Fair Grounds Real Estate Co.*, 69 S. W. 635, 637, 95 Mo. App. 676.

The use of the word "subject to," in a transfer of property subject to an existing agreement, was construed to mean subject, not only to the disadvantages imposed by such agreement, but also to the advantages given thereby. *Bacon v. Grossman*, 76 N. Y. Supp. 188, 189, 71 App. Div. 574.

Webster distinguishes the shades of meaning between the word "liable" and its synonym "subject." He says: "'Liable' denotes something external which may befall us; 'subject' refers to evils which arise

chiefly from internal necessity and are likely to do so. Hence the former applies more to what is accidental; the latter, to things from which we often or inevitably suffer." An event is liable if its occurrence is within the range of possibility; but the law does not hold a master bound to guard against such an event, and, where the only proof that a certain event was liable to occur was that it did occur, the only thing the evidence tends to show is that the event was within the range of possibility. *Beasley v. Lineham Transfer Co.*, 50 S. W. 87, 89, 148 Mo. 413.

A deed conveyed to a railroad company. "subject, however, to the faithful performance of this agreement," the right to construct a railroad through certain land, and stipulated, among other things, that natural drains were to be preserved, and that plank crossings were to be constructed, the conveyance being upon condition that the grantee construct and maintain an electric railroad, and providing that, upon failure or abandonment of that enterprise, the privilege conveyed should revert to the grantors. Held, that the words "subject to" were not equivalent to "upon condition," so that a failure to construct the crossings or maintain the drains specified would not cause the grant to revert. *Gratz v. Highland Scenic R. Co.*, 65 S. W. 223, 225, 165 Mo. 211.

Under a will by which testator, after giving \$5 to each of his children, gave and bequeathed to his wife "the residue of my estate, both personal and real, \* \* \* subject to a division among the aforesaid heirs at her death, in accordance with their obedience to her, as she shall deem proper," the wife took the testator's land in fee simple. *Rogers v. Winklespleck*, 42 N. E. 746, 143 Ind. 373.

Lexicographers define the word "subject" as meaning "to make liable; to bring under the control or action of; to make subservient." Where an executor was made the recipient of all the other real and personal estate owned by the testator, "subject to the foregoing provisions of the will," and no specific appropriation of any part of his estate was made for the payment of certain legacies, the executor took the gift subject to such payment, and the real estate was thus charged. *Thorp v. Munro* (N. Y.) 47 Hun, 246, 249.

#### Subject to agreements mentioned.

"Subject to," as used in an assignment of a lease subject to the agreements therein mentioned to be performed by said lessee, are words of qualification, and not of contract; and hence the assignee does not by such agreement become liable, on the covenant to pay rent, for rent accruing after he

has assigned over. *Consolidated Coal Co. v. Peers*, 46 N. E. 1105, 1109, 166 Ill. 361, 88 L. R. A. 624.

#### **Subject to all lawful claims.**

The term "subject to all lawful claims," in Act June 16, 1836, making stocks, deposits, and debts liable to execution like other goods and chattels, subject, nevertheless, to all lawful claims, means "that the creditor takes the place of defendant, and is entitled to receive what the defendant would be entitled to have and enjoy. If the fund is subject to liens or under equities to others, the creditor must discharge them before he can take the fund. He acquires no rights against third parties superior to those which the defendant possessed." *Reed v. Penrose's Ex'rs (Pa.)* 2 Grant, Cas. 472, 499.

#### **Subject to approval.**

A city charter providing that the board of aldermen "subject, always, to the approval of the mayor," shall have exclusive authority over street improvements, and power to assess damages therefor, means subject to his approval in like manner as ordinances, ordinary orders, resolutions, and votes passed in concurrence by both branches of the city council, and orders of either branch involving the expenditure of money are subject to the approval of the mayor under general laws; and this does not mean subject absolutely to his approval, in such sense that no acts of the board of aldermen in reference to laying out, locating new, or discontinuing streets or ways, or making specific repairs upon them, can take effect unless the mayor gives them his approval. *Doty v. Lyman*, 44 N. E. 337, 338, 166 Mass. 318.

#### **Subject to co-insurance clause.**

At the time of issuing a policy of insurance, the agent issuing it intended to attach thereto a printed slip containing a co-insurance clause, and the policy provided that it should be "subject to the co-insurance clause." Such clause, however, was not attached, and in an action on the policy the insurer claimed that the words "subject to co-insurance clause" of themselves were a restriction by which the assured was prevented from recovering the whole sum insured. In the absence of evidence showing that such phrase has a definite meaning, and the evidence showing that there was not any uniformity in co-insurance clauses as used by different companies, the court was right in holding that the words had no definite meaning. *Phenix Ins. Co. v. Wilcox & Gibbs Guano Co. (U. S.)* 65 Fed. 724, 729, 13 C. C. A. 88.

#### **Subject to condition.**

A will which gave certain land to testator's daughter, to have and to hold to herself, her heirs and assigns, forever, "sub-

ject to the condition that she pay and discharge all my funeral expenses and pay to my daughter K. the sum of \$50," would not create a condition precedent to the vesting of the title and the enjoyment and possession of the land, but would merely operate to charge the lands for funeral expenses and a legacy of \$50. *Smith v. Smith*, 1 N. Y. Supp. 643, 48 Hun, 617.

A devise to testator's wife of certain real estate, "subject to the condition that she is to receive the rents, profits, and benefits during her natural lifetime," expressly limits her interests to a life estate. *Jones v. Deming*, 51 N. W. 1119, 91 Mich. 481.

The words "subject to the condition," as used in a deed stating that the premises were conveyed subject to the condition, etc., were sufficient to create a condition, the breach of which would forfeit the estate, if such clearly appears to have been the intention of the grantor; but they do not have that effect, it appearing from the whole deed that his intention was otherwise. *Skinner v. Shepard*, 130 Mass. 180.

#### **Subject to the Constitution and laws.**

Const. art. 9, § 16, provides that any city having a population of 100,000 may frame any charter for its own government, which must be approved by four-sevenths of the qualified voters, and which, when so adopted, may be amended by proposal made therefor by the lawmaking authorities of such city and accepted by three-fifths of the qualified voters of such city, and not otherwise. The same section further provides that such charter shall always be subject to the Constitution and laws of the state. Held, that the provision that the charter should be subject to the Constitution and laws conferred no authority on the Legislature to authorize amendments to the charter otherwise than as provided by the Constitution. *City of Westport v. Kansas City*, 15 S. W. 68, 69, 103 Mo. 141.

#### **Subject to debts.**

A transfer of property of a firm subject to its debts does not necessarily import an agreement to assume them. *King v. Isreal*, 43 N. Y. Supp. 306, 307, 19 Misc. Rep. 159.

#### **Subject to easement.**

The expression "subject to an easement or right," as used in defining a party wall as a wall which belongs entirely to one of the adjoining owners, but is subject to an easement or right in the other to have it maintained as a dividing line between two tenements, necessarily means subject to an easement created by contract, express or implied, or by prescription or by statute. *Spero v. Shultz*, 43 N. Y. Supp. 1016, 1018, 14 App. Div. 423.

**Subject to execution.**

"Subject to execution," as used in a statute by which a debtor arrested on execution might discharge himself from custody by surrendering to the officer all his property, swearing he had no other subject to execution, meant those goods which the act did not exempt from seizure, and did not mean property merely beyond the bailiwick of the officer, or which from its character could not be seized on execution. *Webster v. Farley* (Ind.) 6 Blackf. 163, 168.

**Subject to jurisdiction.**

Const. U. S. Amend. 14, providing that all persons born or naturalized in the United States and "subject to the jurisdiction thereof" are citizens thereof, means "not merely subject in some respect or degree to the jurisdiction of the United States, but completely subject to their political jurisdiction and owing them direct and immediate allegiance." *Elk v. Wilkins*, 5 Sup. Ct. 41, 45, 112 U. S. 94, 28 L. Ed. 643.

Const. U. S. § 1, cl. 1, providing that all persons born or naturalized in the United States and "subject to the jurisdiction" thereof are citizens of the United States and of the state wherein they reside, was intended to exclude from the operation of the provision children of ministers, consuls, and citizens or subjects of foreign states born within the United States. *Butchers' Benevolent Ass'n of New Orleans v. Crescent City Live Stock Landing & Slaughter House Co.*, 83 U. S. 36, 73, 21 L. Ed. 394.

The phrase "subject to the jurisdiction thereof" means those who are within the dominion of the United States and under the protection of its laws, with the consequent obligation to obey them when obedience can be rendered, and only those thus subject by their birth or naturalization are within the terms of the amendment. The words mentioned except from citizenship children born in the United States of persons engaged in a diplomatic service of a foreign government, whose residence by a fiction of law is regarded as a part of their own country. Persons born on a public vessel of a foreign country while within the waters of the United States are also excepted, and are considered as born in the country to which the vessel belongs. The words also exclude from citizenship persons who, though born or naturalized in the United States, have renounced their allegiance to our government and thus dissolved their political connection with the country. The United States recognizes the right of every one to expatriate himself and choose another country. *In re Look Tin Sing* (U. S.) 21 Fed. 905, 906.

The words "in the United States, and subject to the jurisdiction thereof," in the

first sentence of the fourteenth amendment of the United States Constitution, must be presumed to have been understood and intended by the Congress which proposed the amendment, and by the Legislature which adopted it, in the same sense in which the like words have been used by Chief Justice Marshall in the well-known case of *The Exchange*, and as the equivalent of the words "within the limits and under the jurisdiction of the United States," and the converse of the words "out of the limits and jurisdiction of the United States," as habitually used in the naturalization act. *United States v. Wong Kim Ark* (U. S.) 18 Sup. Ct. 456, 468, 169 U. S. 649, 42 L. Ed. 890.

**Subject to law.**

Where a person was elected a professor of mathematics of a university, and it was resolved that he should hold his office for six years from a fixed time "subject to law," this expression means subject to whatever law the state Legislature might think fit to pass. *Head v. University of Missouri*, 86 U. S. (19 Wall.) 526, 530, 22 L. Ed. 160.

"Subject," when used as an intransitive verb, means to become subservient to, and as a transitive verb means to cause to become subservient or subordinate; so that, as used in Const. art. 11, § 6, providing that charters of cities heretofore or hereafter organized shall be subject to and controlled by general laws, it means that the provisions of such charters are not repealed by laws different therefrom, but merely suspended during the existence of such statutes. *Byrne v. Drain*, 60 Pac. 433, 127 Cal. 663.

Where St. 1890, c. 321, § 1, provides that foreign corporations (except railroads and banking companies) which are or may be subject to the provisions of St. 1884, c. 330, may by voluntary or involuntary proceedings be put into insolvency, and such chapter directs all foreign corporations, except insurance companies, to do certain acts as a prerequisite to transacting business in the state, and, on failure of any such corporation to comply, subjects its officers and agents to heavy penalties, a foreign lumber company, whether it has complied with St. 1884, c. 330, or not, is "subject thereto," within the meaning of the statute of 1890, and may file a petition in insolvency. *Kelley v. Rice-Blake Lumber Co.*, 44 N. E. 1090, 167 Mass. 28.

Const. art. 11, § 8, provides for the preparation and adoption of a charter for any city, which shall be submitted to the Legislature and adopted by it, or rejected, without power of alteration or amendment, but requires such charter to be consistent with or subject to the laws of the state; and section 6 provides that all charters shall be subject to and controlled by general laws. *Held*,

that the phrase "subject to and controlled by general laws" makes all charters framed or effected under the Constitution subject to and controlled by general laws. *Davies v. City of Los Angeles*, 24 Pac. 771, 773, 86 Cal. 37.

**Subject to all liens of mortgages and taxes.**

The acceptance by a grantee of a deed containing the clause, "subject, nevertheless, to all liens of mortgages and taxes thereon," was not an admission that there were any such liens. If they existed, the title was subject to them; but their existence and validity were not conceded. *Purdy v. Coar*, 17 N. E. 352, 354, 109 N. Y. 448, 4 Am. St. Rep. 491.

**Subject to mortgage.**

The acceptance of a deed subject to a specified mortgage does not imply a promise on the part of the grantee to pay the mortgage debt. *Patton v. Adkins*, 42 Ark. 197, 199. Where a deed declares that the grantee takes the land "subject to the mortgage," such phrase does not carry with it an assumption of the debt. *Commercial Bank of Madera v. Redfield*, 55 Pac. 160, 162, 122 Cal. 405. It is held that a conveyance of land by A., on which C. holds a mortgage to B., by warranty deed, subject to the mortgage, does not render B. liable to C. for the mortgage debt. *Way v. Roth*, 58 Ill. App. 198, 202.

The words "subject to a mortgage," in a deed to real estate reciting that it is subject to a mortgage, does not operate to render the grantee personally liable for the mortgage debt, unless he expressly assumes its payment. *Miles v. Miles*, 6 Or. 266, 269, 25 Am. Rep. 522.

The words "under and subject to," in a deed which recites that the grantee takes the land conveyed under and subject to a mortgage debt, does not operate to make him personally liable for the debt, where there is no agreement or consent on his part to pay the debt, and no consideration moves to him for its payment. *Girard Life Ins. & Trust Co. v. Stewart*, 86 Pa. 89, 91.

In holding that the words "subject to the mortgage," in a conveyance of land subject to the mortgage thereon, did not render the grantee personally liable for the mortgage debt, the courts say: "To create such a liability, either the language of the deed should be, 'subject to the payment of the outstanding mortgage,' or that it forms a part of the purchase money which the grantee in the deed assumes to pay, or some other equivalent expression which clearly imports that an obligation is intended to be created by one party, and is knowingly assumed by the other." *Stebbins v. Hall* (N. Y.) 29 Barb. 524, 529.

According to all the cases, where land is taken "subject to a mortgage," the land is a primary fund for the payment of the mortgage, yet without any other liability on the part of the grantee. This meaning is not altered by the addition of the words, "which has been estimated as a part of the consideration money." *Belmont v. Coman*, 22 N. Y. 438, 440, 78 Am. Dec. 213.

The provision in a mortgage, following the description, that said land is "subject to" a mortgage or deed of trust for a certain sum, the balance of purchase money, constitutes more than a bare notice of a former mortgage or deed of trust, and establishes a trust in equity in favor of the person mentioned in the deed of trust. *Commercial & Farmers' Bank v. Vass*, 41 S. E. 791, 792, 130 N. C. 590.

In general, a conveyance subject to a mortgage is held to mean subject to the payment of such mortgage, unless there is something to indicate a different intention; but where the words "above-described premises are subject to a mortgage" are inserted in a warranty deed, not as a part of the granting clause, but as an independent recital, after which follows the usual covenant of warranty against all incumbrances, the clause amounts only to a statement of fact, and the question whether the premises are conveyed subject to the payment of a mortgage is open to parol proof. *Minor v. Terry* (N. Y.) 6 How. Prac. 208, 211.

The words "subject to a mortgage claim," in a deed providing that the conveyance is subject to a mortgage claim, are not sufficient in themselves to import a promise on the part of the grantee to pay the mortgage debt; but, when coupled with the words "the payment of which is part of the consideration," the grantee becomes personally liable for the debt. *Jager v. Vollinger*, 55 N. E. 458, 459, 174 Mass. 521.

The phrase "subject to mortgage," contained in a deed conveying land, reciting that the land is subject to a mortgage of the grantor, which the grantee, in part consideration for the deed, assumes and agrees to pay as his own debt, does not create an agreement between the grantee and the mortgagee; the mortgagee's claim being solely against the grantor, the mortgagor, and the grantee's agreement to assume and pay the mortgage being a mere agreement to indemnify his grantor. Therefore the debt secured by the mortgage is not released on the grantee's appointment as executor of the estate of the mortgagee. *Pettee v. Peppard*, 120 Mass. 522.

A promise on the part of the grantee of land to pay a mortgage debt existing on it cannot be implied from the acceptance of a deed containing a clause, "subject to a mortgage held by A., which is part of the above-named consideration." Taken by them-

selves, the words do not necessarily imply any obligation to be performed by the grantee. They are to be considered rather as additional words of recital or description, showing that the whole amount of the consideration was not paid or intended to be paid, but that the grantee had purchased only an equity of redemption. *Fiske v. Tolman*, 124 Mass. 254, 257, 26 Am. Rep. 659.

A purchase of real estate, declared to be "subject to a mortgage debt," makes the grantee personally liable for the debt. *Blank v. German (Pa.)* 5 Watts & S. 36, 42.

Acceptance by a grantee of a deed of land containing a clause stating that it is "subject to a mortgage, which the grantee hereby assumes and agrees to pay, with the interest now due thereon," constitutes a contract by the grantee, not merely to indemnify the grantor, but to pay the debt, if it be the debt of the grantor. *Furnas v. Durgin*, 119 Mass. 500, 501, 20 Am. Rep. 341.

Where one purchases property, under a deed conveying the same "subject to the mortgage hereinafter particularly mentioned," there can be no language more explicit to show intent of the parties that the grantee was to take the premises subject to the payment of a mortgage. *Jumel v. Jumel (N. Y.)* 7 Paige, 591, 594.

"The difference between the purchaser assuming the payment of a mortgage, and simply buying subject to the mortgage, is simply that in the one case he makes himself personally liable for the payment of the debt, and in the other case he does not assume such liability. In both cases he takes the land charged with the payment of the debt, and is not allowed to set up any defense to its validity." *Hancock v. Fleming*, 3 N. E. 254, 255, 103 Ind. 533.

"Subject to certain mortgages," as used in a deed, are not for the purpose of a description of the land, to identify it, but merely to qualify the estate granted, and constitute a consent of the grantees that the mortgages should be incumbrances on their lands. *Brown v. South Boston Sav. Bank*, 148 Mass. 300, 19 N. E. 382, 384.

A conveyance of land "subject to a mortgage" is neither more nor less than a simple deed of whatever interest or estate the grantor has after the debt is satisfied out of it. *McNaughton v. Burke*, 89 N. W. 274, 275, 63 Neb. 704 (quoting *Hartley v. Harrison*, 24 N. Y. 170).

The phrase "subject to a mortgage" means subject to a debt secured by the mortgage. *Colt v. Sears Commercial Co.*, 37 Atl. 311, 314, 20 R. I. 64.

"Subject," as used in a deed reciting that the property was conveyed subject to a mortgage, means subject in the legal and

equitable course. *Pettingill v. Hubbell*, 32 Atl. 76, 77, 53 N. J. Eq. (8 Dick.) 584.

The words "subject to a mortgage," in a conveyance of a parcel of one or two pieces of land which had been mortgaged together, did not imply that the incumbrance was to be satisfied wholly out of the parcel so conveyed, or that the grantee assumed any personal liability for the mortgage debt. *Hall v. Morgan*, 79 Mo. 47.

A devise of land "subject to a certain mortgage" is not a devise subject to a charge in favor of testator's estate, but a gift of the property subject to the incumbrance thereon; and the devisee is entitled to payments on and reductions of the mortgage made by the testator after the execution of his will. *Langstroth v. Golding*, 3 Atl. 151, 154, 41 N. J. Eq. (12 Vroom) 49.

#### Subject to no extrinsic jurisdiction.

The words "subject to no extrinsic jurisdiction," when used in speaking of the local organizations of a church as being subject to no extrinsic jurisdiction, may have a relative, but not an absolute, value. Thus it was said that it could not, in face of the documents of the church and of its uniform practice, save the several congregations from dependence on the elders in respect to the selection of pastors. *Winebrenner v. Colder*, 43 Pa. (7 Wright) 244, 253.

#### Subject to payment.

There is a difference between the expression "subject to a mortgage" and "subject to the payment" of a certain debt. Where the property of a partnership consisting of a railroad franchise, a road partly built, cars, horses, sleighs, harness, leases, and licenses, was transferred to a corporation, "subject to the payment" by the parties of the second part of all money which the partnership is bound to pay on account of sewers (specifying a certain claim), the property is not taken subject to an incumbrance of the sewer debt, for there is no such incumbrance; but they take it subject to the payment by themselves of the sewer debt, with a liability by themselves to pay the debt. They undertake to relieve the partnership from the payment of the debt, and to make themselves liable and responsible for it. *Dingeldein v. Third Ave. R. Co.*, 37 N. Y. 575, 578.

In construing a conveyance which states that the grantee takes the property "subject to pay a certain debt, the court say that, while at common law this would not create any privity between the grantee in the deed and the daughter of the grantor, or his personal representatives, yet a tendency is discovered in modern adjudication to treat such a condition as a trust in favor of the beneficiary named therein. A similar change

seemed to have occurred in the civil law, where settlements in favor of a third person, which were at first binding only between the parties, ultimately came to be viewed as trusts, which the beneficiary might enforce in his own name and for his own benefit. Our law has gone even further than this. It is well established in this state that a party for whose benefit a stipulation in a simple contract is made may maintain an action upon such stipulation in his own name. *Weinreich v. Weinreich*, 18 Mo. App. 364, 370.

The term "subject to," in a will devising certain land subject to certain payments and conditions, to be paid and fulfilled by the beneficiary, means "yielding and paying out of" the land devised, thus making such payments a charge on the land. In *re Hammond's Estate*, 46 Atl. 935, 936, 197 Pa. 119.

The words "under and subject," in a grant of land under and subject to the payment of the several ground rents which have been reserved in an original grant, operates to bind the grantee to indemnify the grantor no longer than his tenancy of the freehold. *American Academy of Music v. Smith*, 54 Pa. (4 P. F. Smith) 130, 132.

Where land is assigned subject to the payment of perpetual rent charge, the word "subject" is held to be a word of qualification, and not of contract, so that the assignee is not liable for rent accruing after he has reassigned. *Walker v. Physick*, 5 Pa. (5 Barr) 193.

Where an indenture executed by the parties assigned to the defendant certain "premises, subject to the payment of rent" and the performance of covenants and agreements reserved and contained in the original lease, which words came after the habendum and constituted part of it, they were to be taken as words of qualification, and not of contract, as it is the duty of a party who intends to bind another by a covenant in a formal instrument to insert it in that instrument in distinct and intelligible terms. *Wolveridge v. Steward*, 3 Moore & S. 561.

The clause "subject to the payment of all liens," in a deed which provides that the conveyance is subject to the payments of all liens on such premises, cannot be construed to make the grantee personally liable to pay the debts so secured. *Hoy v. Bramhall*, 19 N. J. Eq. (4 C. E. Green) 74, 78.

The words "subject to the payment," in an agreement under seal for the purchase of land subject to the payment of the purchase price and interest due a third person, operates to render the vendee personally liable for such purchase price, which may be recovered in an action by the vendor for the use of the person entitled thereto. *Campbell v. Shrum* (Pa.) 3 Watts, 60, 63.

#### **Subject to periodical overflow.**

See "Periodical Overflow."

#### **Subject to strikes.**

In a contract providing that a coal company shall furnish a certain amount of coal a week, subject to strikes, the words "subject to strikes" cannot be said to be entirely definite in their meaning. There may be a general strike in all the mines in the country, or there may be a strike confined to the plaintiff's mines alone, or to the mines in a certain district alone, or there may be a strike upon the railroad lines, interrupting all traffic; and where it appears that the mining company's employes were on a strike, it was proper to admit evidence that the words "subject to strikes" had acquired by general usage and custom such meaning as to relieve the defendant from liability. *Hesser-Milton-Renahan Coal Co. v. La Crosse Fuel Co.*, 90 N. W. 1094, 1096, 114 Wis. 654.

#### **Subject to taxation.**

The legislative provision that property of corporations shall be "subject to taxation" the same as that of individuals merely means that it shall be treated or shall be dealt with the same as that of individuals, or shall be liable to taxation the same as that of individuals. *Adams v. Yazoo & M. V. R. Co.*, 24 South. 200, 219, 77 Miss. 194, 60 L. R. A. 33.

The term "subject to taxation," in a constitutional provision that corporation property shall be subject to taxation, means liable to taxation. The clause cannot be construed as meaning that the property of the corporation must be subjected to taxation. *Mississippi Mills v. Cook*, 56 Miss. 40, 52.

#### **Subject to terms and conditions of policy.**

A lightning clause, attached to an insurance policy, insured live stock against destruction by lightning, "subject to the terms and conditions of the policy referred to," and to which it was attached. This policy was a fire policy, insuring the same stock while contained in the barn of the insured. Held, that the phrase "subject to the terms and conditions of the policy referred to" meant only such terms and conditions as were applicable to that particular kind of insurance, namely, the insurance against lightning. The clause should be construed in a reasonable, common sense manner, with a view to the necessary intention of the parties at the time the contract was made. A farmer, insuring his horses against lightning, is contracting for indemnity in case the horses should be killed; and he knows that the danger from lightning exists almost wholly in the summer season, and at that time of the year stock of all kinds is left in the field much of the time, by day and night. A poli-

cy of insurance, therefore, which only covered stock when in the barn, would not furnish indemnity, and such a meaning cannot be held to have been in the contemplation of the parties. The terms and conditions to which such an insurance is subject must be such as are reasonably applicable to that kind of insurance upon that particular species of property, and such as, therefore, the parties may be presumed to have had in view when the contract was made. *Haws v. Fire Ass'n of Philadelphia*, 7 Atl. 159, 160, 114 Pa. 431.

An agreement providing that the insured's loss and damage should be a certain amount, "subject to the terms and conditions of the policy," means subject to all the terms and conditions, excepting such as are superseded by the fact that the loss and damage have been fixed. *Whipple v. North British & M. Fire Ins. Co.*, 11 R. L. 139, 140.

#### Subject to waiver.

Under an insurance policy providing that agents of the company have no authority to bind it in violation of any words, printed terms, or conditions therein expressed, and that no printed or written condition or restriction thereof, "which by its terms may be subject to waiver," should be deemed to have been waived, except by distinct agreement clearly expressed in the body of the policy, such conditions only which, under the terms of the policy, might have been waived in the body thereof, and not otherwise, are within the meaning of a condition or restriction subject to waiver. *Morrison v. Insurance Co. of North America*, 6 S. W. 605, 608, 69 Tex. 353, 5 Am. St. Rep. 63.

### SUBJECTION.

"Subjection to the will and control" is synonymous with "occupation" and "possession," and signifies actual possession. *Lawrence v. Fulton*, 19 Cal. 683, 690.

### SUBLEASE.

Assignment distinguished, see "Assignment."

### SUBMISSION.

See "Final Submission."

As civil action, see "Civil Action—Case—Suit—Etc."

That act is called a "submission" by which parties refer any matter in dispute between them to the decision of a third person, the person to whom the reference is made is an "arbitrator," and the judgment pronounced by the arbitrator is an "award." *Garr v. Gomez* (N. Y.) 9 Wend. 649, 661.

A "submission" is a contract between two or more parties whereby they agree to

refer the subject in dispute to others and to be bound by their award. *District of Columbia v. Bailey*, 18 Sup. Ct. 868, 872, 171 U. S. 161, 43 L. Ed. 118. And the submission itself implies an agreement to abide the result, even if no such agreement were expressed. *Whitcher v. Whitcher*, 49 N. H. 176, 180, 6 Am. Rep. 488.

A "submission" is a covenant by which persons who have a lawsuit or difference with one another name arbitrators to decide the matter and bind themselves to perform what shall be arbitrated. *McClendon v. Kemp*, 18 La. Ann. 162; Civ. Code La. 1900, art. 3099.

A "submission" is a contract by which the parties agree to refer matters which are in dispute, to be finally decided by the award of judges named by the parties and called "arbitrators." In order to clothe a person with the authority of an arbitrator, the parties must mutually agree to be bound by the decision of the person chosen to determine the matter in controversy. An arbitrament and award which concludes one party only is not sufficient. Joint Resolution Cong. July 15, 1870, authorizing the Postmaster General to adjust the claims of a designated individual, is not a submission. *Chorpenning v. United States* (U. S.) 11 Ct. Cl. 625, 628.

A "submission to an award" is an agreement between the parties to it to abide by and perform it in every particular, and the mutual submission of the matter in controversy is a valid consideration for the agreement. *Smith v. Smith* (Va.) 4 Rand. 95, 99.

In a statute creating the office of the clerk of the circuit court and allowing a fee for "submission," this term is used either in a strictly technical sense (2 Bouv. Law Dict. 553), or else in its statutory import, as where parties to a question in difference present a submission of the same to any court which would have jurisdiction if an action had been brought, etc. (2 Wag. St. p. 1056, § 25). With the exception of the clerks of the circuit courts, no fee for submission is allowed. The Legislature may therefore be presumed to have employed the term in a sense peculiar to matters in the circuit court, but not as intending by that word to convey the idea of mere submission of a cause to the court or jury for final determination. Otherwise, the clerk of the criminal court when a cause is submitted to the jury for their verdict, or the clerk of the probate court when a claim is presented against an estate for an allowance, would each be in justice entitled to a fee for submission. "The Legislature cannot be supposed to have intentionally discriminated against the clerks of such courts, as would evidently be the case if the word 'submission' is to bear any other meaning than that we have ascribed to it." *Shed v. Kansas City, St. L. & C. B. R. Co.*, 67 Mo. 687, 691, 692.



It is not necessary that a written submission to arbitrators should contain a special agreement to abide the award. If the parties agree to submit, and actually do submit, their differences to arbitration, and an award is made, an agreement to abide the award will be implied. *Stewart v. Cass*, 16 Vt. 663, 666, 42 Am. Dec. 534.

A "submission to arbitration" is to be expounded, not according to the strict technical meaning of the words, but according to their signification in common parlance. Submission touching divers other matters, as well as those particularly meant, is equivalent to a general submission of all questions between the parties, and under it general release may be awarded. A submission of "conditions which had arisen relative to an alleged injury, committed by A. to a horse, the property of B. and C.," to an arbitrator, to determine whether the said A. was liable for the damages occasioned to the horse under the circumstances, with costs, etc., is not only a submission of the question of A.'s legal liability, but also of its extent, and authorizes the arbitrator to determine the amount of damages sustained. *Slocum v. Damon* (Wis.) 1 Pin. 520, 523.

#### As a contract.

A "submission to arbitration" is a contract, and consequently the parties thereto must have a general legal capacity to contract. *Brown v. Mize*, 24 South. 453, 455, 119 Ala. 10.

#### Consent distinguished.

There is a difference between "consent" and "submission." Every consent involves a submission, but it by no means follows that a mere submission involves consent. *Regina v. Day*, 9 Car. & P. 722; *State v. Cross*, 12 Iowa, 66, 70, 79 Am. Dec. 519.

#### As revoked by vacancy.

A "submission to arbitration" is like a delegation of any other power. Neither an agent nor an arbitrator can delegate his power, unless expressly authorized by his constituents. An authority given to two cannot be executed by one, although the other die or refuse; nor, if given to three, can it be executed by two, although the three be authorized to act jointly and severally. A power is terminated by the death either of the party receiving it or of the party conferring it. Therefore, where a submission to arbitration makes no provision for filling vacancies, the occurrence of a vacancy revokes the submission, and it falls. *Wolf v. Augustine*, 37 Atl. 574, 576, 181 Pa. 576.

#### As requiring writing.

At common law a submission to arbitration was not required to be in writing. *Ehrman v. Stanfield*, 80 Ala. 118, 119.

A submission may be either in writing or verbal, and, in declaring upon an award, averments may be made to show the nature of the controversies submitted, and to explain what does not sufficiently appear on the face of the submission, so as to enable the court to ascertain the true object of the submission. *Garr v. Gomez* (N. Y.) 9 Wend. 649, 661.

## SUBMIT.

"The word 'submit,' as applied to a case, is in common use. Parties submit a cause when they refer it to the court or referee for disposition. The word, we think, is sometimes used as applied to evidence, though not, perhaps, with the same accuracy. Where, in an equity case, evidence is brought forward and placed at the disposal of the court, to be admitted or excluded, it is in some sense submitted, and such evidence is certainly offered." Thus, in a certificate on an equity appeal that the abstract contains all the evidence submitted in the cause, the use of the word "submitted" is sufficient to show that the abstract includes all evidence offered, as well as that introduced, and therefore it is a compliance with Code 1873, § 2742, requiring that all evidence offered, as well as that introduced, shall be certified. *Miller v. Wolf*, 18 N. W. 889, 890, 63 Iowa, 233.

No term of general use in the proceedings in a court of appeal is more generally understood than the term "submitted." It means that the parties leave it to the chancellor to determine without argument. Like other terms in the law, it may be modified or qualified by concomitant words, such as "submitted on points of council, filed or to be filed"; but never yet was the term "submitted," without such modification or qualification, understood to mean otherwise than that the party or parties who submitted the case dispensed with the benefit of argument. The practice, when the case is submitted, is for the chancellor to examine the papers, and, if no doubt or difficulty occurs, he renders a decree without hesitation. If doubt occurs, and he does not think proper to investigate the point without the aid of argument, or if, on investigation, doubt remained, or he thinks it more safe and prudent to learn in what light it strikes the counsel, he then lays aside the papers and notifies the counsel of his desire to have the cause argued. *Ridgely v. Carey* (Md.) 4 Har. & McH. 167, 174.

A condition in an arbitration bond that the party shall well and truly "submit, stand to, and abide by" the decision and award of the arbitrators is construed to extend to the performance by the principal of the award after it is made; the court remarking in the course of discussion that to speak of submitting to and abiding by a law, an order, a decision, means in common parlance to obey it, to comply with it, to act in accordance

with it, and to perform its requirements. *Washburne v. Lufkin*, 4 Minn. 400, 470 (Gil. 362, 364).

To "submit" a question to the vote of the stockholders of a corporation is to leave or commit the matter to the discretion or judgment of such stockholders. *McNulta v. Corn Belt Bank*, 63 Ill. App. 593, 608 (citing *Webst. Dict.*).

## SUBORDINATE OFFICER.

The test whether officers are "subordinate" or not is not whether a review of such of their determinations as are quasi judicial may be had, but whether in the performance of their various duties they are subject to the direction and control of a superior officer, or are independent officers, subject only to such directions as the statutes give. *People v. Van Wyck*, 52 N. E. 559, 562, 157 N. Y. 495.

The term "officers, clerks, subordinate officers, and employes," in Act June 1, 1885, relating to cities of the first class, in reference to the appointment of officers, clerks, subordinate officers, and employes, does not include the medical staff, or the board of visiting physicians, of the Philadelphia Hospital, consisting of specialists or experts in the various departments of medical science, who perform gratuitous services. *Commonwealth v. Fidler*, 23 Atl. 568, 571, 147 Pa. 288, 15 L. R. A. 205.

It cannot be said that the president of a railroad company is a subordinate officer of the corporation, so as to be without authority to employ surgical attendance for a servant injured in the performance of his duty. *Bedford Belt Ry. Co. v. McDonald*, 46 N. E. 1022, 17 Ind. App. 492, 60 Am. St. Rep. 172.

## SUBORNATION OF PERJURY

Where the crime of perjury is committed at the instigation or procurement of another, it is termed "subornation of perjury." *State v. Fahey* (Del.) 54 Atl. 690, 692, 3 Pennewill, 594.

Gen. St. 1889, par. 228, defines "subornation of perjury" as follows: "Every person who shall procure any other person by any means whatsoever to commit a willful or corrupt perjury in any cause, matter, or proceeding in or concerning which such other person shall be legally sworn or affirmed shall be adjudged guilty of subornation of perjury." *State v. Geer*, 28 Pac. 1027, 46 Kan. 529. See, also, *Stone v. State*, 45 S. E. 630, 636, 118 Ga. 705, 98 Am. St. Rep. 145.

Rev. St. § 4471, defines two crimes under the general name of "subornation of perjury." One applies to false swearing in a prosecution for a capital crime, and the other

applies to false swearing in other cases. *Thompson v. State*, 61 N. W. 565, 89 Wis. 253.

In perjury and subornation of perjury, the act of the two offenders is concurrent, parallel, and closely related in point of time and conduct. The two crimes both culminate in the delivery of false testimony. Still the offenses are dual, each having in it elements not common to the other. There is sufficient inherent difference between the two to warrant the lawmaking power in separating the act into its component parts, making that of the suborner a new and independent offense, punishable with greater or less severity than that inflicted on the perjurer. *Stone v. State*, 45 S. E. 630, 631, 118 Ga. 705, 98 Am. St. Rep. 145.

## SUBPŒNA.

As a mesne process, see "Mesne Process."

*Bouvier* defines "subpœna" as a "process to cause a witness to appear and give testimony, commanding him to lay aside all pretenses and excuses, and appear before a court or magistrate therein named at a time therein mentioned to testify for the party named under a penalty therein mentioned. The purpose of a subpœna is to place the witness under the order and censure of the court, and a writ which does not effect this is not a subpœna within the meaning of the law. 1 *Thomp. Trials*, § 160; 1 *Greenl. Ev.* § 315; *Alexander v. Harrison*, 28 N. E. 119, 121, 2 Ind. App. 47 (citing *Apperson v. Mutual Ben. Life Ins. Co.*, 38 N. J. Law [9 Vroom] 272).

A "subpœna" is for the purpose of compelling the attendance of a person whom it is desired to use as a witness. *Dishaw v. Wadleigh*, 15 App. Div. 205, 211, 44 N. Y. Supp. 207.

"Subpœna" by etymology signifies an order with a penalty for disobedience. *Burns v. Superior Court of City and County of San Francisco*, 73 Pac. 597, 598, 140 Cal. 1.

Every subpœna is no doubt in some sense a summons; but under the Code, providing that, when a party is to be examined at any time before trial, he may be compelled in the same manner as a witness who is to be examined conditionally, a subpœna is not a summons. The conditional examination of an ordinary witness is provided for by the statutes, which do not admit of the common formal subpœna in such cases. They require a special preliminary application to a judge. To compel an attendance as a witness, the officer granting the order may issue a summons for that purpose. *Bleecker v. Carroll* (N. Y.) 2 Abb. Prac. 82.

A "subpœna in chancery" brings the party into court. A distinction must be

made between process which precedes judicial action and that which follows it as a consequence. Process to bring a party into court has never been regarded as requiring judicial action, and hence it is issued as a matter of course by the clerk. *Commercial Bank of Rodney v. State*, 12 Miss. (4 Smedes & M.) 439, 515.

The sole office of a writ of subpœna is to bring the defendant into court, in order that the court may acquire jurisdiction over his person. *Seattle, L. S. & R. R. Co. v. Union Trust Co.* (U. S.) 79 Fed. 179, 187, 24 C. C. A. 512.

A subpœna is not a writ, the power of which must be exhausted before it can be pronounced served, but one capable of and intended for many services. *Murphy v. Fayette County* (Pa.) 13 Montg. Co. Law Rep'r, 81, 83.

The process by which the attendance of a witness before a court or magistrate is required is a subpœna. *Ann. Codes & St. Or.* 1901, § 1541; *Rev. St. Okl.* 1903, § 5622; *Pen. Code Cal.* 1903, § 1326; *Rev. Codes N. D.* 1899, § 8358; *Code Cr. Proc. S. D.* 1903, § 506; *Pen. Code Idaho* 1901, § 5592; *Cr. Code N. Y.* 1903, § 607; *Rev. St. Utah* 1898, § 5017; *Comp. Laws Nev.* 1900, § 4500. It is a writ directed to a person, and requiring his attendance at a particular time and place to testify as a witness in a particular action, suit, or proceeding therein specified on behalf of a particular party therein mentioned. It may also require him to bring with him any books, documents, or other things under his control, which he is bound by law to produce in evidence. *Ann. Codes & St. Or.* 1901, § 801; *Rev. St. Utah* 1898, § 3417; *Code Civ. Proc. Cal.* 1903, § 1985.

A subpœna is a writ issued to the sheriff, or other proper officer, commanding him to summon a person therein named to appear at a certain term of the court, or on a certain day, to testify in a criminal action, or upon any proceeding before an examining court, coroner's inquest, the grand jury, or before a judge hearing an application under habeas corpus, or in any other case in which the testimony of a witness may be required under the provisions of this Code. *Code Cr. Proc. Tex.* 1895, art. 513.

#### SUBPŒNA AD TESTIFICANDUM.

At common law there was a writ known as a "subpœna ad testificandum." It is defined as a process to compel a witness to appear and give his testimony, commanding him to appear before a court or magistrate therein named at a time therein mentioned to testify for a party named under a penalty therein mentioned. *In re Strauss*, 52 N. Y. Supp. 392, 394, 30 App. Div. 610.

#### SUBPŒNA DUCES TECUM.

A "subpœna duces tecum" is a process whereby a court, at the instance of a suitor, commands a person, who has in his possession or control some document or paper that is pertinent to the issues of the pending controversy, to produce it for use at the trial. *In re Hoyt's Estate* (N. Y.) 7 Civ. Proc. R. 3/4, 376.

A "subpœna duces tecum" is a process of compulsory obligation on a witness to produce a deed or writing required of him, if he has it in his possession and has no lawful excuse for withholding it. *In re O'Toole's Estate* (N. Y.) 1 Tuck. 39, 40.

A "subpœna duces tecum" is the usual method of requiring the production of a paper on the trial of a case. *Murphy v. Russell* (Idaho) 67 Pac. 421, 425.

There was a writ, known to the common law as a "subpœna duces tecum," which, in addition to requiring the attendance of a witness to testify, required him to bring and produce to the court books or papers in his hands tending to illustrate the matter in issue. *In re Strauss*, 52 N. Y. Supp. 392, 394, 30 App. Div. 610.

#### SUBPŒNA TICKET.

A subpœna ticket carries no authority, but is a mere request made to the witness to attend court. *Bratton v. Clendenin* (S. C.) Harp. 454.

#### SUBROGATION.

See "Conventional Subrogation"; "Legal Subrogation."

"Subrogation" is a substitution of one person or thing for another. *Swarts v. Siegel* (U. S.) 117 Fed. 13, 15, 54 C. C. A. 399.

"Subrogation" is the equity by which a person who is secondarily liable for a debt, and has paid the sum, is put in the place of the creditor, so as to entitle him to make use of all the securities and remedies possessed by the creditor, in order to enforce the right of exoneration as against the principal debtor, or of contribution against others, who are liable in the same rank with himself. *Fuller v. John S. Davis' Sons*, 56 N. E. 791, 794, 184 Ill. 505; *Schoonover v. Allen*, 40 Ark. 132, 137; *Talbot v. Wilkins*, 31 Ark. 411, 421; *Sands' Adm'r v. Durham*, 36 S. E. 472, 473, 98 Va. 392, 54 L. R. A. 614.

"Subrogation" is the substitution of another person in the place of a creditor. The substituted party succeeds to the right of the creditor in relation to the debt. *Brown v. Rouse*, 58 Pac. 267, 269, 125 Cal. 645; *Boston Safety Deposit & Trust Co. v. Thom-*

as, 53 Pac. 472, 473, 59 Kan. 470; *Colt v. Sears Commercial Co.*, 37 Atl. 311, 314, 20 R. I. 64; *Liles v. Rogers*, 18 S. E. 104, 105, 113 N. C. 197, 39 Am. St. Rep. 627; *Johnson v. Barrett*, 117 Ind. 551, 554, 19 N. E. 199, 201, 10 Am. St. Rep. 83.

"Subrogation" applies where one party pays a debt for which another is primarily liable, and which in equity and good conscience should have been discharged by the latter. *In re Martin* (R. I.) 54 Atl. 589, 594.

"Subrogation" involves the idea of a right existing in one, with which another, under certain circumstances, is clothed—a right capable of enforcement. The surety pays the debt of his principal, and he is subrogated to the rights of the creditor. *Lawrence v. United States* (U. S.) 71 Fed. 228, 230.

"Subrogation," in its literal and equitable significance, is the demanding of something under the right of another, to which right the claimant is entitled for the purposes of justice to be substituted in place of the original holder. It is the machinery by which the equity of one man is worked out through the legal rights of another. *Chaffee v. Oliver*, 39 Ark. 531, 542.

"Subrogation" is simply asking something in the right of another, as it were under another, which the other ought in justice and equity to accord the use of to the person asking, as, when a surety pays a debt, the creditor ought to allow the surety to use any securities he may have against the debtor, although stricti juris there may be no privity between the surety and the debtor as to such securities. *Goldsmith v. Stewart*, 45 Ark. 149, 154.

"Subrogation" is the substitution of one person in place of another, whether as a creditor or as the possessor of any rightful claim, so that he who is substituted succeeds to the rights of the other in relation to the debt or claim, and to its rights, remedies, or securities. *Leavitt v. Canadian Pac. Ry. Co.*, 37 Atl. 886, 888, 90 Me. 153, 38 L. R. A. 152.

"Subrogation" takes place where one pays a debt which another was justly liable to pay, and the payment is to discharge the property of the person paying from an incumbrance. *Cockrum v. West*, 122 Ind. 372, 376, 23 N. E. 140, 141 (citing *Lowrey v. Byers*, 80 Ind. 447).

The doctrine of "subrogation" is that one who has been compelled to pay a debt which ought to have been paid by another is entitled to exercise all the remedies which the creditor possessed against that other, and to indemnify from the fund out of which should have been made the payment which he made. *Sheld. Subr. § 11. Grand Council of Penn-*

*sylvania, Royal Arcanum, v. Cornelius*, 47 Atl. 1124, 1125, 193 Pa. 46.

In law the word "subrogation" denotes putting a third person, who has paid the amount due the creditor, in his place. *Connecticut Mut. Life Ins. Co. v. Cornwell*, 25 N. Y. Supp. 348, 350, 72 Hun, 199.

"Subrogation" is a mode of relief which equity adopts to force the final satisfaction of a debt by him who is primarily liable. *Cook v. Berry*, 44 Atl. 771, 775, 193 Pa. 377.

"Subrogation" is the substitution in place of the creditor of one, usually a surety, who under the compulsion of necessity or for the protection of his own interests has discharged a debt for which, as between himself and another, the latter is primarily liable. In such case the surety or party paying is entitled to the security, benefits, and charges held by the creditor. 2 Beach, Mod. Eq. Jur. § 978; *Mansfield v. City of New York*, 58 N. E. 889, 890, 165 N. Y. 208.

The doctrine of subrogation is that, when one has been compelled to pay a debt which ought to have been paid by another, he is entitled to a cession of all the remedies which the creditor possessed against the other. *McCormick's Adm'r v. Irwin*, 35 Pa. (11 Casey) 111, 117.

"Subrogation" takes place where one pays a debt which another was justly liable to pay, and the payment is made to discharge the property of the person paying from an incumbrance. *Lowrey v. Byers*, 80 Ind. 443, 447.

"Subrogation" is a term borrowed from the civil law. In *Houston v. Branch Bank*, 25 Ala. 257, it is defined as a substitution of a new for an old creditor, or in its more general sense the act of putting by transfer a person in the place of another or a thing in the place of another. By this transfer the new creditor is subrogated to all the rights of the original creditor. *Knighton v. Curry*, 62 Ala. 404, 408.

"Subrogation" is a fiction of the law, which, in the language of the Code of Mississippi, "is the right of a creditor in favor of a third person who pays him," and is either conventional or legal. *Bradford v. Richard*, 16 South. 487, 489, 46 La. Ann. 1530.

*Sheldon, Subrogation, § 3*, says: "Subrogation as a matter of right, independently of agreement, takes place for the benefit of insurers, of one who, being himself a creditor, has satisfied the lien of a prior creditor; of a purchaser, who has extinguished an incumbrance upon the estate which he has purchased." *Blair v. Mounts*, 24 S. E. 620, 623, 41 W. Va. 706.

"Subrogation" is defined as the substitution of another person in the place of a cred-

itor or claimant, to whose rights he succeeds in relation to the debt or claim asserted, which has been paid by him involuntarily, and contemplates some original privilege on the part of him to whose place substitution is claimed. *Merchants' & Mechanics' Bank v. Tillman*, 31 S. E. 794, 795, 106 Ga. 55.

"Subrogation" was a creation of the civil law, but was never recognized to its full extent by the common law. It was called by the civilians a "species of spontaneous agency." To lay a foundation for a claim of recompense or remuneration on the part of the negotiorum gestor, the labor or expense must be bestowed either with the direct intention of benefiting the third party, against whom the claim is made, or in the bona fide belief that the subject belongs to the person by whom the expense or labor is bestowed. *Durante v. Eannaco*, 72 N. Y. Supp. 1048, 1050, 65 App. Div. 435.

#### Assignment distinguished.

A distinction must be observed between subrogation to and an assignment of a mortgage. Subrogation is an act of law, and not of contract. The doctrine of subrogation does not apply to a case where it was the agreement and intention of the parties that the mortgage should be kept alive for the protection of the assignees against judgments in favor of other parties. *C. M. Hapgood Shoe Co. v. First Nat. Bank of Orockett*, 56 S. W. 995, 997, 23 Tex. Civ. App. 506.

In *Gatewood v. Gatewood*, 75 Va. 411, it is said that subrogation is a very different thing from an assignment. It is the act of the law, and the creature of a court of equity, depending, not upon contract, but upon the principles of equity and justice. It presupposes an actual payment and satisfaction of the debt secured by the mortgage. But, although the debt is paid and satisfied, a court of equity will keep alive the lien for the benefit of the party who made the payment, provided he, as security for the debt, has such an interest in the land as entitles him to the benefit of the security given for its payment. Thus, where an owner of land finds it bound by a lien for the purchase money due by his grantor, and to protect himself pays off the lien, he is entitled to be subrogated to the rights of the holder of the lien. *Fulkerson v. Taylor*, 41 S. E. 863, 865, 100 Va. 426.

#### As a creation of equity.

The doctrine of "subrogation" rests on the principle of equity, and privity of contract is not necessary to its support. *Tarver v. Land Mortg. Bank*, 27 S. W. 40, 41, 7 Tex. Civ. App. 425 (citing *Gans v. Thieme*, 93 N. Y. 232; *Cottrell's Appeal*, 23 Pa. [11 Harris] 294).

The right of subrogation is not founded on a contract. It is a creation of equity. It

is enforced solely for the purpose of accomplishing the ends of substantial justice, and is independent of any contract relations between the parties. *Ætna Life Ins. Co. v. Town of Middleport*, 8 Sup. Ct. 625, 630, 124 U. S. 534, 31 L. Ed. 537.

Subrogation is not founded on contract, but upon principles of equity, and may be enforced where no contract or privity of any kind exists between the parties. *Smith v. National Surety Co.*, 59 N. Y. Supp. 789, 791, 28 Misc. Rep. 628.

The doctrine of subrogation is derived from the civil law, and has been adopted by our courts of equity. It is treated as a creature of equity, and administered so as to secure real and essential justice, without regard to form and is independent of any contractual relations between the parties to be affected by it. *McNeill v. Miller*, 2 S. E. 335, 337, 29 W. Va. 480.

Subrogation is independent of any merely contractual relation, and is broad enough to include every instance in which one party is required to pay a debt for which another is primarily answerable, and which in equity and good conscience ought to be discharged by the latter. *Boston Safe Deposit & Trust Co. v. Thomas*, 53 Pac. 472, 473, 59 Kan. 470; *Johnson v. Barrett*, 117 Ind. 551, 554, 19 N. E. 199, 201, 10 Am. St. Rep. 83.

"This doctrine or rule of subrogation is not a fixed and inflexible rule. It is a creature of the equity courts, invented and applied by them to do justice, or prevent an injustice being done in a particular case and under a particular state of facts." *Arlington State Bank v. Paulsen*, 78 N. W. 303, 313, 57 Neb. 717.

The doctrine of subrogation is enforced solely for the purpose of accomplishing substantial justice, and, being administered upon equitable principles, it is only when an applicant has an equity to invoke and when innocent persons will not be injured that a court can interfere. *Heisler v. C. Aultman & Co.*, 57 N. W. 1053, 56 Minn. 454, 45 Am. St. Rep. 486.

The principle which governs in all cases of subrogation is one of equity only, and is to be carried out in the exercise of an equitable discretion with due regard to the legal and equitable rights of others, and, being a purely equitable right, it ought to be denied in all cases where its exercise would produce injustice. It requires an assignment, legal or equitable, from the original creditor, or an agreement or understanding on the part of the party liable to pay the debt that the person furnishing the money for the same shall in effect become the creditor, or that the person must furnish the same, either because he is liable as a surety, or liable in some other secondary manner

or for the purpose of saving or protecting some right or interest, or supposed right or interest, of his own. But the right of subrogation is not founded on contract alone, nor on the absence of contract, but is founded upon the facts and circumstances of the particular case and on the principles of natural justice. *Traders' Bank v. Myers*, 44 Pac. 292, 294, 3 Kan. App. 636 (citing *Crippen v. Chappel*, 35 Kan. 495, 11 Pac. 453, 57 Am. Rep. 187).

Though the right of subrogation is one of the highest equity, still it is purely an equitable result, and the rights of the surety to become subrogated to the rights of the creditor do not depend on contract, but rest alone on principles of justice and equity. Subrogation will not be allowed if it would do substantial wrong, nor when the surety who has paid is indebted to the principal in more than the amount of his debt; nor can it be maintained when the party claiming has in fact been reimbursed and has sustained no loss. *Eaton v. Hasty*, 6 Neb. 419, 425, 29 Am. Rep. 365.

The right of subrogation is not founded on contract, express or implied. It is based on the principles of equity and justice, and includes every instance where one party, not a mere volunteer, pays for another a debt for which the latter was primarily liable, and which in equity and good conscience he ought to have paid. *White River School Tp. v. Dorrell*, 59 N. E. 867, 26 Ind. App. 538.

"Subrogation" is the doctrine of equity jurisprudence, and is not usually applied in courts of common law, except in those states in which equitable remedies are administered through the forms of law. It is a substitution of one person for another, so that the same rights and duties which attach to the original person will attach to the substituted one, and, owing to the strict rules of common-law pleading, this cannot be done in actions at law, except, at any rate, where some statutory provision enables the court to permit the substitution to be made. *Moore v. Watson*, 40 Atl. 345, 20 R. I. 495.

"Subrogation" is a right arising in pure equity and benevolence. It is an equitable result, and, like other controversies in equity, depends on facts to develop its necessity in order that justice may be done. It is an equity called into existence for the purpose of enabling a party secondarily liable, but who has paid the debt, to reap the benefit of any securities which the creditor may hold against the principal debtor, and by the use of which the party paying may thus be made whole. *Bisph. Eq.* 18. But until the creditor has been fully paid subrogation cannot take place upon any terms whatever. Therefore a tender by the lessee of land to a judgment creditor of the amount due, accompanied with a demand that the judg-

ment be assigned to him, could not in any event entitle such lessee to subrogation, since the tender, accompanied by the demand, was not equivalent to payment. *Appeal of Forest Oil Co.*, 12 Atl. 442, 443, 118 Pa. 138, 4 Am. St. Rep. 584.

The right of subrogation is primarily a doctrine of equity; and when the surety has obtained otherwise all that this right could possibly secure to him, he is not entitled to subrogation. *Marshall v. Dixon*, 9 S. E. 167, 168, 82 Ga. 435.

"Subrogation" rests upon purely equitable grounds, and it will not be enforced against superior equities. *Musgrave v. Dickson*, 172 Pa. 629, 632, 33 Atl. 705, 51 Am. St. Rep. 765.

In the case of *The Sarah J. Weed* (U. S.) 21 Fed. Cas. 458, "subrogation" is defined as an equitable assignment operated by the law itself, when justice requires it, as, for instance, when the surety pays the debt of his principal. In modern times, courts of law have dealt with subrogation as they would with assignments, and, when the right of action to which the plaintiff asks to be subrogated is a legal right of action, a court of law may treat a plaintiff who is entitled in equity to subrogation as an assignee, and allow him to maintain an action of a legal nature on the claim to which he claims to be subrogated. Subrogation is founded on principles of equity and benevolence, and may be decreed where no contract or privity of any kind exists between the parties. *Dunlop v. James*, 67 N. E. 60, 61, 174 N. Y. 411 (citing *Cottrell's Appeal*, 23 Pa. [11 Harris] 294).

#### As either legal or conventional.

"Subrogation" is either legal—that is, given by the law—or it arises out of convention or contract. A legal subrogation is allowed only in cases where the person advancing money to pay the debt of a third person stands in the situation of a surety, or is compelled to pay the debt to protect his own rights. Conventional subrogation results from an agreement made either with the debtor or creditor that the person paying shall be subrogated. *First Nat. Bank v. Thompson*, 48 Atl. 333, 335, 61 N. J. Eq. 188.

#### Persons entitled to relief.

The right of subrogation is never accorded to a mere volunteer. *Traders' Bank v. Meyers*, 44 Pac. 292, 295, 3 Kan. App. 636.

"Subrogation" may be enforced whenever one not a mere volunteer discharges the debt of another. *Miller's Appeal*, 119 Pa. 620, 631, 13 Atl. 504, 507.

Whenever one not a mere volunteer pays and discharges the debt of another, he is

entitled to all the remedies which the creditor possesses against the debtor. The remedy of subrogation is no longer limited to securities and quasi securities, but includes so wide a range of subjects that it has been called the mode which equity adopts to compel the ultimate payment of a debt by one who, in justice, equity, and good conscience ought to pay it. *Arnold v. Green*, 116 N. Y. 566, 572, 23 N. E. 1, 2. A surety on appeal, who has been compelled to pay a judgment founded on tort against several defendants, is entitled to be subrogated to plaintiff's rights under a contract with one of them, made pending the appeal, without the surety's knowledge or consent, binding such defendant to pay part of the judgment on condition of his release therefrom. *Smith v. National Surety Co.*, 59 N. Y. Supp. 789, 799, 23 Misc. Rep. 628.

There can be no right of subrogation in one whose duty it is to pay, or in one claiming under him, or against one who is secondarily liable, or not liable at all. In such a case payment is extinguishment. Nor will subrogation ever be enforced where the equities are equal or the rights not clear, nor to the prejudice of the legal or equitable rights of others. *Grand Council of Pennsylvania, Royal Arcanum, v. Cornelius*, 47 Atl. 1124, 1125, 198 Pa. 46.

The doctrine of subrogation is broad enough to include every instance in which one party pays a debt for which another is primarily answerable, and which in equity and good conscience should have been discharged by the latter; but it is not to be applied in favor of one who has officiously and as a mere volunteer, paid the debt of another, for which neither he nor his property was answerable, and which he was under no obligation to pay; and it is not allowed where it would work any injustice to the rights of others. Subrogation, as a matter of right, independently of contract, takes place for the benefit of a purchaser who has extinguished an incumbrance upon the estate which he has purchased. It will be applied whenever the person claiming its benefit has been compelled to pay the debt of a third person in order to protect his own rights or save his own property. *McNeill v. Miller*, 2 S. E. 335, 337, 29 W. Va. 480.

A surety, who has been compelled to pay a debt for which another is primarily liable, succeeds to all rights which the creditor had of enforcing the liability of the original debtor; or an insurer, who has paid a loss for which another is responsible, either by statute or at common law, is subrogated to any claim that the insured had against the person whose tortious act caused the injury, or who for any reason is liable to the owner thereof. *Leavitt v. Canadian Pac. Ry. Co.*, 37 Atl. 886, 888, 90 Me. 153, 38 L. R. A. 152.

"Subrogation" is extended by courts of chancery sometimes to cases of payments by persons not legally bound to pay, but who do so, not as volunteers, but with a well-founded expectation, justified by the conduct or contract of the debtor, that they will be entitled to hold all the securities for their indemnity which the creditor had against the debtor. *Schoonover v. Allen*, 40 Ark. 132, 137.

"Subrogation" is the substitution of another person in the place of a creditor, to whose rights he succeeds in relation to the debt. This may come about when one who is bound as a surety to pay a debt advances the amount of it to a creditor, in which case he receives everything that the creditor has to enforce a collection of the debt. It may come about, also, when one who has any interest to protect pays some lien or incumbrance upon property for the purpose of protecting that interest, in which case he will be deemed the equitable assignee of the debt which he pays. *Finegan v. City of New York*, 38 N. Y. Supp. 358, 361, 4 App. Div. 15 (citing *Cole v. Malcolm*, 66 N. Y. 636).

One who is only a volunteer cannot invoke the aid of subrogation, for such a person can establish no equity. *Beach, Mod. Eq. Jur.* § 801. An agent with power of attorney to sell lands made a mortgage thereon, and without the knowledge or consent of his principal applied the proceeds to the discharge of the prior valid mortgage. It was held that the second mortgagee could not be subrogated to the mortgage discharged. *Campbell v. Foster Home Ass'n*, 163 Pa. 609, 636, 30 Atl. 222, 26 L. R. A. 117, 43 Am. St. Rep. 818.

"Subrogation" is, as defined by *Bisph. Eq.* § 335, "the equity by which a person who is secondarily liable for a debt, and has paid the same, is put in the place of the creditor, so as to entitle him to make use of all the securities and remedies possessed by the creditor, in order to enforce the right of exoneration as against the principal debtor, or of contribution against others liable in the same rank with himself." A surety who pays the debt of his principal is therefore subrogated to all the remedies of the creditor, as against the principal or others who become liable for the debt. *Talbot v. Wilkins*, 31 Ark. 411, 421.

"Subrogation" applies where a person pays a debt for which another is primarily liable, and which in equity and good conscience should have been discharged by the other. A stranger, paying the debt of another, will not be subrogated to the creditor's right, without an agreement to that effect. In *re Martin* (R. I.) 54 Atl. 589, 591.

The primary meaning of "subrogation" is the act of putting one person in place

of another, or the substitution of one person in place of the creditor, to whose rights he succeeds in relation to the debt. Formerly the right of subrogation was limited to transactions between principals and sureties, as, when a surety paid the debt of his principal to the creditor, the surety was entitled to have the full benefit of all mortgages or collateral securities for the debt both of a legal and equitable nature. *Heuser v. Sharman*, 56 N. W. 525, 526, 89 Iowa, 355, 48 Am. St. Rep. 390.

While it is true that "subrogation" does not arise out of contract, but is founded on equitable considerations, it is further true that it is never enforced at the expense of a legal right; neither can it be invoked for the benefit of strangers or intermeddlers, without the knowledge or consent of the one sought to be charged. It always requires something more than the mere payment of a debt in order to entitle the person paying the same to be substituted in the place of the original creditor. It requires an assent, legal or equitable, from the original creditor, or an agreement on the part of the party liable to pay the debt that the person furnishing the money to pay the same shall in effect become the creditor, or the person furnishing the money must furnish it, because he is liable as surety, or in some secondary character, or for the purpose of saving some interest of his own. *Gray v. Zellmer*, 72 Pac. 228, 229, 66 Kan. 514 (citing *Crippen v. Chappel*, 35 Kan. 495, 11 Pac. 453, 57 Am. Rep. 187).

"Subrogation" is the substitution of one person in the place of another as a creditor; the new creditor succeeding to the rights of the former. It is the mode by which a third person, who pays a creditor, succeeds to his rights against the debtor. When a person is under obligation to do so, or is interested in so doing, pays the debt of another, he may be subrogated to all the rights, securities, or remedies of the creditor whom he satisfies; while, when one voluntarily, and, as a mere volunteer, having no interest to protect, pays the debt of another, the payment operates as an extinguishment of the claim, and the doctrine of subrogation does not apply. *Wilson v. Wilson*, 57 Pac. 708, 712, 6 Idaho, 597.

The doctrine of subrogation requires that the person seeking its benefit must have paid a debt due to a third party before he can be substituted to that party's rights; and in doing this he must not act as a mere volunteer, but on compulsion, to save himself from loss by reason of a superior lien or claim on the part of the person to whom he pays the debt. *Tarver v. Land Mortg. Bank*, 27 S. W. 40, 41, 7 Tex. Civ. App. 425.

The doctrine of subrogation is not applied in favor of one who has officiously and

as a mere volunteer paid the debt of another, for which neither he nor his property was answerable; but it will be applied whenever the person claiming its benefit has paid a debt for which another was primarily answerable, and which he was compelled to pay in order to protect his own rights and save his own property. The doctrine is that one who has the right to pay a debt which ought to have been paid by another is entitled to exercise all the remedies which the creditor possesses against that other, and to indemnity from the fund out of which should have been made the payment which he has made. *Blair v. Mounts*, 24 S. E. 620, 623, 41 W. Va. 706.

To afford relief or protection to a mere volunteer, an uninvited intermeddler in the affairs of others, is not remotely contemplated by the doctrine of subrogation. It is only in those cases where the person advancing money to pay the debt of a third party stands in the situation of a surety, who is compelled to pay it to protect his own rights, that a court of equity as a matter of course substitutes him in the place of the creditor. One who advances money to pay off an incumbrance upon realty, at the instance of the owner thereof, and upon the express understanding that the advance made is to be secured by the immediate execution of papers which will constitute a first lien on the property, is not a mere volunteer, and, in the event the new security thus taken turns out to be defective, the person parting with his money on the faith thereof, if not chargeable with culpable and inexcusable neglect in the premises, will be subrogated to the rights of the prior incumbrancer. *Merchants' & Mechanics' Bank v. Tillman*, 31 S. E. 794, 795, 106 Ga. 55.

*Bouvier*, in defining the word "subrogation," observes that a "principle which lies at the bottom of the doctrine is that the person seeking it must have paid the debt under grave necessity to save himself a loss. The right is never accorded to a volunteer." And where, to gratify a desire to make a loan for profit and more effectually secure such obligation, the person desiring to make the loan, without the slightest compulsion, chose to pay the debt of another at a time when he had no interest at hazard, he was an intermeddler, to whom the doctrine of subrogation would not apply. Chief Justice Ryan, in *Watson v. Wilcox*, 39 Wis. 643, 20 Am. Rep. 63, says: "One who, having no interest to protect, voluntarily loans money to a mortgagor for the purpose of satisfying and canceling the mortgage, taking a new mortgage for his own security, cannot have the former mortgage revived, and himself be subrogated to the rights of the mortgagee therein. \* \* \* We know of no case that has ever carried the doctrine of subrogation so far as to hold that a mere loan of money,



for the purpose of enabling the borrower to pay a debt, entitled the loaner to be subrogated to the rights of the creditor whose debt was thus paid." Being entire strangers to all previous transactions affecting existing obligations, for which they were in no manner liable, their voluntary interference was not of a character to invoke the doctrine of subrogation. In *Ætna Life Ins. Co. v. Town of Middleport*, 124 U. S. 534, 8 Sup. Ct. 625, 31 L. Ed. 537, Mr. Justice Miller, after defining the term "subrogation," then states the doctrine of its application: "It takes place for the benefit of a person who, being himself a creditor, pays another creditor whose debt is preferred to his by reason of privileges or mortgages, being obliged to make the payment, either as standing in the situation of a surety, or that he may remove a prior incumbrance from the property on which he relies to secure his payment. Subrogation, as a matter of right, independently of agreement, takes place only for the benefit of insurers, or of one who, being himself a creditor, has satisfied the lien of a prior creditor, or for the benefit of a purchaser who has extinguished an incumbrance upon the estate which he has purchased, or of a co-obligor or surety who has paid the debt which ought, in whole or in part, to have been met by another. The doctrine of subrogation is not applied for the mere stranger or volunteer, who has paid the debt of another, without any assignment or agreement for subrogation, without being under any legal obligation to make the payment, and without being compelled to do so for the preservation of any rights or property of his own." In *Sandford v. McLean* (N. Y.) 3 Paige, 122, 23 Am. Dec. 776, Chancellor Walworth thus makes a clear-cut statement of the controlling principle: "It is only in cases where the person advancing money to pay the debt of a third party stands in the situation of a surety, or is compelled to pay it to protect his own rights, that a court of equity substitutes him in the place of the creditor, as a matter of course, without any agreement to that effect. In other cases the demand of a creditor, which is paid with the money of a third person, and without any agreement that the security shall be assigned or kept on foot for the benefit of such third person, is absolutely extinguished. *Pollock v. Wright*, 87 N. W. 584, 585, 15 S. D. 134.

The doctrine of subrogation is a pure, unmixed equity, having its foundation in the principles of natural justice, and from its nature never could have been intended for the relief of those who were in any condition in which they were at liberty to elect whether they would or would not be bound. The one who voluntarily pays a tax to a city, for which neither he nor his property is liable, is not entitled to be subrogated in equity to the rights of the city as against

the property or its owner. *Montgomery v. City of Charleston* (U. S.) 99 Fed. 825, 829, 40 C. C. A. 108, 48 L. R. A. 503.

The right of subrogation is not necessarily dependent upon the conventional relation of principal and surety, and in behalf of the latter; but when a person is compelled to pay a claim, or has legitimately an interest to protect in doing so, he is entitled to his remedy against the person primarily liable to pay it. In other words, when a person is liable to be charged with that which primarily ought to be borne by another, the former is entitled to the equity of a surety, and, on payment, to the remedies of the creditor against the person so primarily liable. *Jones v. Bacon*, 25 N. Y. Supp. 212, 217, 72 Hun, 506 (citing *Wilkes v. Harper* [N. Y.] 2 Barb. Ch. 338).

No one who is a mere volunteer can acquire a right of subrogation. There must be either some duty on his part to pay, or some interest to be protected, which gives him a right to pay the debt. *Acer v. Hotchkiss*, 97 N. Y. 395. A purchaser at a tax sale, who is a mere volunteer, and pays his money on a bid and receives certificates, does not thereby become entitled to be subrogated to the right to receive the taxes from the owner of the premises. *Finegan v. City of New York*, 38 N. Y. Supp. 358, 361, 4 App. Div. 15.

Subrogation is confined to the relation of principal and surety and guarantors; to cases where a person, to protect his own junior lien, is compelled to remove one which is superior; and to cases of insurance. Any one who is under no legal obligation or liability to pay the debt is a stranger, and if he pays the debt a mere volunteer. *Ætna Life Ins. Co. v. Town of Middleport*, 8 Sup. Ct. 625, 630, 124 U. S. 534, 31 L. Ed. 537.

#### SUBROGATION BY CONVENTION.

"Subrogation by convention" occurs where a party interested in property makes a payment at the request of either the debtor or the lienor, with the understanding that he shall be subrogated. Where a son lent his father money with which to pay assessments which were a lien on a lot in which the son was in no wise interested, the latter was not entitled to be subrogated to such lien. *Kocher v. Kocher*, 39 Atl. 536, 56 N. J. Eq. 547.

#### SUBSCRIBE—SUBSCRIPTION.

See "Bona Fide Subscriber."

##### Attest distinguished.

"Subscribing," as used in a statute prescribing the mode of devising real estate, and providing that such last will and testament shall be signed by the testator or testatrix,

or by some other person in his or her presence and by his or her direction, and, if not wholly written by himself or herself, shall be attested by two or more competent witnesses subscribing their names in his or her presence, means the writing on the same paper of the names of the witnesses for the sole purpose of identification. "To attest the publication of a paper as a last will, and to subscribe to that paper the names of the witnesses, are very different things. Attestation is an act of the senses; subscription is an act of the hand. The one is mental; the other, mechanical. To attest a will is to know that it was published as such and to certify the fact required to constitute an actual and legal publication. There may be a perfect attestation in fact without subscription." *Swift v. Willey*, 40 Ky. (1 B. Mon.) 114, 115. See, also, *Tobin v. Haack*, 81 N. W. 758, 761, 79 Minn. 101; *In re Downie's Will*, 42 Wis. 66, 76.

#### As execute.

"Subscribed," as used in Rev. St. c. 75, § 8, requiring every contract for the sale of land to be in writing, and subscribed by the party purchasing, is equivalent to "executed," as used in an allegation that an agreement for the sale of lands was executed by the purchaser. *Cheney v. Cook*, 7 Wis. 413, 423.

#### Mark.

A subscription of a will, within the meaning of the statutes in reference to subscribing witnesses, is satisfied by the act of the witness in affixing his mark to his name, subscribed to the instrument by the testator. *Garrett v. Heflin*, 13 South. 327, 98 Ala. 615, 39 Am. St. Rep. 89.

"Subscribed," as used in a statute requiring conveyances of land or any interest therein to be by deed in writing subscribed by the grantor, was satisfied if the mark of the grantor be affixed, and the mark may be made by another at his request, or the true name, written out in full by another at the grantor's request, will be sufficient. *Nye v. Lowry*, 82 Ind. 316, 319.

Where a testator's name was written to the will by another person, but the testator made his mark, the will will be deemed to have been "subscribed," within the statute requiring wills to be subscribed by the testator. *Guthrie v. Price*, 23 Ark. 396.

"Subscription" includes a mark by or for a person who cannot write, if his name be subscribed to an instrument and witnessed by a person who writes his own name as a witness. *Terry v. Johnson*, 60 S. W. 300, 301, 109 Ky. 589.

Since the adoption of the Civil Code, which in laying down rules of construction (Gantt, Dig. § 5625), provides "that the word 'signature' or 'subscription' includes mark, when the person cannot write, his name being

written near it and witnessed by a person who writes his own name as a witness," the mark of one who cannot write is not to be considered a signature or subscription, unless the person writing his name writes his own name as a witness. *Watson v. Billings*, 38 Ark. 278, 283, 42 Am. Rep. 1. This only means that such a signature is not to be taken prima facie as genuine, without further proof of signing. It was not intended to exclude such proof. *Ex parte Miller*, 3 S. W. 883, 49 Ark. 18, 4 Am. St. Rep. 17.

Under the Code definition of "subscription" as including a mark when a person cannot write, his name being written near it and witnessed by a person who writes his own name as a witness, an instrument is subscribed by one who is unable to write only when he has made his mark near his name subscribed for him, and this making of his mark has been witnessed by a person who can and does write his own name as witness. *Houston v. State*, 21 South. 813, 814, 114 Ala. 15.

The word "signature" or "subscription" includes mark when the person cannot write; his name being written near it and witnessed by a person who writes his name as a witness. Civ. Code Ala. 1896, § 1; Pen. Code Cal. 1903, § 7; Pol. Code Mont. 1895, § 16; Pen. Code Mont. 1895, § 7; Civ. Code Mont. 1895, § 4662; Rev. Codes N. D. 1899, § 5135; Civ. Code S. D. 1903, § 2469; Rev. St. Okl. 1903, § 2808.

Signature or subscription includes mark, when the person cannot write, his name being near it by a person who writes his own name as a witness: provided, that when a signature is by mark it must, in order that the same may be acknowledged or may serve as the signature to any sworn statement, be witnessed by two persons, who must subscribe their own names as witnesses thereto. —Civ. Code Cal. 1903, § 14; Code Civ. Proc. Cal. 1903, § 17.

The word "subscription" includes a mark, the name being written near the mark and witnessed. *Shannon's Code Tenn.* 1896, § 62. See, also, *Brown v. McClanahan*, 68 Tenn. (9 Baxt.) 347. Under this statute it is held that a signature written by another than the signer, who was unable to write, is not a signature by mark, unless there is a sign or mark to indicate that the signer did not sign his own name. *Simmons v. Leonard*, 18 S. W. 280, 281, 91 Tenn. (7 Pickle) 183, 30 Am. St. Rep. 875.

"Signature" or "subscribe" includes the mark of a person unable to write. Rev. St. Tex. 1895, art. 3270.

In the construction of the statutes, the word "subscription" includes marks of an illiterate or infirm person. Pen. Code Ga. 1895, § 2.

**Place of signing.**

"Subscribed" means signed, without respect to whether the signature is at the bottom, in the middle, or at the beginning of the instrument. *Roberts v. Phillips*, 4 El. & Bl. 450, 454, 456, 457, 30 Eng. Law & Eq. 147, 151.

To subscribe is to attest or give consent or evidence knowledge by underwriting, usually, but not necessarily, the name of the subscriber; but the place of the writing is immaterial, since a still more general meaning of the word "subscribe" is to attest by writing. In *re Walker's Estate*, 42 Pac. 815, 816, 110 Cal. 387, 30 L. R. A. 460, 52 Am. St. Rep. 104; *California Canneries Co. v. Scatena*, 49 Pac. 462, 463, 117 Cal. 447.

The statute of frauds, requiring the note or memorandum of a sale to be made in writing and subscribed by the parties to be charged thereby, means a manual signing of the agreement at the end thereof by the party to be charged. The etymology and definition of the word "subscribe," as given by lexicographers, shows that its meaning, when applied to the signature to an instrument in writing, is the signature or writing of one's name beneath or at the end of an instrument. The derivation of the word from the Latin "subscribo" shows that literally and according to its derivation its meaning is to write under or underneath. *James v. Patten*, 6 N. Y. (2 Seld.) 9, 12, 55 Am. Dec. 376.

The statute of frauds, requiring that the memorandum of a sale be "subscribed" by the party to be charged, was not complied with by a signature in the midst of the list of articles sold. *McGivern v. Fleming* (N. Y.) 12 Daly, 289, 290; *Davis v. Shields* (N. Y.) 26 Wend. 341, 351.

Rev. St. p. 389, § 12, providing that the memorandum of sale of personalty shall be "subscribed by the party to be charged," means a signing at the end of the memorandum. *Coon v. Rigden*, 4 Colo. 275, 282.

A complaint for larceny, signed by the complainant below the description of the goods stolen and above the charge of larceny, was not "subscribed," as required by Rev. St. c. 135, § 2. *Commonwealth v. Barhight*, 75 Mass. (9 Gray) 113, 114.

The word "subscribe," when used in reference to the authentication of a writing or document, ordinarily implies that the name of the party who subscribes is set by him or by his authority at the bottom or end of the writing or document. If the parties to a mortgage write their names in the body of the affidavit to the mortgage, it is not a compliance with the statute requiring that they shall "subscribe" the affidavit. *Stone v. Marvel*, 45 N. H. 481.

The word "subscribed," when used in reference to the authentication of a writing

or document, ordinarily implies that the name of the party who subscribed is set, by him or his authority, at the bottom or end of the writing or document. *Stone v. Marvel*, 45 N. H. 481. This rule has been repeatedly applied to wills and to papers, where the question was whether they had been so subscribed as to satisfy the statute of frauds. *American Surety Co. v. Worcester Cycle Mfg. Co.* (U. S.) 100 Fed. 40, 41.

Where a statute requires that a will or other instrument be "subscribed," it is necessary that the signature be at the end or foot of the instrument, in order to constitute a compliance with the statute, in which respect the term differs from "signed," which is held only to require that the name be written somewhere in the instrument, but may be either in the body or at the end thereof. *Lawson v. Dawson's Estate*, 53 S. W. 64, 65, 21 Tex. Civ. App. 361.

The name of a lien claimant at the top of his bill, though made with his own hand, is not a sufficient compliance with the statutory provision that the statement of his claim shall be "subscribed" by the lien claimant. *Stratton v. Shoenbar* (Me.) 10 Atl. 446, 447.

Burrill, in his Dictionary, says: "To subscribe is to write under; write at the bottom or end of a writing or instrument; to write the name under." As used in 2 Gav. & H. St. p. 180, § 274, providing that the execution of an instrument is the subscribing and delivering of it, with or without affixing a seal, means writing the name under. *Wild Cat Branch v. Ball*, 45 Ind. 213, 216.

**Printed or stamped signature.**

A statute providing that the summons in a civil action shall be "subscribed" by the plaintiff or his attorney does not require that the subscription shall be a written signature in the proper handwriting of plaintiff or his attorney, but the requirement of the statute is satisfied if the name be printed or stamped. *Mezchen v. More*, 11 N. W. 534, 54 Wis. 214; *Barnard v. Heydrick* (N. Y.) 49 Barb. 62, 69.

Under a statute requiring the summons to be subscribed by the plaintiff or his attorney, it is not necessary that the name be written, but it may be printed, on the summons. Any signature, whether written or lithographed, which the party issuing the summons may adopt as his own, will be sufficient. *Herrick v. Morrill*, 37 Minn. 250, 33 N. W. 849, 850, 5 Am. St. Rep. 841.

"Subscribed," as used in 2 Rev. St. p. 135, § 8, requiring a contract for the sale of an interest in real estate, or some note or memorandum thereof expressing the consideration, to be in writing and subscribed by the party by whom the sale is to be made or by

his lawfully authorized agent, means an actual signing in writing of the name of the party who is to make a sale of an interest in lands at the end of the contract or of the memorandum therefor; hence, where the names at the end of the agreement or of the memorandum thereof for such a sale were printed, the contract was not "subscribed." *Vielie v. Osgood* (N. Y.) 8 Barb. 130, 132.

#### **Sign synonymous.**

As used in the statute directing that all devises of land be in writing and signed by the testator, and be subscribed by three or more witnesses, the words "subscribed" and "signed" are used with the same view and to the same end. Mr. Baily defines "sign" to be a sensible mark or character, or a subscription of one's own name, and "subscribe" as to set one's hand to a writing. Therefore, if the requirement as to the testator's signature is complied with by a mark, the requirement that it be "subscribed" by witnesses may be also complied with by mark. *Pridgen v. Pridgen's Heirs*, 35 N. C. 259, 260.

The word "subscribe," according to the best lexicographers, means to write underneath; while "sign" is defined to affix a signature to. In *re Strong*, 16 N. Y. Supp. 104, 2 Con. Sur. 574.

2 Rev. St. p. 136, § 3, requiring contracts for the sale of goods to be "subscribed" by the parties to be charged, requires a subscription at the end thereof, and it is not sufficient that the names of the parties appear in the body of the contract. The verb "to sign" in its primary, derivative, and ancient sense, signifies to declare assent or attestation by some sign or mark. Hence it early passed to mean the showing or declaring of such assent or attestation by the customary mark or the written name. In ordinary, as well as in legal, use, it is now understood to mean to write the name in any such way as will indicate that the writing with which it is connected expresses the assertion, the promise, or the act of the signer according to the nature of the writing. It may be at the end, or elsewhere, as in the margin in the official acts of some public officers. Thus, one of the ancient decisions on the meaning of the word in the statute of wills says that the writing of a name on the same paper would answer, saying that "it would serve for all material purposes if it should be signed at the top or bottom, because the statute did not say 'subscribed,' but 'signed.'" The word "subscribe," according to its derivation, means to write beneath; but in habitual use it denotes the writing of the name at the end of any writing, in token of assent or attestation, according to the import of the writing itself. It has a secondary meaning, but that is purely metaphorical, denoting the consent, assent, or promise thus conveyed, without reference to the external mode of

expressing it. But this secondary sense is excluded when actual writing is spoken of, and, besides, holds only when the word is used as a neuter or intransitive verb, accompanied by the preposition "to." This distinction may be observed, alike in colloquial use and in correct written style. In the earliest adjudications of the statutory sense of the word "sign" it was expressly distinguished between those two words, and the decision of the court supporting a mention of the name in the beginning of the instrument as a good signing was founded on the reason that the statute did not say "subscribe," but "sign." *Davis v. Shields*, 26 Wend. 341, 356 (reversing 24 Wend. 322).

"Subscribe," as used in 2 Rev. St. p. 135, §§ 8, 9, providing that every contract for the leasing for a longer period than one year, or for the sale, of any land or any interest therein, shall be void unless the contract, or some note or memorandum thereof expressing the consideration, be in writing "and subscribed by the party by whom the lease or sale is to be made," is to be understood in a different sense from the word "signed." *Miller v. Pelletier* (N. Y.) 4 Edw. Ch. 102, 106.

#### **Signature by another.**

Under a statute requiring that every last will and testament must be "subscribed" by the testator at the end thereof, or by some person for him at his request, the subscription was valid where the testator held the pen and another person guided it. *Vines v. Clingfost*, 21 Ark. 309, 312.

#### **SUBSCRIBE—SUBSCRIPTION (To Stock).**

In construing the charter of a corporation created for the purpose of the encouragement of art and science in the distribution of the works of art and to aid the University of Alabama in replacing its library and establishing a scientific museum, and authorizing such corporation to distribute books, paintings, statues, antiques, etc., by the casting of lots, etc., and authorizing the corporation to receive subscriptions and to sell and dispose of certificates of subscription, it was said that the term "subscription" must mean one of three things, and in its generality is broad enough to include all three; that is, it means either a subscription to the purchase or part purchase of some of the articles the association is authorized to distribute in awards, or a contribution of some article of the kind mentioned to be disposed of, or a subscription to a fund to be employed in procuring works of art for distribution, and in replacing a library of the University and providing for it a scientific museum. *Boyd v. State*, 61 Ala. 177, 197.

To "subscribe for" shares in a bank or corporation, in one of the ordinary significa-

Meanings of the word "subscribe," is to give the thing subscribed for, or to contribute to the undertaking accordingly. *Sagory v. Dubois* (N. Y.) 3 Sandf. Ch. 466, 493.

A statute authorizing a religious body to take and hold "subscriptions or contributions," in money or otherwise, confers only a power to take by gift, and does not embrace power to take by will. *Brown v. Thompkins*, 49 Md. 423, 431.

"A subscription for shares in a corporation is an agreement to take them upon the conditions of the charter, and subjects the subscriber to those liabilities only which are imposed by the charter or the statute under which the corporation is organized." *Rockingham Bldg. Co. v. Burlingame*, 31 Atl. 23, 67 N. H. 301.

An actual "taking" of shares of stock of a corporation is equivalent to a subscription, or an agreement to take. *Barron v. Burrill*, 29 Atl. 938, 939, 86 Me. 72.

#### **As an agreement to pay.**

A "subscription" to the stock of a corporation implies an agreement to pay for the shares. *Crissey v. Cook*, 72 Pac. 541, 542, 67 Kan. 20.

It is well settled that the subscription to the capital stock of a corporation is a promise to pay money, and that a right of action thereon is not created until there has been a call by the corporation. *Otter View Land Co.'s Receiver v. Bolling's Ex'r* (Ky.) 70 S. W. 834, 835 (citing *Calloway v. Glenn*, 49 S. W. 440, 105 Ky. 648).

"Subscribe," as used in reference to a paper signed and delivered for the purpose of securing the erection of a manufacturing establishment, is used in the sense of agreeing in writing to furnish a sum of money or its equivalent for a designated purpose. *Strong v. Eldridge*, 36 Pac. 696, 697, 8 Wash. 595.

"Subscribe," as used in reference to contracts for stock in a corporation to be organized, includes the idea of a promise to pay the amount subscribed in the manner agreed upon. *Cheraw & C. R. Co. v. White*, 14 S. C. 51, 61, 62.

A subscription for shares is defined as implying a promise to pay for them, which promise will sustain an action to collect, without proof of any particular consideration. The signing of the paper is an implied promise to pay the subscription. *Ventura & O. V. R. Co. v. Collins* (Cal.) 46 Pac. 287, 289.

A subscription to corporate stock imports a promise by the subscriber to pay the face value of the shares of stock subscribed for, in compliance with assessments lawfully made, for the recovery of which the corporation may maintain a suit at law. Where

stock is subscribed for, it is in existence, within the meaning of the statutes authorizing the taxation of corporation stock, though the stock certificate has not been issued. *American Pig Iron Storage Co. v. State Board of Assessors*, 29 Atl. 160, 161, 56 N. J. Law, 389.

To subscribe is to agree in writing to furnish a sum of money or its equivalent for some designated purpose. *Heller v. Ellwood Board of Trade*, 47 N. E. 649, 650, 18 Ind. App. 188.

"Subscribe," as used in an instrument agreeing to subscribe a certain amount in order to secure the location of a manufacturing establishment, will be construed to mean "agree to pay." *Strong v. Eldridge*, 36 Pac. 696, 697, 8 Wash. 595.

"Subscribe," as used in a condition annexed to a subscription for capital stock of a corporation that good and responsible individuals in a place subscribe a certain sum within one year from the date, imports subscriptions made within the time named, without indicating any assignment of time, as past or future, for the making of such subscriptions, but only that prior to the close of the prescribed period the required amount should be subscribed. It is used in the present tense, and has reference to the period as continuing to its close, meaning to subscribe at any time within it. In this view the person's subscription is embraced in, and not excluded by, the terms of the condition. *Montpelier & W. R. R. Co. v. Langdon*, 45 Vt. 137, 142.

#### **As chose in action.**

See "Chose in Action."

#### **Part of common fund implied.**

"Subscribed," as used in an agreement by which the parties recited that they "subscribed and contributed," implied that the donations of each were parts, the whole of which was to form a common fund. *Murray v. McHugh*, 63 Mass. (9 Cush.) 158, 166.

#### **As a contract.**

A subscription for the building of a church on condition that other subscriptions aggregating a certain sum are obtained, subsequent subscribers knowing of the former subscription, is something more than a mere offer. It is a contract upon consideration, and is not revoked by the death of the subscriber. *Waters v. Union Trust Co.*, 89 N. W. 687, 688, 129 Mich. 640.

A subscription, when made, becomes a conditional contract with every other person who may subscribe that the amount subscribed shall, upon the formation of the company, be paid in accordance with the terms of the subscription; and when the requisite stock is subscribed, and the company is du-

ly organized, it becomes the offer or basis of credit to the public, or to all who may deal with it, and every subscriber participating in the organization thereby makes his subscription absolute, and is bound to pay it according to the terms of the charter and by-laws of the company, and can discharge his liability in no other way. A subscription by a number of people to the stock of a corporation thereafter to be formed by them has in law a two-fold character. It is, first, a contract between the subscribers to become stockholders, without further acts on their part, immediately on the formation of the corporation; and, second, it is in the nature of a continuing offer to the proposed corporation, which, upon acceptance by it after its formation, becomes, as to each subscriber, a contract between him and the corporation. *Balfour v. Baker City Gas Co.*, 41 Pac. 164, 165, 27 Or. 300.

A "stock subscription" is nothing but a contract by which a subscriber is bound to pay the company certain amounts. *Downie v. Hoover*, 12 Wis. 174, 175, 78 Am. Dec. 730.

"A subscription to the capital stock of a corporation is a contract between the subscriber and the corporation by which the subscriber agrees to take a certain number of shares of its capital stock, and we think that, where a bare subscription is relied upon to prove that the person is a stockholder, there should be enough in the subscription list itself to show his intention to take that number of shares." *Grangers' Market Co. v. Vinson*, 6 Or. 172, 174.

A subscription to corporation stock is not so far a completed contract as to prevent a withdrawal of the subscription before the corporation is organized and the subscription is accepted. The right of subscribers to the capital stock of a proposed corporation to withdraw their subscription at any time before the organization of the corporation is completed has been affirmed in several recent and well-considered opinions. The right rests upon the impregnable ground of the legal impossibility of completing a contract between two parties, only one of which is in existence. *Bryant's Pont Steam Mill Co. v. Felt*, 32 Atl. 888, 889, 87 Me. 234, 33 L. R. A. 593, 47 Am. St. Rep. 323.

#### **Donation included.**

"Subscriptions," within the meaning of the saving clause of the section of the Constitution of 1870, prohibiting cities, counties, towns, townships, or other municipalities from subscribing to the capital stock of any railroad or private corporation, or from making donations to loan its credit in aid of such corporations, providing, however, that the article shall not be construed as affecting the right of any such municipality to make any such subscriptions, where the same have been authorized under existing laws, include dona-

tions. *Chicago & I. R. Co. v. Pinckney*, 74 Ill. 277, 279; *Fairfield v. Gallatin County*, 100 U. S. 47, 49, 25 L. Ed. 544; *Louisville v. Portsmouth Sav. Bank*, 104 U. S. 469, 471, 26 L. Ed. 775; *Town of Enfield v. Jordan*, 7 Sup. Ct. 358, 364, 119 U. S. 680, 30 L. Ed. 523.

A clear distinction between "subscriptions" to the capital stock of a railroad company or private corporations and "donations" or "loans of credit" to such corporations is apparent from the reading of the constitutional provision providing that no city, town, township, or other municipality shall ever become a subscriber to the capital stock of any railroad or private corporation, or make donation to or loan its credit in aid of such corporation, but that the adoption of the article shall not be construed as affecting the right of such municipalities to make such subscriptions where the same have been authorized under existing laws by a vote of the people of such municipalities prior to such adoption. It is apparent that donations or loans of credit to such corporation are prohibited under all circumstances, but that a subscription may be made, if authorized prior to the adoption of the Constitution. *Town of Concord v. Portsmouth Sav. Bank*, 92 U. S. 625, 629, 23 L. Ed. 628.

#### **Resolution of county.**

To constitute a subscription by a county to stock in a railroad company, it is not necessary that there be an act of chirographical subscription. A resolution of the county declaring a subscription made, an acceptance thereof by a railroad company, and notice of it, constitutes a subscription. *Nugent v. Putnam Co.*, 86 U. S. (19 Wall.) 241, 248, 22 L. Ed. 83.

#### **SUBSCRIBED CAPITAL STOCK.**

"Subscribed capital stock," as used in Civ. Code, § 309, prohibiting the directors of a corporation from creating debts beyond their subscribed capital stock, means "all subscribed capital stock, whether paid in or not, and regardless of the disposition made of it." *Moore v. Lent*, 22 Pac. 875, 877, 81 Cal. 502.

"Subscribed," as used in a statute of Ohio by which stockholders and corporations are made subject to a certain individual liability on "stock subscribed," must be construed with reference to the constitutional provision under which it was framed, making such stockholders liable on all stock "owned" by them and would include stock distributed as a stock dividend. *Appeal of Aultman*, 98 Pa. 505, 516.

#### **SUBSCRIBER.**

##### **To corporate stock.**

"Subscribers," as used in Act Feb. 12, 1849, § 27, making the stockholders of every

plank road company liable in their individual capacity for the payment of the debts of such company to the amount of stock they severally have subscribed, and in the amendatory act of January 28, 1851, providing that no subscriber to the capital stock of any plank road shall be responsible beyond the actual amount of stock so by him subscribed, includes stockholders of every description. *Gay v. Keys*, 30 Ill. (20 Peck) 413, 420.

By an act of Parliament, passed for making a tunnel under the Thames, the company of proprietors were enabled to raise a sum of £200,000, and it was enacted that the persons who had subscribed, or who should thereafter subscribe, or advance any money toward making the tunnel, should pay the sums respectively subscribed at such times and places and in such manner as should be directed by the directors, and, in case any of such subscribers should neglect to pay in the manner required, the company, or their directors, were empowered to sue for and recover the same. By another section, reciting that the probable expenses would amount to £160,000, and that the sum of £140,000, being more than four-fifths of such expenses, had already been subscribed for defraying such expenses by several persons, under a contract binding them, their heirs, executors, and administrators, for payment of the several sums so subscribed by them respectively, it was enacted that the whole of the sum of £160,000 should be subscribed in like manner before any of the powers and provisions given by that act should be put in force. Held, that the word "subscriber," in this act applied only to those who had stipulated that they would make payment, and not to all those who had already advanced money, and consequently that a person whose name was mentioned in the recital of the act of Parliament as one of the original proprietors, and who had paid a deposit on eight shares, but who had not signed any contract, was not a subscriber within the meaning of the act, and not liable to be sued by the directors. *Thames Tunnel Co. v. Sheldon*, 6 Barn. & C. 341.

#### To a newspaper.

The primary meaning of the word "subscribe" is to write underneath, as one's name; but it also means to give consent to something written, to assent, to agree. So that, to become a subscriber to a newspaper, there must be some voluntary act on the part of the subscriber, or something which is in effect an assent by him to the use of his name as a subscriber; and hence a person to whom a paper is sent without his knowledge or consent, either expressed or implied, is not a subscriber, within the meaning of McClain's Code, § 428, requiring the board of supervisors of each county to select two newspapers having the largest number of subscrib-

ers within the county to be the official papers of the county. *Ashton v. Stoy*, 64 N. W. 804, 805, 96 Iowa, 197, 30 L. R. A. 584.

#### SUBSCRIBING WITNESS.

A "subscribing witness" is one who was present when the instrument was executed, and who at the time, at the request or with the assent of the party, subscribed his name to it as a witness of the execution. If his name is signed, not by himself, but by a party, it is no attestation. Neither is it such if, though present at the execution, he did not subscribe the instrument at that time, but afterwards, and without request or by fraudulent procurement of the other party. But it is not necessary that he should have actually seen the party sign, nor have been present at the very moment of signing; for if he is called in immediately afterwards, and the party acknowledges his signature to the witness, and requests him to attest it, this will be deemed part of the transaction, and therefore sufficient. *Greenl. Ev. § 569; Huston v. Ticknor*, 99 Pa. 231, 238.

A subscribing witness to a deed is defined to be one who was present when the instrument was executed, and who at that time, at the request or with the consent of the party, subscribed his name to it as a witness of the execution. *Tate v. Lawrence*, 58 Tenn. (11 Heisk.) 503, 510.

A "subscribing witness," as the term is used in Civ. Code, § 3275, providing: "If a subscribing witness is also a legatee or devisee under the law, the witness is competent; but the legacy or devise is void"—means when he writes his name under an attesting clause. The real purpose of the section was to indicate a witness who attests the execution of a will by writing his name under the attesting clause. That the testimony of one named in a nuncupative will as legatee is essential to proving the making thereof does not render his legacy void. *Smith v. Crotty*, 38 S. E. 110, 111, 112 Ga. 905.

"Subscribing witness" is defined in 1 *Greenl. Ev. § 569a*, as "one who was present when the instrument was executed, and who at that time, at the request or with the assent of the party, subscribed his name to it as a witness of the execution. If his name is signed, not by himself, but by the party, it is no attestation. *Houston v. State*, 21 South. 813, 814, 114 Ala. 15.

Within the meaning of a statute requiring that a deed be proved, before it is placed on record, by the acknowledgment of the bargainor or by the testimony of two subscribing witnesses, a subscribing witness is one who becomes a witness at the request of the bargainor, either in his presence or at his special request, or with his assent, upon his acknowledgment of the execution of the deed.

Where a deed was signed and delivered by a bargainor, in the presence of two sons of the grantee, but who were not requested to and did not subscribe as witnesses thereto, they were not subscribing witnesses, who could prove the deed for record after the death of the bargainor. *Tate v. Lawrence*, 58 Tenn. (11 Helsk.) 503, 515.

A "subscribing witness" is one who sees a writing executed or hears it acknowledged, and at the request of the party thereupon signs his name as a witness. A subscribing witness must therefore be something more than a person who subscribes his name as a witness, and the testator must either sign the will in the presence of the witness, or must acknowledge to him by word or act that he had signed it. It is not necessary that the witness should know the contents of the instrument subscribed by him, or its nature or character; but he must be able to testify that the principal in the affair put his name on the identical piece of paper on which the witness placed his own. *Luper v. Werts*, 23 Pac. 850, 855, 19 Or. 122.

Persons who witnessed the execution of the renunciation of a right to letters of administration with the will annexed, but did not subscribe to it as witnesses, are not subscribing witnesses to such paper, and their subsequent proof of the paper in the manner required by subscribing witnesses, but not at the time of such renunciation, cannot make it admissible in evidence as having been duly proved by "subscribing witnesses." In *re Clute's Estate*, 37 Misc. Rep. 586, 588, 75 N. Y. Supp. 1059.

A "subscribing witness" is one who sees a writing executed or hears it acknowledged, and at the request of the party thereupon signs his name as a witness. Code Civ. Proc. Cal. 1903, § 1835; Ann. Codes & Sts. Or. 1901, § 769.

### SUBSCRIPTION LIST.

The "subscription list" of a newspaper is not the subject of a separate property, but an incident of the establishment, which passes with a sale of the material. The actual advantage to be derived from it resembles that which is derived from the right of renewal, as it is called, incident to certain leases, which are not at the death of the tenant a separate subject of appraisal or inventory. *McFarland v. Stewart* (Pa.) 2 Watts, 111, 26 Am. Dec. 109.

The term "property" includes the subscription list of a newspaper, which has a large monetary value. *Holden's Adm'rs v. McMakin* (Pa.) 1 Pars. Eq. Cas. 270, 298.

### SUBSEQUENT.

The words "since" and "subsequently," although similar in meaning, are not iden-

tical. "Since," according to Worcester, means "from the time of"; and its meaning is illustrated by a line from Milton: "He since the morning set out from heaven." Webster, in his Dictionary, says: "The proper signification of 'since' is 'after,' and its appropriate sense includes the whole period between an event and the present time. 'I have not seen my brother since January.'" "Subsequently," according to the same authorities, means "at a later time," or "afterwards"; that is, at any time afterwards. In *re Rosenfield* (U. S.) 20 Fed. Cas. 1202, 1204.

Webster defines "since" as "after," and its appropriate sense includes the whole period between an event and the present time; but, after giving citations as examples of its use, he further says: "'Since,' then, denotes during the whole time after an event, or any particular time during the period." The word "subsequent," as employed in the provision of the bankrupt act with regard to the omission to keep "proper books of account subsequent to the passage of this act," was synonymous with the word "since," and no distinction was intended by its use. In *re Cretlew* (U. S.) 6 Fed. Cas. 810, 814.

The word "subsequent," like the words "after," "from," "succeeding," and other similar words, in a devise of property to a beneficiary on condition that he shall pay to another a certain sum within one year after the testator's decease, or after, from, or succeeding his decease, where it is not expressly declared to be exclusive or inclusive, is susceptible of different significations, and is used in different senses, and with an exclusive or inclusive meaning, according to the subject to which it is applied; and, as it would deprive it of some of its proper significations to affix one invariable meaning to it in all cases, it would, of course, in many of them, pervert it from the sense of the writer or speaker. Its true meaning, therefore, in any particular case, must be collected from its context and subject-matter, which are the only means by which the intention is ascertained. *Sands v. Lyon*, 18 Conn. 18, 27.

### SUBSEQUENT CONDITION.

See "Condition Subsequent."

### SUBSEQUENT CREDITOR.

The term "subsequent creditors," as applied to a recording act, means creditors whose debts were contracted subsequent to the deed of the land. *McGhee v. Wells*, 35 S. E. 529, 532, 57 S. C. 230, 76 Am. St. Rep. 567.

Within the rule that a voluntary conveyance of land by a husband to his wife will be set aside at the suit of a "subsequent creditor," one having a valid cause of action *ex delicto* is to be regarded as a sub-



sequent creditor. *Evans v. Lewis*, 30 Ohio St. 11, 14.

### SUBSEQUENT INSURANCE.

See "Other Insurance."

The term "subsequent insurance," as used in a policy providing that the same shall be void in case of subsequent insurance, means valid and enforceable subsequent insurance. *Hubbard v. Hartford Fire Ins. Co.*, 33 Iowa, 325, 330, 11 Am. Rep. 125; *Behrens v. Germania Fire Ins. Co.*, 64 Iowa, 19, 19 N. W. 838; *Philbrook v. New England Mut. Fire Ins. Co.*, 37 Me. 137; *Sweeting v. Mutual Fire Ins. Co. in Harford County*, 83 Md. 63, 34 Atl. 826, 32 L. R. A. 570; *Clark v. New England Mut. Fire Ins. Co.*, 60 Mass. (6 Cush.) 342, 348, 53 Am. Dec. 44; *Thomas v. Builders' Mut. Fire Ins. Co.*, 119 Mass. 121, 122, 20 Am. Rep. 317; *Dahlberg v. St. Louis Mut. Fire & Marine Ins. Co.*, 6 Mo. App. 121, 122; *Gale v. Belknap County Ins. Co.*, 41 N. H. 170, 171; *Schenck v. Mercer County Mut. Fire Ins. Co.*, 24 N. J. Law (4 Zab.) 447, 448; *Fireman's Ins. Co. v. Holt*, 35 Ohio St. 189, 35 Am. Rep. 601; *Stacey v. Franklin Fire Ins. Co. (Pa.)* 2 Watts & S. 506; *Knapp v. North Wales Mut. Life-Stock Ins. Co. (Com. Pl.)* 11 Montg. Co. Law Rep'r, 119; *Sutherland v. Old Dominion Ins. Co. (Va.)* 31 Grat. 176, 183; *Allison v. Phoenix Ins. Co. (U. S.)* 1 Fed. Cas. 530; *Jackson v. Massachusetts Mut. Fire Ins. Co.*, 40 Mass. (23 Pick.) 418, 34 Am. Dec. 69; *Jersey City Ins. Co. v. Nichol*, 35 N. J. Eq. (8 Stew.) 291, 40 Am. Rep. 625. Contra, see *Lackey v. Georgia Home Ins. Co.*, 42 Ga. 456; *Stevenson v. Phoenix Ins. Co.*, 83 Ky. 7, 4 Am. St. Rep. 120; *Allen v. Merchants' Mut. Ins. Co.*, 30 La. Ann. 1386, 31 Am. Rep. 243; *Bigler v. New York Cent. Ins. Co.*, 22 N. Y. 402 (affirming 20 Barb. 635); *American Ins. Co. v. Replogel*, 114 Ind. 1, 15 N. E. 810, 813; *Stephenson v. Phoenix Ins. Co.*, 83 Ky. 7, 6 Ky. Law Rep. 196, 4 Am. St. Rep. 120; *Donogh v. Farmers' Fire Ins. Co.*, 104 Mich. 503, 62 N. W. 721; *Hughes v. Insurance Co. of North America*, 40 Neb. 626, 59 N. W. 112; *Somerfield v. State Ins. Co.*, 76 Tenn. (8 Lea) 547, 41 Am. Rep. 662; *Willson v. Aetna Ins. Co.*, 12 Tex. Civ. App. 512, 33 S. W. 1085.

### SUBSEQUENT NEGLIGENCE.

"Subsequent negligence" means ordinarily the negligence that did the mischief, which is more usually known as "negligence which is a proximate cause." *Holwerson v. St. Louis & S. Ry. Co.*, 57 S. W. 770, 775, 157 Mo. 216, 50 L. R. A. 850.

### SUBSEQUENT PURCHASER.

Gen. St. 1889, par. 3905, providing that every mortgage given with intent to defraud creditors shall be void as against the

creditors of the person making the same, "or against subsequent purchasers or mortgagees in good faith" after the expiration of one year after the filing thereof, means only purchasers and mortgagees who purchased or took their mortgages after the expiration of the year from the filing of the mortgage. *Howard v. First Nat. Bank of Hutchinson*, 24 Pac. 983, 44 Kan. 549, 10 L. R. A. 537.

One who purchases property covered by a chattel mortgage from a purchaser from the mortgagor is a "subsequent purchaser," within the meaning of Laws 1833, c. 420, § 3, providing that a chattel mortgage shall cease to be valid as against subsequent purchasers after the expiration of a year, unless refilled, notwithstanding his purchase was not directly from the mortgagor, and a refilling is necessary to prevent his purchase from overreaching the mortgage. *Dillingham v. Bolt* (N. Y.) 4 Abb. Prac. (N. S.) 221, 223.

A "subsequent purchaser" of mortgaged property, within the statute requiring the filing and deposit of chattel mortgages, means a purchaser of goods by contract—one who of his own volition buys them, and pays a price agreed upon, and receives a transfer therefor from the one who sells and delivers them—and does not contemplate a wrongdoer or trespasser upon the property, who against his will is cast in judgment for the value of it, and takes title unwillingly, by operation of law, on payment of the judgment. *Scott v. Cox*, 70 S. W. 802, 805, 30 Tex. Civ. App. 190.

The statute providing that every chattel mortgage filed, etc., should cease to be valid against subsequent purchasers or mortgagees, unless it should, within 30 days before the expiration of the year, be again filed, means after the time when it ought to be again filed to preserve its validity. *Meech v. Patchin*, 14 N. Y. 71, 74; *Dillingham v. Bolt*, 37 N. Y. 198, 199; *Wray v. Fedderke*, 43 N. Y. Super. Ct. (11 Jones & S.) 335, 339 (citing *Meech v. Patchin*, 14 N. Y. 71).

The phrase "subsequent purchaser" is defined by Code, § 1646, to be one "who shall purchase for the full value thereof the same lands," etc., without notice. *Walton v. Parish*, 95 N. C. 259, 264.

The term "subsequent purchaser for valuable consideration" is synonymous with "bona fide purchaser," when used in the statute declaring the omission to record a deed fraudulent and void as against a subsequent purchaser for a valuable consideration. *Van Rensselaer v. Clark* (N. Y.) 17 Wend. 25, 31, 31 Am. Dec. 280.

**As purchaser from grantor.**

"Subsequent purchasers," within the recording act, are only such persons as are subsequent purchasers from the grantor.

Pierce v. Turner, 9 U. S. (5 Cranch) 154, 165, 3 L. Ed. 64.

Where a statute in relation to an unrecorded deed speaks of "subsequent purchaser," it means a purchaser from the grantor directly, and not a purchaser at an execution sale. Henderson v. Downing, 24 Miss. (2 Cushman) 106, 115.

Within Comp. Laws, § 4231, providing that every conveyance of real estate within this state which shall not be recorded as provided in that chapter shall be void as against any subsequent purchaser in good faith and for a valuable consideration of the same real estate whose conveyance shall first be duly recorded, by "subsequent purchaser" is meant a subsequent purchaser from the same grantor. Smith v. Williams, 6 N. W. 662, 663, 44 Mich. 240.

A "subsequent purchaser," within Code 1873, § 1941, providing that no instrument affecting real estate is valid as against a subsequent purchaser for a valuable consideration unless recorded, means one who claims under some common grantor under the same chain of title. Fletcher v. Kelly, 55 N. W. 474, 477, 88 Iowa, 475, 21 L. R. A. 847.

The "subsequent purchasers" who are protected by the recording act against the grantees of prior unrecorded deeds are those who claim from a common source of title with the latter. No protection is intended against an independent title, distinct from that on which the unrecorded deed is based. Rankin v. Miller, 43 Iowa, 11, 12.

The words "subsequent purchasers," as used in Code, § 2925, providing that an unrecorded deed shall be void as against subsequent purchasers, describe purchasers claiming under a common grantor. Noyes v. Crawford, 91 N. W. 799, 801, 118 Iowa, 15, 96 Am. St. Rep. 363.

The term "subsequent purchaser," within the meaning of recording acts, applies to subsequent purchasers from the heir, as well as from the original grantor himself. Kennedy v. Northup, 15 Ill. (5 Peck) 148, 155; McClure v. Tallman, 30 Iowa, 515, 518.

"Subsequent purchasers in good faith," as used in Comp. St. 1893, c. 32, § 14, providing that every chattel mortgage, unaccompanied by an immediate delivery and followed by a continued change of possession of the things mortgaged, should be absolutely void as against the subsequent purchasers in good faith, unless the mortgage or a copy thereof shall be filed in the office of the county clerk, mean those who acquire title to mortgaged property by contract with the mortgagor or his vendee after the execution of a mortgage and without notice thereof, and that purchasers of such

property sold under execution will take it discharged of the mortgage lien, itself invalid as against the lien created by the seizure of the property under execution, irrespective of such purchaser's knowledge of the existence of such mortgage lien. Farmers' & Merchants' Bank v. Anthony, 57 N. W. 1029, 1030, 39 Neb. 343.

The words "subsequent purchasers," as used in Rev. St. art. 4640, declaring a deed not duly recorded void as against subsequent purchasers for value without notice, mean only those the origin of whose title is subsequent to the title of the grantee in the recorded deed; and where a grantor conveyed to his mother with intent to defraud his creditors, and the mother subsequently conveyed to another, who in turn conveyed to plaintiff, all of the conveyances being registered when they were executed, the registry of a sheriff's deed, executed subsequent to the conveyance and registration of the deed to the mother, but prior to the conveyance to plaintiff, was not notice of the existence of such deed. White v. McGregor, 50 S. W. 564, 565, 92 Tex. 556, 71 Am. St. Rep. 875.

#### **As purchaser of mortgage, not premises.**

A subsequent purchaser in good faith, within the meaning of the recording act of 1830, requiring an assignment of a mortgage to be recorded as against a subsequent bona fide purchaser of the mortgage assigned, means a purchaser of the mortgage assigned, and not a purchaser of the premises. A subsequent purchaser of the premises is bound by a prior recorded mortgage, no matter who holds it. Campbell v. Vedder, 1 Abb. Dec. 295, 302, \*42 N. Y. 174, 178 (cited in Curtis v. Moore, 46 N. E. 168, 169, 152 N. Y. 159, 57 Am. St. Rep. 506).

#### **As purchaser subsequent to execution.**

"Subsequent purchaser," as used in a statute providing that an unrecorded conveyance or mortgage shall be invalid as to subsequent purchasers or creditors, means subsequent to the execution, and not to the recording, of such instrument. King v. Fraser, 23 S. C. 543, 548.

#### **As purchaser subsequent to recording.**

"Subsequent purchaser," as used in Gale's St. p. 664, providing that all deeds and other title papers which are required to be recorded shall take effect and be in force from and after the time of filing the same for record, and not before, as to all creditors and subsequent purchasers without notice, and all such deeds and title papers shall be adjudged void as to all such creditors and subsequent purchasers without notice until the same shall be filed for record in the county where the lands lie, must have

reference to the recording, and not to the date, of the instrument, and such, indeed, is its literal and grammatical construction. *Doyle v. Teas*, 5 Ill. (4 Scam.) 202, 252.

### SUBSEQUENT RATIFICATION.

"A 'subsequent ratification' of the act of an agent differs from a prior authority only in this: It must appear to have been given on a full knowledge of the facts and circumstances, and without any concealment on the part of the agent." *Pearson v. Caldwell*, 70 N. C. 291, 295.

### SUBSEQUENT TERM.

Any "subsequent term," within the meaning of the condition of a recognizance of bail in a criminal action pending in a Circuit Court of the United States, which provides that the party held to bail shall appear for trial at the next regular term of the court and at any subsequent term thereafter, is to be construed to mean that the party shall appear at any subsequent term which may follow in regular succession in the course of business of the court, and not at any distant future term to which either party might be disposed to postpone the trial, without reference to any intervening term. *Reese v. United States*, 76 U. S. (9 Wall.) 18, 18, 19 L. Ed. 541.

### SUBSERVIENT.

Webster defines "subservient" to mean useful, as an instrument to promote a purpose serving to promote some need. *People v. Graceland Cemetery Co.*, 86 Ill. 336, 338, 29 Am. Rep. 32.

Land owned by a cemetery company and platted by it for future use for burial purposes, but only used for the present for raising sod and flowers for use in the cemetery, and for draining the cemetery and feeding horses used therein, is not "subservient to burial purposes," within the meaning of an exemption clause in the company's charter. The mere purchase of land for future use as burial grounds, and platting it, does not make it subservient to burial purposes. The subserviency is not merely to cemetery uses, or for general purposes of the company, but to burial uses, which clearly means useful as an instrument to promote interments of the dead—actual burials. *Rosehill Cemetery Co. v. Kern*, 35 N. E. 240, 243, 147 Ill. 483.

### SUBSISTING.

"Subsisting," as used in Code 1876, § 2996, providing that "when the defendant pleads a set-off to the plaintiff's demand, to which the plaintiff replies the statute of limi-

tations, the defendant, notwithstanding such replication, is entitled to have the benefit of his debt as a set-off, where such set-off was a legal, subsisting claim at the time the right of action accrued to the plaintiff on the claim in suit," cannot be applied to a claim which, at the time plaintiff's right of action accrued, was barred by the statute of limitations, although a debt against which the statutory bar has run is in one sense a subsisting demand. *Washington v. Timberlake*, 74 Ala. 259, 263.

Where a policy is taken out to be applied to the payment of the insured's "subsisting pecuniary demands," notes are within the words of the policy, though they are outlawed. *Townsend v. Tyndale*, 43 N. E. 107, 108, 165 Mass. 293, 52 Am. St. Rep. 513.

### SUBSTANCE.

See "Defect of Substance"; "Matter of Substance."

Amendment of, see "Amend—Amendment."

Bouvier defines "substance" as that which is essential, and says that it is used in opposition to "form." Hence, when an indictment is adjudged insufficient in substance, it is because it lacks something essential to make a legal charge of crime. *State v. Burgdoerfer*, 17 S. W. 646, 649, 107 Mo. 1, 14 L. R. A. 846.

"Substance," as used in speaking of the substance of a slanderous charge, "is used by way of contradistinction from the letter and form of the charge, and, although the latter is not required, the essence is indispensable." *Stow v. Converse*, 4 Conn. 17, 33.

Gen. St. c. 57, § 45, relating to sales of decedent's real estate by an administrator under license from the probate court, requires such administrator to take and describe an oath in substance as follows, etc. Held, that the phrase "in substance" is in opposition to form, and signifies that adherence to the form or language of the statute is not required, if the essential part be complied with. *Hugo v. Miller*, 52 N. W. 381, 382, 50 Minn. 105.

In the requirement that a declaration in libel or slander has set out the substance of the words, "substance" does not mean the same idea, but means so many of the identical words as constitute the gravamen of the charge. *Fritz v. Williams* (Miss.) 16 South. 359, 360.

An instruction, in an action for damages for slander, that if the jury found from a preponderance of the evidence that the defendant spoke the words "in substance as alleged," plaintiff could recover, does not mean other words with the same meaning,

or equivalent words, but means the substance of the same words alleged in the complaint. *Durrah v. Stillwell*, 59 Ind. 139, 142.

The last clause of an oath of an insolvent, on presenting his petition for a discharge from imprisonment, read as follows: "Or settled with any of my creditors with a view to obtain the benefit of the act entitled 'An act to abolish imprisonment for debt in certain cases.'" An indictment for perjury stated that the defendant did falsely, etc., say, depose, and swear in "substance and to the effect" following, to wit: "I, E. W., do swear that," etc. (setting forth the oath as prescribed by the statute until the last clause which read as follows), "or settle with any of my creditors with a view to obtain the benefit of an act entitled 'An act to abolish imprisonment for debt in certain cases.'" Held, that the words "substance and effect," as used in the indictment, should not be construed to mean "tenor and effect," so as to mean an exact copy of the oath, but was used in the ordinary sense of those words, and hence a variance between the oath and the indictment, in the fact that the indefinite article "an" was substituted in the indictment for the definite article "the," was immaterial. *People v. Warner* (N. Y.) 5 Wend. 271, 273.

#### Form distinguished

The distinction between "form" and "substance" in pleadings is stated as follows in section 17, c. 9, Gould, Pl.: "The difference between matter of form and matter of substance, in general, under the statute of Elizabeth, as laid down by Lord Hobak, is that that without which the right doth sufficiently appear to the court is form, but that any defect by reason whereof the right appears not, is a defect in substance." In the next section, giving his own definition, the author says: "If the matter pleaded be in itself insufficient, without reference to the manner of pleading it, the defect is substantial; but, if the only fault is in the form of alleging it, the defect is but formal." *Pierson v. Springfield Fire & Marine Ins. Co.* (Del.) 31 Atl. 966, 968, 7 Houst. 307.

A statute giving the right of appeal from an order "affecting a substantial right" relates only to the subject-matter of the litigation, and not to mere matters of practice. Thus an order denying a motion to set aside a judgment because the summons in the action was improperly attested, which affects merely a matter of form, is not one affecting a substantial right. *Rahn v. Gunnison*, 12 Wis. 528, 531.

Laws 1860, c. 264, § 10, subd. 2, providing that an appeal may be had from a final order "affecting a substantial right" made on a summary application after judgment, should be construed to authorize an appeal

from an order refusing to set aside a default judgment on foreclosure of a mortgage, and to let in a meritorious defense not presented in time because of excusable neglect, since a "substantial right" of the defendant was thereby affected. *Johnson v. Eldred*, 13 Wis. 482, 484.

#### SUBSTANTIAL.

The words "outward, open, actual, visible, substantial, and exclusive," in connection with a change of possession, mean substantially the same thing. They mean not concealed; not hidden; exposed to view; free from concealment, dissimulation, reserve, or disguise; in full existence; denoting that which not merely can be, but is opposed to potential, apparent, constructive, and imaginary; veritable; genuine; certain; absolute; real at present time, as a matter of fact, not merely nominal; opposed to form; actually existing; true; not including, admitting, or pertaining to any others; undivided; sole; opposed to inclusive. *Bass v. Pease*, 79 Ill. App. 308, 318.

"Substantial," as used in reference to whether certain legislation presents a subject for judicial control, as depending upon whether the classification be substantial or illusive, means that the limitation is incidentally consequent upon the character of the legislation. *Foley v. City of Hoboken*, 38 Atl. 833, 834, 61 N. J. Law, 478.

#### SUBSTANTIAL BRIDGE.

The words "permanent" and "substantial," as used in Gen. St. c. 67, § 15, as amended by Act 1866, providing that a certain special tax shall be applied to building and repairing permanent and substantial bridges, etc., are used in a descriptive sense, and apply only to structures of a permanent and substantial character, and do not include temporary structures or ordinary repairs. *Follmer v. Nuckolls County*, 6 Neb. 204, 212.

#### SUBSTANTIAL DISPUTE.

A dispute is substantial when a conclusion of fact to be drawn from the testimony is one about which reasonable men might honestly differ. When, at the close of plaintiff's case, such a dispute exists on the evidence, a motion to nonsuit on this ground cannot prevail. *Day v. Donohue*, 41 Atl. 934, 935, 62 N. J. Law, 380.

#### SUBSTANTIAL EQUIVALENT.

The "substantial equivalent" of a thing, in the sense of the patent law, is the same as the thing itself. *Crown Cork & Seal Co. v. Aluminum Stopper Co.*, 108 Fed. 845, 868, 48 C. C. A. 72.

**SUBSTANTIAL HOUSEHOLDER.**

"Substantial householders," as used in statutes requiring that the overseer of the poor of districts should be substantial householders, was a relative term, so that, if the district contained a great many apparent farms, the appointment of a day laborer might be improper; but in a district where there were only three houses, and two of them were occupied by day laborers, who were both householders with some lands annexed to their houses, and one of them was the proprietor, their appointment was within the meaning of the act. The term would also permit of the appointment of a woman. *King v. Stubbs*, 2 Term R. 395, 408.

**SUBSTANTIAL INCLOSURE.**

Code, § 85, providing that, for the purpose of constituting an adverse possession by a person claiming title not founded upon a written instrument or a judgment or decree, land shall be deemed to have been possessed and occupied only in case where it has been protected by a "substantial inclosure," etc., is not satisfied by the fact that the land is inclosed on two sides by a substantial fence, but is only marked on the other two sides by a highway and a line of trees. *Pope v. Hanmer* (N. Y.) 8 Hun, 265, 269.

**SUBSTANTIAL JUSTICE.**

The California statute, authorizing a court to render such judgment as "substantial justice shall require" means substantial legal justice, ascertained and determined by fixed rules and positive statutes, and not the abstract and varying notions of equity entertained by each individual. *Stevens v. Ross*, 1 Cal. 94, 98.

Failure of the street commissioners of a city to let contracts for city improvements to the lowest bidder, as they were required to do by law, is prima facie at least an act "affecting the substantial justice of the tax" levied to pay for such improvements, within the meaning of a section of the charter of the city providing that the validity of the tax should not be affected, except by some act affecting the substantial justice of the tax itself. *Wells v. Burnham*, 20 Wis. 112, 115.

**SUBSTANTIAL MANNER.**

A building contract, reciting that the work shall be done in a "plain, substantial, and workmanlike manner," implies that the work shall be done perfectly for the character of the job contemplated. *Smith v. Clark*, 58 Mo. 145, 146.

**SUBSTANTIAL PERFORMANCE.**

"Substantial performance" of a contract to construct a building does not mean exact

performance in every slight or unimportant detail. In many cases, such as building contracts, notwithstanding the most honest, diligent, and intelligent effort to fully perform in every particular, yet, owing to oversight, inadvertence, or some excusable mistake, very often some slight omissions or defects may be discovered. To hold that a builder could not in any such case recover on his contract would be too rigid a rule to apply to the practical affairs of life. Substantial performance is all that reason or the law requires. Literal compliance in every detail is not required. This is the rule applicable to contracts generally. *Leeds v. Little*, 44 N. W. 309, 310, 42 Minn. 414.

To justify a recovery upon a contract as "substantially performed," the omissions or deviations must be the result of mistake or inadvertence, and not intentional, much less fraudulent; and they must be slight or susceptible of remedy, so that an allowance out of the contract price will give the other party substantially what he contracted for. They must not be substantial and running through the whole work, so as to be remediless and defeat the object of having the work done in a particular manner. *Elliott v. Caldwell*, 43 Minn. 357, 360, 45 N. W. 845, 846, 9 L. R. A. 52.

**SUBSTANTIAL RESEMBLANCE.**

Under the tariff act, providing that articles not otherwise enumerated shall be classified under the same head with articles to which they bear a similitude, the similitude must be a substantial one; not merely an adaptability to sale as a substitute for the article to which it is said to be assimilated, but representing either its employment or its effect in producing results. Nor is it enough that the imported article bears more resemblance to one enumerated article than to another, because it might not bear any substantial resemblance to either, and whether the article bears a substantial resemblance to any of the enumerated articles is a question for the jury. *Sykes v. Magone* (U. S.) 38 Fed. 494, 497.

**SUBSTANTIAL RIGHT.**

"It is difficult to determine precisely the meaning of the term 'substantial right.' The word 'right' is of extensive and varied signification. We speak of a right of action, a right of possession, a right of property, a writ of right. A substantial, or real, or actually existing right, I apprehend, must mean some legal right, to which the party who appeals claims to be entitled. It may grow out of some adjudication of the court on a question of fact, or of law, or both. But it must be something to which the party is entitled, not something which he seeks from the favor, or asks from the discretion of the court. An order denying an application for an al-

lowance in addition to the taxable costs is not an appealable order." *Cook v. Dickenson*, 7 N. Y. Super. Ct. (5 Sandf.) 663, 664.

A "substantial right," within Code, § 349, allowing a review on appeal of an order affecting a substantial right, is something to which, on proved or conceded facts, a party may lay claim as a matter of law, which a court may not legally refuse, and to which it can be seen a party is legally entitled within well-settled rules of law. *People v. New York Cent. R. Co.*, 29 N. Y. 418, 430.

"All orders appealable to the General Term, which either affect a substantial right or are made in summary applications after judgment and affect a substantial right, are appealable." Code, § 349, subds. 3, 5. This term "substantial" had no special legal significance when it was incorporated by the Legislature into the Code for the purpose of describing the cases in which appeals from orders could be taken to the General Term. For that reason it must be construed according to its popular and usual signification; and, understood in that manner, it includes all positive, material, and absolute rights, as distinguishable from those of a merely formal or unessential nature. An obligation imposed upon a party by an order subjecting him to the payment of a sum of money, great or small, has been held to fall within this designation of an order affecting a substantial right, even though discretionary. *Security Bank of New York v. National Bank of the Commonwealth (N. Y.)* 48 How. Prac. 135, 137 (citing *People v. New York Cent. R. Co.*, 29 N. Y. 421, 422).

The expression "order affecting a substantial right," in provisions of the Code allowing appeals, is not confined to matters of absolute legal right, but includes orders affecting a substantial interest; a matter of substance, instead of form. Trial by jury is a substantial right; and an order directing a reference in a cause in which the party opposing is entitled to jury trial is appealable. *Martin v. Windsor Hotel Co.*, 70 N. Y. 101, 102.

A "substantial right," as used in the act conferring on the court the power to review an order affecting a substantial right made on a summary application in an action after judgment, is something to which, on proved or conceded facts, a party may lay claim as matter of law, which a court may not legally refuse, and to which it can be seen that the party is entitled within well-settled rules of law. Though an order fixes a substantial right, it cannot be reviewed in the Court of Appeals if it is a matter resting in the discretion of the court granting the order. The reason for not entertaining such an appeal rests, not on the restrictions of the act, but

on the character of the court and its limited jurisdiction, confining it to questions of law only as to where specially authorized. A collusive arrangement to prevent competition at a judicial sale, and a sale in pursuance thereof, to the injury of an infant, is a fraud in law, and subsequent mortgagees and purchasers, with knowledge of the fraud, can gain no advantage therefrom; and these questions are not matters of discretion and, when involved in an order, they may be reviewed in the Court of Appeals, the same as if presented on exceptions. *Howell v. Mills*, 53 N. Y. 322, 329.

The words "substantial right," as used in Code Civ. Proc. § 581, providing that an order affecting a substantial right made in a special proceeding or on a summary application is a final order, which may be vacated, modified, or reversed, means an order which affects an essential legal right, and not a mere technical one. An order requiring a defendant against whom a judgment has been rendered to appear at a time and place specified and answer under oath all such questions concerning his property as may be propounded to him is an order affecting a substantial right within the meaning of the section. *Clarke v. Nebraska Nat. Bank*, 49 Neb. 800, 802, 69 N. W. 104.

An order of the General Term of the City Court, affirming an order refusing to open a default, is not an order affecting a "substantial right," so as to be appealable to the Court of Common Pleas. *Keller v. Feldmann*, 21 N. Y. Supp. 581, 582, 2 Misc. Rep. 179.

The term "substantial right," as used in Rev. St. § 6707, authorizing a review of an order affecting a substantial right in an action, where such order in effect determines the action and prevents a judgment, involves the idea of a legal right; and, to bring the right within the category of a substantial right, the order must at least affect a legal right. *Armstrong v. Herancourt Brewing Co.*, 42 N. E. 425, 53 Ohio St. 467.

Under a statute (Laws 1859, c. 211) authorizing the making of an order directing a corporate election, where it appears that the directors have neglected or refused for the space of two years to call and hold such an election, it is held that such an order is an order affecting a "substantial right," within the meaning of a statute authorizing appeals from a final order affecting a substantial right; the court observing that, if the right of a stockholder to have an election is so substantial that the law will furnish him the means of compelling it, the rights of the other stockholders to the benefit of an election duly held, if they can show such to have been the case, must be substantial enough to sustain the right to appeal. *In re Fleming*, 16 Wis. 70, 75, 76.

An order which discharges a person having property of a judgment debtor from process for contempt for refusing to answer questions properly put on examination in supplementary proceedings necessarily arrests such proceedings, and is a final order affecting a "substantial right," within Laws 1860, c. 264, § 2, subd. 10, providing that such orders shall be appealable. *Ballston Spa Bank v. Marine Bank of Milwaukee*, 18 Wis. 490, 492.

Rev. St. c. 125, § 40, provides that the court in every stage of an action shall disregard any error or defect in the pleadings or proceedings which shall not affect the substantial rights of the adverse party. Held, that the term "substantial rights of the adverse party" meant a right which affected the adverse party's interest in the suit; and hence a mere defect in the form of the verdict returned, where the verdict in substance was precisely what the statute required, was not a defect affecting the adverse party's substantial rights, as the term was thus used. *Allard v. Lamirande*, 29 Wis. 502, 510.

Upon a bill to settle accounts between partners, where creditors intervene, an order determining that certain chattels levied upon were partnership assets affects a substantial right, and may be appealed from. *Putnam v. Putnam*, 14 Pac. 356, 357, 2 Ariz. 259.

An order of the probate court, requiring a guardian to pay a judgment obtained against his ward and himself as garnishee, is a final order involving a substantial right, from which an appeal may be taken under Code, § 3164. *Coffin v. Elsininger*, 75 Iowa, 80, 39 N. W. 124.

An order in a motion directing an attorney to pay over money collected comes within Code Civ. Proc. § 581, is a final order affecting a substantial right, and is appealable. *Baldwin v. Foss*, 14 Neb. 455, 16 N. W. 480.

An order in partition, directing a sale of the premises instead of an actual partition, affects a substantial right, and is therefore appealable under the Wisconsin statutes. *Vesper v. Farnsworth*, 40 Wis. 357.

An order sustaining a demurrer to a petition for the removal of an assignee is appealable, as it affects a substantial right of both the petitioners and the assignee. *Burt v. Barnes*, 58 N. W. 790, 791, 87 Wis. 519.

#### SUBSTANTIAL SIMILARITY.

"Substantial similarity," within the rule authorizing evidence of experiments made under circumstances and conditions similar to those constituting, as it were, the premises from which the original event is alleged to have been the conclusion, means such a degree of similarity as that evidence of the

experiments will accomplish the desideratum of assisting the jury to intelligently consider the issue of fact presented in regard to this matter. *Morton v. State (Tex.)* 71 S. W. 281, 282.

#### SUBSTANTIALLY.

"Substantially" means in a substantial manner; really; solidly; competently. *Western Assur. Co. v. Altheimer*, 25 S. W. 1067, 1069, 58 Ark. 565; *Cheesman v. Hart (U. S.)* 42 Fed. 98, 99.

"Substantially" means, not an accurate or exact copy, but one which contains the substance of the instrument copied. *Edgerton v. State (Tex.)* 70 S. W. 90, 91.

The word "substantially," in Code, § 1246, subd. 7, providing that certificates of the examination of married women should be substantially according to a form prescribed in the statute, is used "as it often is, in the sense of comprehending the form given; all that is necessary or essential." *Lineberger v. Tidwell*, 10 S. E. 758, 761, 104 N. C. 506.

The word "substantially," as used in an instruction declaring that the jury were to decide whether a certain article alleged and admitted to be kept and offered for sale was substantially naphtha or not, mean really or essentially. *Commonwealth v. Wentworth*, 118 Mass. 441, 442.

#### SUBSTANTIALLY AS DESCRIBED.

The effect of the words "substantially as described," in a claim for a patent, is not to limit the claim to the precise construction shown in the specification, nor to deprive the patentee of the benefit of the doctrine of equivalents, where his invention is of a primary character. *Lowrie v. H. A. Meldrum Co. (U. S.)* 124 Fed. 761, 764.

In considering an application for a patent, stating that "what we claim as our invention is discharging the cut grain," etc., "substantially as described" the court said: "The qualification 'substantially as described' is evidently intended to mean little or much, as the interests of the patentees may require." *Seymour v. Osborne (U. S.)* 21 Fed. Cas. 1121 (quoted in *Boyden Power Brake Co. v. Westinghouse*, 18 Sup. Ct. 707, 716, 170 U. S. 537, 42 L. Ed. 1136). See, also, *The Corn Planter Patent*, 90 U. S. (23 Wall.) 181, 218, 23 L. Ed. 161.

"Substantially as described," as used in a claim for a patent, does not warrant the reading into the claim, as an additional element, a device mentioned in the specification merely as a preferred form of construction; so that a patentee who has claimed either more or less than was necessary cannot, in a suit for infringement, be relieved from the

consequences thereof. *Paul Boynton Co. v. Morris Chute Co.* (U. S.) 87 Fed. 225, 227, 30 C. C. A. 617.

#### SUBSTANTIALLY AS SET FORTH.

A claim for a patent covering a combination "substantially as set forth" means substantially as set forth in regard to the combination which is the subject of the claim; and such words will be given a construction commensurate with the real invention, so as to protect the inventor. *Westinghouse v. New York Air Brake Co.* (U. S.) 59 Fed. 581, 596 (citing *Lake Shore & M. S. R. Co. v. National Car Brake Shoe Co.*, 110 U. S. 229, 4 Sup. Ct. 33, 28 L. Ed. 129; *Winans v. Denmead*, 56 U. S. (15 How.) 330, 14 L. Ed. 717.

The phrase "substantially as set forth," as used in the claim of a patent, is technical, and is equivalent to saying "by the means described in the text of the inventor's application for letters patent, as illustrated by the drawings, diagrams, and models which accompany the application." These words limit the general term of the specification, which set out the function performed by the invention and confined the inventor's rights to his own special means of performing that function. *Boyden Power Brake Co. v. Westinghouse Air Brake Co.* (U. S.) 70 Fed. 816, 826, 17 C. C. A. 430.

"Substantially as and for the purpose set forth," as used in a claim for a patent, are to be construed as efficacious to import a limitation ascertainable from the specification, and necessary to make the claim coterminous with the invention, but are not used to import a limitation not inherent in the invention. *Campbell Printing Press & Mfg. Co. v. Madden*, 64 Fed. 782, 786.

#### SUBSTANTIALLY AS SPECIFIED.

"Substantially as specified," as used in a claim of a patent reading, "The brush, J, in combination with the perforated cylinder, A, and trough, C, substantially as specified," relates to material features of the combination specified, to be ascertained by considering the purpose of the machine and what are the elements of the combination which are effective in producing the result intended. It refers to the specification of such elements or devices wanting in the claim, and elements of the combination not specifically mentioned in the claim may be included therein—that is, in the claim—in the light of other parts of the specifications which are applicable. *Lee v. Pillsbury* (U. S.) 49 Fed. 747, 749.

#### SUBSTANTIALLY COMPLIED WITH.

"Substantially," as used in an instruction to a jury, in an action on policy of fire insurance, that, if plaintiffs have substantially

complied with the terms of the policy, they should recover, is understood by the profession and treated by authors upon Insurance as meaning in contradistinction to a strict or exact compliance. *Western Assur. Co. v. Altheimer*, 25 S. W. 1067, 1069, 58 Ark. 565 (citing *Aurora Fire Ins. Co. v. Eddy*, 55 Ill. 213; *Taylor v. Beck*, 13 Ill. [3 Peck] 376; 1 May, Ins. p. 184, § 184; 1 Wood, Ins. § 207).

#### SUBSTANTIALLY DISPUTED.

The right of a judgment debtor to the possession of the property is "substantially disputed," within the terms of Code, § 2447, providing that the judgment debtor may be required to deliver to the receiver personal property, his right to the possession whereof is not substantially disputed, by such debtor assigning to a third person such personal property for an alleged indebtedness, though there is no definite statement showing an actual indebtedness. *Frost v. Craig*, 9 N. Y. Supp. 528, 529, 16 Daly, 107.

#### SUBSTANTIALLY PAID.

In the ordinary meaning "substantially" is in a substantial manner, in substance, or essentially, and hence, as used in a statement that a given sum is substantially, if not wholly, paid, is not equivalent to a statement that it is fully paid. *Hardin County v. Weels*, 78 N. W. 908, 909, 108 Iowa, 174.

#### SUBSTANTIALLY THE SAME.

"When we say a thing is 'substantially the same,' we mean it is the same in all important particulars. It must be of the same material, when the material is important. It must be of the same thickness, when thickness is important. It must be applied in the same way, condition, and extent to the doors, as well as to the sides, when either of these circumstances make an essential difference. \* \* \* Change of form is not material, when the form does not contribute toward the new result. When it does, the forms must be alike in all important particulars." *Adams v. Edwards* (U. S.) 1 Fed. Cas. 112, 114.

#### SUBSTANTIALLY TRUE.

"Substantially true" does not mean somewhat true, or partially true, on the one hand, nor does it mean true in every possible and immaterial respect on the other. It means true without qualification in all respects material to the risk. *Jeffrey v. United Order of Golden Cross*, 53 Atl. 1102, 1103, 97 Me. 176 (citing *France v. Aetna Life Ins. Co.* [U. S.] 9 Fed. Cas. 657).

#### SUBSTANTIALLY A TRUE COPY.

An information for sending an obscene letter through the mail averred that certain



words and figures conveyed therein were "substantially a true copy" of the letter. Held, that the phrase "substantially a true copy" did not mean a full and exact copy, but rather a copy of the material or essential parts, or an abstract of them. *Thomas v. State*, 2 N. E. 808, 812, 103 Ind. 419.

## SUBSTANTIVE FELONY.

The words "substantive felony," as used in Rev. St. c. 167, § 4, providing that an accessory before the fact may be indicted and convicted of a substantive felony, means one which depends on itself, and is not dependent on another felony, which can only be established by the conviction of the one who committed it. *State v. Ricker*, 29 Me. (16 Shep.) 84, 89.

## SUBSTANTIVE RIGHT.

The distinction between "remedy" and "substantive right" is incapable of exact definition. The difference is somewhat a question of degree. The Constitution of Kansas contains the general provision that stockholders shall be liable to creditors of a corporation for an additional amount equal to their stock. Gen. St. Kan. par. 1192, provides that each stockholder shall be liable to each creditor whose execution has been returned nulla bona. This statute does not merely provide a remedy for the enforcement of rights created by the Constitution, but creates substantive rights, which may be enforced in other jurisdictions in accordance with the forms of remedy there provided. *Dexter v. Edmonds* (U. S.) 89 Fed. 467, 468.

## SUBSTITUTE.

See "Gum Substitute."

"Substitute," as used in Code 1876, § 4207, providing for the punishment of a person playing at a game with cards, dice, or some device or substitute for cards or dice, at a tavern or in a public house, highway, or some other public place, means "that which is put in the place of another thing, or used instead of something else, embracing whatever may be used in the place of cards or dice, whether designed or invented for that purpose or not, and is not synonymous with 'device,' which is defined by Webster to be 'that which is devised or formed by design; a contrivance; an invention.' As used in the statute, 'device' has a somewhat more narrow meaning than 'substitute.'" *Henderson v. State*, 59 Ala. 89, 90.

The word "substitutes," as used in a deed of trust to secure a debt, describing the property as the farming implements and live dairy cattle then on the grantor's farm, together with all their increase or substitutes

therefor, during the lien of the deed, to the value at any time of a certain sum, impliedly gives the grantor the authority to sell and dispose of the cattle in the ordinary course of business. *Goddard v. Jones*, 78 Mo. 518, 520.

## SUBSTITUTED DELIVERY.

To constitute a valid "substituted delivery" of a cargo to the consignee, it was the duty of the ship to deliver at a suitable wharf at a suitable time, and to give the consignee fair opportunity to remove it. *The St. Georg* (U. S.) 95 Fed. 172, 177.

## SUBSTITUTIONAL — SUBSTITUTIONARY.

A gift to the issue is substitutional, when the share which the issue are to take is by a prior clause expressed to be given to the parent of such issue; and a gift to the issue is an original gift, when the share which the issue are to take is not by a prior clause expressed to be given to the parent of such issue. *Acken v. Osborn*, 17 Atl. 767, 769, 45 N. J. Eq. (18 Stew.) 377.

"Substitutionary legacies" are defined by Mr. Redfield (2 Redf. Wills, p. 447) as where legacies are subsequently given to come in the place of others given before, either in a former will, or where the substitutionary legacies are given in a codicil executed at a later date than the instrument by which the legacies were given in the first instance. In all cases such substitutionary legacies, unless there is something in the terms used or the circumstances attending the substitution to the contrary, will have all the incidents, conditions, and limitations attaching to the original legacy. In *re De Laveaga's Estate*, 51 Pac. 1074, 1075, 119 Cal. 651.

## SUBSURFACE WATERS.

Those which, without any permanent, distinct, or well-defined channel, percolate in veins or filter from the lands of one owner to those of another. *Tampa Waterworks Co. v. Cline*, 20 South. 780, 782, 37 Fla. 536, 33 L. R. A. 376, 53 Am. St. Rep. 262.

## SUBTENANT.

A "subtenant" is one who leases all or a part of rented premises from the original lessee for a term less than that held by the latter. In such cases at common law a subtenant's property was subject to distress, while he was not liable on the contract between lessor and lessee. At common law the landlord had no lien on his tenant's property until distrained, while under the statutes of Texas he has a preference lien on all the crops raised on the rented premises. *Forrest v. Durnell*, 26 S. W. 481, 482, 86 Tex. 647.

## SUBTERRANEAN STREAMS.

"Subterranean streams" are those which flow in a permanent, distinct, and well-defined channel from the lands of one to those of another proprietor. *Tampa Waterworks Co. v. Clue*, 20 South. 780, 782, 37 Fla. 586, 33 L. R. A. 376, 53 Am. St. Rep. 262.

"Subterranean or underground water courses" are, as the name indicates, those water currents that flow under the surface of the earth. A large portion of the great plains and valleys of the mountainous regions of the West is underlaid by a stratum of water-bearing sand and gravel, and fed by the water from the mountain drainage. This water-bearing stratum is of great thickness. The water is moving freely through it, and is practically inexhaustible, and, if it can be brought to the surface, will irrigate a large portion of the country overlying it. These water courses are divided into two distinct classes—those whose channels are defined, and those unknown and undefined. *City of Los Angeles v. Pomeroy*, 57 Pac. 585, 598, 124 Cal. 597.

## SUBURBAN.

"Suburban," as used in a statute authorizing a city council to define places for the sale of intoxicating liquors to be drank upon the premises in the business portions of the city, and to exclude them from the suburban and residence portions, does not mean the same thing. The suburban portion of the city is the outlying part; that portion which is remote from the center of trade and population, where the houses are generally more or less scattered, and where many of the improvements and advantages enjoyed by the central and more densely populated parts of the city are wanting. The suburban part of the city may be used for business, or it may be occupied by residences, or it may be used for both residence and business purposes. *Rowland v. City of Green-castle*, 62 N. E. 474, 476, 157 Ind. 591.

## SUBVERT.

Webster defines the word "subvert" as meaning to overthrow; to ruin utterly; to corrupt; to destroy. Plaintiff alleged that defendant wrongfully and unlawfully opened a well on his land above a certain spring, and cut off and turned aside the vein of water supplying the same, and that he dug ditches and laid logs and pipes in the same to said spring and well, and drew off and subverted the water therefrom. It was held that the word "subvert" did not give the defendant any notice that he would be called upon to answer any charge of corrupting the water in the spring. "Subvert" has no such natural signification, as applied to ma-

terial objects like a vein or stream of water, however it may be as to "the minds of the hearers," as spoken of in 2 Tim. ii, 14. by which Webster illustrates the definition of the word. *Chesley v. King*, 74 Me. 164, 170, 43 Am. Rep. 569.

## SUCCEEDING.

The word "succeeding," like the words "after," "from," "subsequent," and other similar words in a devise of property to a beneficiary on condition that he shall pay to another a certain sum within one year after the testator's decease, or after, from, or subsequent to his decease, where it is not expressly declared to be exclusive or inclusive, is susceptible of different significations, and is used in different senses, and with an exclusive or inclusive meaning, according to the subject to which it is applied; and as it would deprive it of some of its proper significations to affix one invariable meaning to it in all cases, it would, of course, in many of them, pervert it from the sense of the writer or speaker. Its true meaning, therefore, in any particular case, must be collected from its context and subject-matter, which are the only means by which the intention is ascertained. *Sands v. Lyons*, 18 Conn. 18, 27.

In the construction of statutes the words "preceding," "following," and "succeeding," when used by way of reference to any section or sections, shall mean the section or sections next preceding, next following, or next succeeding, unless some other section is expressly designated in such reference. *Gen. St. Conn. 1902, § 1.*

The word "preceding" means the next preceding, and the word "succeeding" the next succeeding, whenever used to designate any particular article, chapter, or title of the Code. *Pen. Code Tex. 1895, art. 29.*

"Preceding," when used by way of reference to a title, chapter, or article, means next preceding. "Succeeding," in like manner, means the next succeeding. *Rev. St. Tex. 1895, art. 3270.*

The words "preceding," "succeeding," or "following," used in reference to any section or sections of a chapter or statute, mean next preceding, next succeeding, or next following that in which such reference is made, unless a different interpretation be required by the context. *Code W. Va. 1899, p. 133, c. 13, § 17.*

## SUCCEEDING TERM.

*Pen. Code, § 958*, provides that any person against whom an indictment is returned for an offense not affecting his life, may demand a trial at the term at which the indictment was found, or at the next succeed-

ing term thereafter, and if not tried at such term he shall be discharged and acquitted of the offense. It was held that the words "succeeding term" meant the regular term succeeding that at which the demand was made, and that a person so charged was not entitled to be discharged and acquitted because the state failed or refused to try him at a special term held after the demand was made. *Stripland v. State*, 41 S. E. 987, 989, 115 Ga. 578.

## SUCCESS.

See "Prosecute to Success."

## SUCCESSFUL.

"Successful," as used in an agreement between an association and an architect, providing that, if successful in a competition for certain prizes, such architect should be appointed superintendent of the construction of the building which it was planning, imports that, if the plan submitted by him was accepted as the most meritorious, he should be entitled to the position of superintendent; and in the event of his plan being so accepted, and of a failure to so employ him, he would have a good ground of action for such failure. *Walsh v. St. Louis Exposition & Music Hall Ass'n*, 2 S. W. 842, 843, 90 Mo. 459.

Where a contract provided that an attorney was to have a certain fee on the successful termination of a suit in the district court, and on two similar cases being continued to await the deciding of the first one in the Supreme Court, his client is "successful," within the meaning of the word as used in the contract, if the case in the district court is substantially decided in its favor, and the attorney is entitled to his fee, though he does not gain everything claimed in the complaint, and the other two cases are continued, though no reason is specifically given for their continuance. *Cole v. Richmond M. Co.*, 18 Nev. 120, 124, 1 Pac. 663, 665.

## SUCCESSFUL PARTY.

In case of an appeal from the justice of the peace, where by statute there is a new trial in the circuit court, the party in whose favor judgment is there rendered is the "successful party," within the meaning of Rev. St. c. 133, § 26, providing that the same costs, fees, and disbursements shall be allowed to the successful party in cases of new trial on appeal in the appellate court as on affirmance or reversal of the judgment, and is therefore entitled to full costs, although his judgment may be for a less sum than was awarded him by the justice. *Smithbeck v. Larson*, 18 Wis. 183, 187; *Norwegian*

*Evangelical Lutheran Church v. Thorson*, 21 Wis. 34, 35.

Under Rev. St. § 184g, providing that, on appeal from an award, costs shall be allowed to the successful party, plaintiff is the "successful party" if on his appeal the award is increased, or if on defendant's appeal the award is not reduced. *Washburn v. Milwaukee & L. W. R. Co.*, 18 N. W. 328, 334, 59 Wis. 364.

## SUCCESSFUL VACCINATION.

The term "successful vaccination," as used in the by-laws of a mutual insurance association, requiring an applicant to waive claim of death from smallpox unless he had been successfully vaccinated, is not used in the sense of entire immunity from smallpox. Successful vaccination carries the idea merely of the production upon the person vaccinated of such symptoms or manifestations as are usually produced by such operation when considered effective. The eruption produced by the inoculation, with its accompanying characteristics, is the only evidence that the vaccination has taken or is successful. *Sovereign Camp, Woodmen of the World, v. Woodruff*, 32 South. 4, 5, 80 Miss. 546.

## SUCCESSION.

See "Artificial Succession"; "Hereditary Succession"; "Intestate Succession"; "Irregular Succession"; "Natural Succession"; "Testamentary Succession"; "Vacant Succession."

"Succession" is the transmission of the rights and obligations of a deceased to his heirs. *Davenport v. Adler*, 26 South. 836, 838, 52 La. Ann. 263; *Stuart v. Sutcliffe*, 14 South. 912, 914, 46 La. Ann. 240; *Succession of Murray*, 7 South. 126, 127, 41 La. Ann. 1109; *Adams v. Akerlund*, 48 N. E. 454, 457; 168 Ill. 632. "Succession" signifies also the estates, rights and charges which a person leaves after his death, whether the property exceeds the charges, or the charges exceed the property, or whether he has only left charges without any property. Civ. Code La. 1900, arts. 871, 872. The succession includes, not only the rights and obligations of deceased as they exist at the time of his death, but all that has accrued thereto since the opening of the succession, as also new charges to which it becomes subject. A succession is called "vacant" when no one claims it, or when all the heirs are unknown, or when all the heirs to it have renounced it. *Simmons v. Saul*, 11 Sup. Ct. 369, 372, 138 U. S. 439, 34 L. Ed. 1054.

The word "succession" is a word of technical meaning, and refers to those who by descent or will take the property of a de-

cedent. It is a word which clearly excludes those who take by deed, grant, gift, or any form of purchase or contract. *Quarles v. Clayton*, 10 S. W. 505, 507, 87 Tenn. 308, 3 L. R. A. 170.

"Succession by law" is the title by which a man, on the death of his ancestor intestate, acquires his estate, whether real or personal, by the right of representation as his next heir. *Halifax, Analysis of Civil Law*, 47; *Hunt v. Hunt*, 37 Me. 333, 344.

The word "succession," in its common legal use, denotes the devolution of title to property under the law of descent and distribution. It is defined as "the coming in of another to take the property of one who died without disposing of it by will." The title to corporate property and franchises is held continuously and uninterruptedly by and in the name of the corporation and in the name of the various stockholders. There is no devolution of title in case of the death of a member or stockholder. The succession is not interrupted, but continues in the corporation. The succession is continuous during the life of the corporation, whether it be for years or for an unlimited time. *State ex rel. Walker v. Payne*, 31 S. W. 797, 798, 129 Mo. 468.

The word "succession" is often used synonymously with the word "descent." *Adams v. Akerlund*, 48 N. E. 454, 457, 168 Ill. 632.

A deed of gift to a son, though made as an advancement, and as such chargeable against the son's ultimate share of the father's estate under a law existing at the time of the deed, is a "succession," under Act Cong. June 30, 1864, c. 173, § 132, declaring that if any person shall by deed or gift, made without valuable and adequate consideration and purporting to vest the estate either immediately or in the future, whether or not accompanied by the possession, convey any real estate, such disposition shall be held to confer upon the grantee a succession within the meaning of the act. *United States v. Banks* (U. S.) 17 Fed. 322, 323.

"Succession" is the act or right of legal or official investment with a predecessor's office, dignity, possession, or functions; also the legal or actual order of so succeeding from that which is or is to be vested or taken. As used in Rev. St. 1898, § 4024, providing that "an adopted child shall be deemed, for purposes of inheritance and succession, the same to all intents and purposes as if the child had been born in lawful wedlock of such parents by adoption," it is used in the sense of a legal investment with a predecessor's possession. *Glascott v. Bragg*, 87 N. W. 853, 854, 111 Wis. 605, 56 L. R. A. 258.

"Succession" is defined in general terms, by Act June 30, 1864, § 126 (13 Stat. 287), to denote the devolution of title to any real estate; and section 127 of the same act provides that every disposition of real estate by will or by laws of descent, by reason whereof any person shall become beneficially entitled in possession or expectancy to any real estate, or the income thereof, upon the death of any person dying after the passage of that act, shall be deemed to confer on the person entitled by reason of any such disposition a succession, and that the term "successor" shall denote the person so entitled. *Blake v. McCartney* (U. S.) 3 Fed. Cas. 595, 596.

"Succession" is the coming in of another to take the property of one who dies without disposing of it by will. *Civ. Code Cal.* 1903, § 1383; *Civ. Code Idaho* 1901, § 2537; *Civ. Code Mont.* 1895, § 1850; *Rev. St. Okl.* 1903, § 6893; *Civ. Code S. D.* 1903, § 1092. In providing for the transmission of the estate by succession, the Code declares that the estate is succeeded to by the heirs, and is distributed to, or goes to, or comes to them. Where a declaration of homestead was filed on the separate property of one of the spouses, while *Civ. Code*, § 1265, providing that land held by spouses is held in joint tenancy, was in force, and before it was amended, the surviving husband or wife takes the title to the homestead as surviving joint tenant, and not by descent, even if the other spouse dies after the amendment of 1874, which limits the title of the survivor. *In re Headen's Estate*, 52 Cal. 294, 298.

#### SUCCESSION BY RIGHT OF REPRESENTATION.

Inheritance or succession by right of representation is the taking by the descendants of a deceased heir of the same share or right in the estate of another person as their parent would have taken, if living. *Rev. Laws Mass.* 1902, p. 1267, c. 133, § 6.

#### SUCCESSION TAX.

A tax on property passing by will or by the statute of inheritance is a "succession tax." *Ferry v. Campbell*, 81 N. W. 604, 606, 110 Iowa, 290, 50 L. R. A. 92.

A "succession tax" is not a tax on property, but on the privilege of succeeding to the inheritance. It is not a direct tax upon the land taken by descent, but is an impost upon the devolution of the estate and the right to become beneficially entitled thereto, or to the income thereof. *In re Swift* (N. Y.) 2 Con. Sur. 644, 646, 16 N. Y. Supp. 193. See, also, *Black v. State*, 89 N. W. 522, 526, 113 Wis. 205, 90 Am. St. Rep. 853.

A "succession tax" is an excise, within the power of Congress to lay and collect

taxes, duties, imposts, and excises. *Scholey v. Rew*, 90 U. S. (23 Wall.) 331, 346, 23 L. Ed. 99.

"A succession tax, as the words clearly indicate and the history of such taxes clearly establishes, is an excise or duty upon the right of a person or corporation to receive property by devise or inheritance from another under the regulation of the state. Wherever properly laid, this is its distinguishing feature, in contradistinction from a property tax." The term "succession tax" does not include the tax provided by Act April 1, 1895, which provides for the levy of a collateral succession tax, on all property conveyed by will, except, etc., of so much for each \$100 worth of property, as it is a property tax, and not a succession tax. The mere calling of such a tax a "succession tax" does not make it different from an ordinary tax upon property, when the effect and operation are identical with an ordinary property tax. *State ex rel. Garth v. Switzler*, 45 S. W. 245, 253, 143 Mo. 287, 40 L. R. A. 280, 65 Am. St. Rep. 653.

## SUCCESSIVE.

See "For—Successive Issues."

Where Rev. St. 1892, c. 42, art. 9, § 27, provides that notice of special assessment shall be given by publishing the same at least "five successive days" in a daily newspaper, the statute will be construed to be satisfied by a publication on Friday and Saturday and the succeeding Monday, Tuesday, and Wednesday, since Sunday, being a dies non, does not interrupt the succession. *Rasmussen v. People*, 39 N. E. 606, 155 Ill. 70.

Where a notice of a special assessment is required to be published "five successive days," such requirement is not shown to have been complied with by a certificate which states that such notice was published five times, the first time April 30th, and the last May 5th following. *Casey v. People*, 46 N. E. 7, 8, 165 Ill. 49.

An Illinois statute providing that notice of municipal assessment, etc., shall be published at least "five successive days," is not complied with by a certificate alleging that such notice has been published five times, stating the date of the first and last publication, since such certificate does not show that it was not published two or more times in different editions of a paper printed or published on the same day. *Toberg v. City of Chicago*, 45 N. E. 1010, 1011, 164 Ill. 572.

Where, after publishing an order declaring the result of a local option election for "three successive weeks," further publication was stopped by a temporary injunction, and after the order was dissolved, the declara-

tory order was published for another week, such publication is a publication for four "successive weeks," within *Sayles' Ann. St. art. 3234*, requiring the court to have published for four successive weeks the order declaring the result of the election. *McDaniel v. State (Tex.)* 21 S. W. 684, 685 (reversed [Tex.] 23 S. W. 989, 990).

## SUCCESSIVELY.

"Successively," as used in a statute requiring notice of the execution sale of real property to be posted for four weeks successively in three public places of the county where the property is to be sold, and publishing once a week for the same period in a newspaper of the county, is to have its ordinary meaning, as "in a successive manner; in a series; in an order; following in order or uninterrupted course." *Walker v. Goldsmith*, 12 Pac. 537, 555, 14 Or. 125.

## SUCCESSOR.

"Successor" is defined to be "he that followeth, or cometh in another's place." *Beatty v. Ross*, 1 Fla. 198, 209 (quoting 6 Jac. Law Dict.).

According to all the lexicographers, a "successor" is merely one who succeeds or takes the place of another. *State v. Andrews*, 67 Pac. 870, 877, 64 Kan. 474.

A "successor" is one who follows another into a position, and not one who went into the position with and survives such other. *Hood v. Hayward*, 35 N. Y. St. Rep. 229, 239.

The word "successor" is an apt and appropriate term to designate one to whom property descends, and in association with the words "heirs, administrators, and assignees," plainly imports a devolution or charge upon the obligor's estate. *American Surety Co. v. McDermott*, 25 N. Y. Supp. 467, 468, 5 Misc. Rep. 298.

Where, under a Constitution providing that a term of office shall continue for a definite period and until a successor is elected and qualified, a person was elected to an office at the proper time and duly qualified, but died before the time occurred for him to take the office, he was a "successor" duly elected and qualified to the office, and the right of his predecessor to continue in office ceased. The death of that successor before his term commenced did not revive a right in his predecessor, which had ceased when he qualified. *State ex rel. Attorney General v. Seay*, 64 Mo. 89, 104, 105, 27 Am. Rep. 206.

"Successor," as used in a lease of ground made by the executor, as trustee for minor devisees, providing for the appraisal of

all permanent and valuable improvements made upon the land by the lessee and standing thereon at the termination of the lease, should be valued by disinterested parties to be chosen—one by the party of the first part or his successors, one by the party of the second part or his successors, and the third chosen by those two—as applied to a trustee, means to be representing the estate, not simply a “successor” as trustee. *Cicalla v. Miller*, 58 S. W. 210, 215, 105 Tenn. 235.

“Successor,” as used in a provincial act of 1772, enacting that the overseers of Boston should be incorporated into a body politic, and that they and their successors in office should have a perpetual succession by that name, and that the real or personal property given to the poor of the town should be vested in the overseers and their successors in their corporate capacity, is a descriptio personarum, or a designation of the persons who are at all times to compose the one corporation. The term is “their successors in said office.” It is equivalent to saying “the overseers then in office and those who should afterwards from time to time constitute the corporation.” *Overseers of the Poor of Boston v. Sears*, 39 Mass. (22 Pick.) 122, 132.

“Successors” is a necessary word in most instances in grants to corporations sole, in order to pass a fee; but the word “successors” in a deed to a corporation aggregate is not necessary to pass the fee. *Chancellor v. Bell*, 17 Atl. 684, 685, 45 N. J. Eq. (18 Stew.) 538.

The word “successors,” in a deed to a corporation, has reference in its strict sense to the succession of individuals who compose the corporation. Where a corporation gave a power of attorney to confess judgment in an action “against our successors or assigns,” it was held to bind also the corporation itself, and not only the individuals who at some future and undefined time might compose the corporation. *Cumberland Building & Loan Ass'n v. Aramingo M. E. Church* (Pa.) 13 Phila. 171, 172.

“Successors,” as used in Gen. Laws 1872, § 2, providing that, upon the adoption of such law by a city in lieu of a special charter, the city officers then in office should thereafter exercise the powers conferred upon like officers in this act until their successors shall be elected and qualified, is to be construed as meaning the successors who are elected and qualified under the law so adopted. *Crook v. People*, 106 Ill. 237, 249.

The use of the word “successors” in the habendum clause of a deed, which read, “to have and to hold the described premises to the grantees, their successors and assigns,” was construed not to indicate that the conveyance was in trust to the grantees, though they were described as trustees. *Kanenbley*

*v. Volkenberg*, 75 N. Y. Supp. 8, 10, 70 App. Div. 97.

“Successor” is, generally speaking, the person who takes the place of another. There are, in law, two sorts of successors—the successor by universal title, such as the heir; and the successor by particular title, such as the buyer, donee, or legatee of particular things, or the transferee. The universal successor represents the person of the deceased, and succeeds to his rights and charges. The particular successor succeeds only to the rights appertaining to the thing sold, ceded, or bequeathed to him. *Civ. Code La. 1900*, art. 3553, subd. 28.

The word “company” or “association,” when used in reference to a corporation, shall be deemed to embrace the words “successors and assigns of such company or association,” in like manner as if these last-named words, or words of similar import, were expressed. *U. S. Comp. St. 1901*, p. 4.

#### As any successor.

The word “successor,” as used in the statute regulating executions, and providing that if any sheriff, having sold land, shall abscond or be rendered unable by death or otherwise to make a deed of conveyance for the same, then “the successor of such sheriff may, under the order of the court from which the execution is issued, make a deed to the purchaser,” is not limited in its meaning to the immediate successor of the sheriff making the sale, but includes any successor. *Fowble v. Rayberg*, 4 Ohio (4 Ham.) 45, 58.

#### As one entitled to succeed.

The word “successor,” in the statutes as in the books, is used in the twofold sense of the one entitled to succeed and the one who has in fact succeeded, and in the provision of the statute providing that an officer shall hold an office for a certain time and until his successor is elected and qualified is used in the former acceptance. *People v. Ward*, 40 Pac. 538, 539, 107 Cal. 236.

#### As creating estate of inheritance.

The words “successors and assigns,” as used in a mortgage on land to an individual, his successors and assigns, is not sufficient to create an estate of inheritance, but conveys only a life estate, though the mortgage contained a power of sale authorizing the mortgagee, in case of default, to sell the land and execute a conveyance thereof in fee simple. *Sedgwick v. Laffin*, 92 Mass. (10 Allen) 430.

#### As subsequent owner.

“Successors,” as used in Act 1870, declaring that a certain railroad company and its successors, and its and their capital stock, rights, franchises, railroads, rolling stock, and all other property, should be exempted

from taxation for a period of 25 years, and further providing that the act should be held to constitute an irrevocable contract between the state and the company, its successors and assigns, is evidently used to designate such corporations or persons as may in any lawful manner acquire the proprietorship of the corporate rights and the property, through which they are to be exercised, which the corporation had to which the exemption was given. *International & G. N. Ry. Co. v. Smith County*, 65 Tex. 21, 25.

#### **Surviving executor or administrator.**

Where one of two or more executors or administrators dies, the others may proceed and complete the administration of the estate pursuant to the letters. Such survivors are within the meaning of the word "successors," as used in the Code of New York, and the survivors perform all the duties of a trust. In *re Trask's Estate*, 49 N. Y. Supp. 825, 827.

#### **Surviving co-party.**

Where there is more than one plaintiff or defendant in a suit, the survivor is neither the personal representative nor successor to his deceased co-party. *Phoenix Ins. Co. v. Moog*, 1 South. 108, 111, 81 Ala. 335 (citing 2 Tidd, Pr. 1116; 1 Bac. Abr. 11).

#### **Temporary appointee.**

"Successors," as used in Act April 2, 1858, § 6, as amended March 27, 1866 (Swan & S. St. p. 723), providing that the board of commissioners of the Reform School shall hold their offices for three years from the date of their appointment and until their successors are appointed and qualified, unless vacancies occur from death, resignation, or removal for cause, means the appointee of the Governor by and with the advice of the Senate, and not the appointee of the Governor alone, who comes into the office temporarily to fill a vacancy; and hence, the mere appointment, in the manner in which appointments are made to fill vacancies, of a successor to one of the commissioners, did not create a vacancy in the office. *State v. Howe*, 25 Ohio St. 588, 593, 18 Am. Rep. 321.

### **SUCCESSOR IN ESTATE.**

Code Civ. Proc. § 1161, subd. 1, declares that a tenant of real estate for a term less than life is guilty of unlawful detainer, when he continues in possession in person or by co-tenant of property or any part thereof, after the expiration of the term for which it is let to him, without the permission of the landlord or the successor in estate of his landlord, if any there be. Defendant was in possession of land under G., the owner in fee, as tenant from month to month. G. rented to plaintiff in present for five

years, who never entered into possession, but raised the rent and notified defendant, who neither attorned to the plaintiff nor paid the rent. Held, that the plaintiff was the "successor in estate" of the landlord, within the meaning of the section, and could therefore sue in unlawful detainer. *McDonald v. Hanlon*, 21 Pac. 861, 862, 79 Cal. 442.

### **SUCCESSOR IN INTEREST.**

"Successor in interest," as used in Code Civ. Proc. § 757, providing that in case of the death of a sole plaintiff or sole defendant, if the cause of action survives, the court must allow or compel the action to be continued by or against his representative or successor in interest, means the possessor of an interest which, apart from the right to the interest, however that may be created, commences, or as to the right of enjoyment depends, upon the fact of the death occurring, and do not refer to an interest gained by transfer from the party by assignment which transfers the interest before the party's death. *Northrup v. Smith*, 9 N. Y. Supp. 802, 803, 58 N. Y. Super. Ct. (26 Jones & S.) 120.

Within the meaning of Code Civ. Proc. § 757, providing, in the case of the death of a sole plaintiff or sole defendant, the court, if the cause of action survives or continues, may, on motion, allow or compel the action to be continued by or against his personal representative or successor in interest, the term "successor in interest" includes an assignee of the administrator of the deceased person. *McNulta v. Huntington*, 70 N. Y. Supp. 897, 899, 62 App. Div. 257.

"Successors in interest," as used in Civ. Code, § 3439, which renders all conveyances by a debtor, made with the intent to defraud any creditor, void as against creditors and their successors in interest, should be construed to include a person to whom a debt was transferred by a creditor, and to whom the debtor afterwards makes a part payment and executes a note for the balance. The form of the indebtedness was changed, and the amount was reduced, but in substance it was a continuation of the old debt. *Windhaus v. Bootz* (Cal.) 25 Pac. 404.

### **SUCCESSOR IN OFFICE.**

"Successors in office," as used in a deed conveying real estate to a school board and their successors in office for the erection of a schoolhouse thereon, includes the school board of an incorporated town, to which the property so conveyed is afterwards attached for school purposes. *Curtis v. Board of Education*, 23 Pac. 98, 43 Kan. 138.

A bond given by a marshal to the President of the United States and to his "suc-

cessors in office" appears on its face to be taken by the President colore officii, is not a personal contract, and must have been taken for the use of the United States. *Jackson v. Simonton* (U. S.) 13 Fed. Cas. 250, 252.

### SUCCESSOR IN TRUST.

"Successors in trust," as used in a deed of assignment, refers to such persons as might lawfully succeed the assignee in case of resignation, removal, or death. *Langdon v. Thompson*, 25 Minn. 509, 512.

### SUCCINCT STATEMENT.

Supreme Court rule 9, providing that briefs on appeal shall begin with a "succinct statement" of so much of the record as is essential to the questions discussed, means a concise statement of what is claimed to be the substance or gist or pith of the record, with references to the printed case for verification in case of a dispute, and does not mean a reprint of the whole record, or any considerable part of it. *McLimans v. City of Lancaster*, 23 N. W. 689, 695, 63 Wis. 596.

A statement of a claim against the decedent's estate, which prima facie shows an indebtedness of the estate to claimant and sets out the demand with sufficient clearness to bar another suit therefor, is a "succinct and definite statement," within the meaning of *Burns' Rev. St. 1894, § 2465* (*Horner's Rev. St. 1897, § 2310*), requiring the filing of such statements of a claim against the decedent's estate. *Woods v. Matlock*, 48 N. E. 384, 385, 19 Ind. App. 364; *Hyatt v. Bonham*, 49 N. E. 361, 362, 19 Ind. App. 256.

"Succinct" means brief; precise; exact. It is derived from the two Latin words, "sub," under, below, and "cingere," to girdle, and literally means "girdled below," or from below; hence compressed into narrow shape. A copy of an obligation by decedent to pay a sum of money constitutes, therefore, a succinct statement against his estate. *Wolfe v. Willsey*, 28 N. E. 1004, 1007, 2 Ind. App. 549 (citing *Webst. Dict.*).

### SUCH.

See "All Such."  
Any such, see "Any."

"Such" is defined by Webster as "having the particular quality or character specified; certain; representing the object as already particularized in terms which are not mentioned." *State v. Estep*, 71 Pac. 857, 859, 66 Kan. 416.

A testatrix devised property to her daughter for life, and on her death to "the lawful issue of her daughter and the heirs and assigns of such issue." Held, that the

use of the word "such" was not sufficient to show that by "issue" the testatrix meant children. The meaning was the same as though the limitation over had been to the issue and their heirs and assigns. *Carrol v. Burns*, 108 Pa. 386, 393.

The expression "such trustee," as used in the bond of an assignee for the benefit of creditors, which recites that by a certain deed of assignment he was appointed trustee for the purposes therein expressed, and which is conditioned for the faithful performance by him of all his duties as such trustee according to law, refers to the trustee as assignee, and not as a trustee appointed by the court or chosen by the creditors, and therefore the sureties are bound for the faithful performance of his duties as assignee under the deed of assignment. *Walsh v. Miller*, 38 N. E. 381, 385, 51 Ohio St. 462.

The term "such final judgment," as used in Act Cong. March 3, 1887, § 10, providing for interest from the date of such final judgment or decree in actions against the United States, relates to the judgments or decrees of the District or Circuit Courts, concerning which the district attorney is intrusted with specified duties in other portions of the section, and not the judgment or decree of the Court of Claims, with which he has no concern whatever, and which has no general jurisdiction in equity or admiralty. *United States v. Barber* (U. S.) 74 Fed. 483, 488, 20 C. C. A. 616.

The word "such," in a penal statute, repeated three times in connection with, and always referring, to fornication with resulting issue, as first mentioned in the section, held to show that the Legislature intended to create no crime but that for which a positive punishment was prescribed, and to extend it to no other fornication than such as is followed by issue. *Smith v. Minor*, 1 N. J. Law (Coxe) 16, 22.

The words "such business," in Acts 1893, No. 119, defining what shall constitute fraternal beneficiary societies, etc., and providing, in section 3, that "all such associations coming within the description as set forth in section 1 of this act, organized under the laws of this or any other state \* \* \* and now doing business in this state, shall be considered duly organized, and may continue such business," mean such business as was authorized under the act under which the association was incorporated, and not such business as the association had theretofore been doing. *Walker v. Giddings*, 103 Mich. 344, 61 N. W. 512, 514.

Under the act constituting district courts in certain cities in the state, section 14, providing "that the territorial jurisdiction of every judge of any district court under this



act shall be coextensive with the limits of the city for which he is appointed and commissioned," and that "his writs, precepts, and process shall run in and through such county, and he may, in causes pending before him, award writs of subpœna for witnesses in the other counties of the state," the words "such county" had no proper relation to the limits of the city in the preceding clause of the section, and the relative word "such" blinds this latter clause to the city limitation. *Wellman v. Bergmann*, 44 N. J. Law (15 Vroom) 613, 615.

"Such county clerk," as used in a certificate that the deputy county clerk, etc., appeared before the acknowledging officer and acknowledged the execution of the deed by him as such county clerk, means as such deputy county clerk; no other county clerk being referred to in the certificate. *Ward v. Walters*, 22 N. W. 844, 846, 63 Wis. 39.

As used in Rev. Postal Laws, § 229, providing that any person employed in the postal service of the United States, who shall secrete, embezzle, or destroy any letter intrusted to him, etc., and that "any such person" who shall steal any of the things out of any letter which shall have come into his possession, etc., refers only to an employé in the postal service, and does not refer comprehensively to any employé who has embezzled a letter intrusted to him in the course of his official duty. It does not refer to the person who has secreted, embezzled, or destroyed the letter, but merely to the person employed in the postal service; and the person who embezzles and the person who steals must in either case be an employé in the postal service. *United States v. Taylor* (U. S.) 28 Fed. Cas. 19, 20.

As used in a deed of land to a corporation to build a schoolhouse thereon within two years, the land and buildings never to be devoted to any other use than a location for a schoolhouse, teacher's house, and the necessary buildings and other purposes of an academic or public school, the land to revert when it ceased for the space of two years together to be used for "such purposes," does not mean a school in operation; no other use being made of the property, and there being no abandonment. *Gage v. School Dist. No. 7*, 9 Atl. 387, 388, 64 N. H. 232.

The words "such refusal," as used in the short statute of limitations (2 Edmonds, St. p. 91, § 38), barring a claim against the estate of any deceased person, if rejected by the administrator or executor and a suit has not been brought therein within six months after the rejection, and providing that any executor or administrator may, on the trial of any action founded upon such demand, give in evidence in bar thereto the facts of such refusal and neglect to commence suit, means a refusal to allow or pay the claim

against the estate, and not a refusal to refer. *Fishkill Nat. Bank v. Speight*, 47 N. Y. 668.

The introductory clause of a will reciting, "As for such worldly estate wherewith it hath pleased God to bless me, I give," etc., does not of itself import an intent of the testator to dispose of all his estate and not to die intestate, but were introduced to make a distinction between his temporal and his eternal concerns. These words alone, unconnected with any subsequent matter, do not pass a fee. *Terrel v. Sayre*, 3 N. J. Law (2 Penning.) 588, 601.

The introduction to a will stating that, "as touching such worldly estate wherewith it hath pleased God to bless me with, I give, demise, and dispose of the same" in the following manner and form, was construed to show the intention of the testator to dispose of his entire property and estate. *Wardell v. Allaira*, 20 N. J. Law (Spencer) 6, 8.

The words "such injury alone," in a clause of an accident policy, where the company agrees to make a certain payment if the death of the insured "shall result from such injuries alone, within ninety days from the date of the accident," referred to the kind of injury which furnished the basis of indemnity, in case of partial or permanent disability—injury through external, violent, or accidental means. *Moore v. Wildey Casualty Co.*, 57 N. E. 673, 674, 176 Mass. 418.

The words "such as" are employed to give some example of a rule, and are never exclusive of other cases which that rule is made to embrace. Civ. Code La. 1900, art. 3556, subd. 29.

#### As "a" or "the."

Under a statutory provision that a person convicted of certain crime shall be punished by solitary confinement for "such" term, not exceeding two years, it is held that though there is nothing to which the term "such" can apply, it is, as so used, equivalent to "a" term, or "the" term. *Evans v. Commonwealth*, 44 Mass. (3 Metc.) 453.

The words "in such manner," as found in Const. art. 2, § 28, requiring that taxes shall be equal and uniform throughout the state, "but the Legislature shall have the power to tax merchants, peddlers, and privileges in such manner as they may from time to time direct," have no other significance than to express with distinctiveness and emphasis that the power of the Legislature to tax merchants, peddlers, and privileges was to be unlimited and unrestricted, and might be exercised in any manner and mode in their discretion. *Western Union Tel. Co. v. Harris* (Tenn.) 52 S. W. 748, 752 (citing *Jenkins v. Ewin*, 55 Tenn. [8 Heisk.] 456, 478).

**As referring to last antecedent.**

"Such," as used in statutes, is a descriptive and relative word, and refers to the last antecedent, unless the meaning of the sentence would thereby be impaired. *Summerman v. Knowles*, 33 N. J. Law (4 Vroom) 202.

St. 8 & 9 Wm. III, c. 11, § 2, provided that "inasmuch as, for want of a sufficient provision of law for the payment of costs of suit, adverse evil-disposed persons are encouraged to bring frivolous actions, be it enacted that if any person shall commence to prosecute in any court of record any action," etc., "wherein upon any demurrer, either by plaintiff or defendant, judgment shall be given by the court against such plaintiff, or if at any time after judgment given for defendant in any such action," etc., "the plaintiff shall sue out any writ of error to annul such judgment, and the judgment shall be afterwards affirmed, and defendants shall have judgment for costs," etc. Held, that "such action, complaint, or suit," as used in the statute, meant any action, complaint, or suit in any court of record, and did not refer merely to the sentence preceding it, so as to confine the remedy to those actions in courts of record in which judgment is given against a plaintiff upon demurrer. *Ricketts v. Lewis*, 1 Barn. & Ald. 197, 20 L. R. 376, 377.

Act April 15, 1817, provides that it shall be lawful for the court of chancery, in the settlement of the accounts of guardians, executors, or administrators, to make a reasonable allowance to them for their services over and above their expenses, and that when the right of such allowance shall have been settled by the chancellor it shall be conformed to in all cases of the settlement of such accounts. "Such allowance," as there used, plainly comprehends the reasonable allowance and every allowance mentioned in the first clause. *McWhorter v. Benson* (N. Y.) 1 Hopk. Ch. 28, 37.

A statute provided that in two events widows might make an election to take dower in a manner different from the usual mode. This election was given by two different sections, and a subsequent section, immediately following them, provided that "such election" shall be made in a specified manner and within a prescribed time. There was nothing in the import of these words which would limit their reference to the election given by the last section. There is no reason why they should thus be limited in their application. The necessity for prescribing and limiting a time within which the election should be made was as urgent in the one case as in the other. The inconvenience resulting from an indefinite time in which an election as to the kind of dower to be taken was to be made was as great in the one case as in the other. The court held

that there was no propriety in narrowing their influence to only one section, and that the words applied to the election authorized by both or either section. *Kemp v. Holland*, 10 Mo. 255, 258.

The word "such," in Rev. St. § 1697, providing that within 10 days after the execution of the assignment the assignor shall make and file in the office of the clerk a correct inventory of his assets and a list of his creditors, etc., which inventory and list shall be verified by his oath, and have affixed a certificate of the assignee that the same is correct according to his best knowledge and belief, and a failure to make and file such inventory and list shall render such assignment void, is to be construed according to the most natural and reasonable, as well as the most grammatical, sense in reference to its antecedent, as referring only to a correct inventory of assets and list of creditors, without any reference whatever to the oath of the assignor or the certificate of the assignee. *Steinlein v. Halstead*, 8 N. W. 881, 52 Wis. 289.

The words "said" and "such," when used by way of reference to any person or thing, shall apply to the person or thing last mentioned. Pub. St. N. H. 1901, p. 63, c. 2, § 14; V. S. 1894, 15.

**As of like kind.**

A question, to a witness who had testified to the making and negotiation of a certain note, as to whether he knew of the same maker giving the defendant any other "such" note than the one he had mentioned, did not limit the inquiry to a note of the particular tenor or purport, but to the fact of giving any note of a like kind. *Commonwealth v. Miller*, 57 Mass. (3 Cush.) 243, 254.

"Such," as used in section 154 of the county government act, providing that the tax collector must perform such duties, means duties of that kind, and of like kind, though not necessarily identical. *Ventura County v. Clay*, 44 Pac. 488, 491, 112 Cal. 65.

"Such," as used in a statute, the first section of which refers in direct terms to actions thereafter to be commenced and provides the time to answer, the second section providing for the manner of sale upon judgments in such actions, must be taken, in its ordinary acceptation, to mean of that kind, of the like kind, and to refer to the class of actions specified in the first section. *Ogden v. Glidden*, 9 Wis. 46, 52.

As used in a will devising an estate to a daughter, remainder to the heirs of her body lawfully begotten, and, on the failure of such issue at the death of the daughter, the property to go to another, "such" is equivalent to "of that kind." *Travers v. Wallace*, 49 Atl. 415, 417, 93 Md. 507.

Wag. St. p. 925, § 6, concerning mandamus, declares that in case a verdict shall be found for the person suing such writ, or judgment given for him on demurrer, or by nil dicit, or for want of a replication or other pleading, he shall recover his damages and costs in such manner as he might have done in a civil action for a false return, and the same may be levied by execution, as in other cases. Held, that the words "in such manner," etc., mean nothing more nor less than under the like conditions and limitations as would apply to a civil action for a false return on the alternative writ, if there was no statute in the case. *State ex rel. Alexander v. Ryan*, 2 Mo. App. 303, 310.

#### As word of reference.

Acts 1883, c. 230, entitled "An act to punish parties who may engage in keeping or conducting of halls or houses for conduct of games of keno, faro, three-card monte and mustang," by section 1 provides that any person who should keep a room, hall, or house for the purpose of encouraging or promoting, aiding, or assisting in the playing of any game of keno, faro, three-card monte, mustang, red and black, high ball, roulette, twenty-one, or hazard, or who should keep or exhibit such gaming table or operate the same, should be punished, etc., "such" is defined by Webster as used to represent the object indefinitely, or particularized one way or another, or one and another not there mentioned. The reference is had to a house, room, or hall in which the games were played or to be played. "Such gaming table" is a table of that particular character specified; a table representing the object as particularized in terms which are not mentioned. The words "such gaming table" represent something of a particular character that has been specified or described before its use in another clause of the sentence or paragraph, and are used as an expression of reference to an object or thing clearly described, with the purpose that the reader shall return to that description to ascertain the object referred to or represented. *Garvin v. State*, 81 Tenn. (13 Lea) 162, 171.

In an agreement stipulating that a railroad company should lay down on certain streets a single track only, without sidings for standing or passing trains, and should at no time lay down or construct any such switches or turn outs on the streets mentioned, "such" relates to the antecedent, "sidings." *City of Philadelphia v. River Front R. Co.*, 19 Atl. 356, 357, 133 Pa. 134.

"Such cases," as used in Laws 1861, c. 1104, providing that "hereafter writs of error in capital cases in the circuit courts of this state shall be allowed also in the manner and on the terms provided now by law for writs of error in cases of misdemeanors and crimes not capital: provided, however, that

the justices of the several circuit courts shall have the same power in allowing or directing writs of error in such cases as the justices of the Supreme Court" have, refers to all the cases mentioned in the former part of the section, and extends the authority of circuit justices to issue writs of error in cases of misdemeanors and crimes not capital, as well as in capital cases. *Williams v. State*, 20 Fla. 391, 396.

In construing Mansf. Dig. § 1643, relating to embezzlement by public officers having the custody of public funds, and declaring that every such officer who shall fail or omit to pay the amount found due by him upon settlement shall be deemed guilty of a felony, the court said: "The clause of the statute relative to the settlement and failure to pay the amount found due must be read as coupled with each of those that precede it; otherwise, it is left without force in the statute. The phrase 'every such officer' in this clause must refer, then, to one of the officers before named, who has converted the public funds to his own use, used them for his private purposes, permitted others to so use them, or misapplied them in some other manner. It would certainly be competent for the Legislature to make it embezzlement for any officer to use public funds in his private business, or to misappropriate them in any way, whether he should afterwards settle his accounts or not; but the purpose of this section seems to have been to protect the revenue, rather than to punish the offender, and to give the delinquent the opportunity to escape the severe penalty by reimbursing the public, in compliance with the order of court that settles his account, before prosecution is begun against him. *State v. Govan*, 48 Ark. 81, 2 S. W. 347, 349.

#### Power of selection implied.

In a settlement in contemplation of marriage, by which the estates were given to trustees for the use of "such of the children, child, and issue" of the settlor by his intended wife, and in such shares as he and his wife, or the survivor of them, should appoint, the word "such" imported an intention on the part of the settlor to give the power of selection, and the argument did not require that each child should receive some share. *Willmetts v. Alchin*, 2 Barn. & Ald. 122, 125.

The words "such of," in a power to appoint among such of the children of certain persons and in such proportions as they may appoint, may be construed to authorize M. to exclude certain children of the designated persons. *Ingraham v. Meade* (U. S.) 13 Fed. Cas. 50, 51.

Where a bequest was that the trustees should pay the income arising from a certain fund to a certain person for life at such time

as they saw fit, the time of payment is wholly in the discretion of the trustees. *Bartlett v. Slater*, 53 Conn. 102, 22 Atl. 678, 679, 55 Am. Rep. 73.

The use of the phrase "in such manner as she shall appoint," in a will devising property to testator's wife for life, and directing her at her decease to give and bequeath the same to her children in such manner as she shall appoint, does not authorize the wife to exclude any of the children; but she has merely the power to give the property to them in such shares as she may think fit and as might best suit their respective circumstances. *Walsh v. Wallinger*, 2 Russ. & M. 78, 80.

**As said.**

Testator's will directed that on the death of his wife, who was given a life estate, the homestead should be used by his daughters, C., E., and H., as a home for all or either of them as might be married; but, when the homestead should be no longer occupied by either or any of them, he gave and devised the same to "such child or children at that time living, and their heirs and assigns, forever, and the representative of any deceased, to have the share of his or her parent." Held, that the word "such" was not used in the sense of "said" or "before mentioned," but with reference to the subsequent qualification of survivorship, and that the property was given to those of his children who should be alive at the termination of the enjoyment by the three children mentioned, and the issue of those who should be dead. *Endicott v. Endicott*, 3 Atl. 157, 160, 41 N. J. Eq. (14 Stew.) 93.

**As same as previously mentioned.**

The word "such" is often used to mean the same as "previously mentioned or specified, not other or different." *Evans v. State*, 50 N. E. 820, 150 Ind. 651; *State v. Second Judicial District Court*, 68 Pac. 570, 574, 26 Mont. 396.

"Such," as used in the proviso of a statute relating to mechanics' liens, that, if such journeyman, day laborer, or other person have no written contract, it shall be sufficient for him to file an itemized account of his claim, supported by affidavit, qualifies "journeyman, day laborer, or other person," and clearly indicates that every journeyman, day laborer, or other person is not included. The word refers to what has been specified, and means "the same as has been mentioned." *Warner Elevator Mfg. Co. v. Houston (Tex.)* 28 S. W. 405, 408.

"Such," as used in Rev. Laws, § 2324, exempting generally the products of the real estate of a married woman from attachment or levy of execution, and providing that such products may be attached or levied upon for labor or materials furnished upon or for the

cultivation or improvement of such real estate, should be construed in the sense of same. *Ackley v. Fish*, 55 Vt. 18, 19.

The words "such suit," as used in Const. art. 3, § 13, declaring that in suits at common law, where the value in controversy exceeds \$20, the right of trial by jury, if required by either party, shall be preserved, and in such suit before a justice a jury may consist of six persons, necessarily referred to and embraced the class of suits mentioned in the preceding part of the sentence; that is, suits at common law where the amount in controversy was over \$20. It does not, however, embrace all such suits at common law, because by section 28 of the same article of the Constitution the jurisdiction of a justice is limited to not exceeding \$300; but it does embrace all such suits where the value in controversy is over \$20 and not exceeding \$300. *Barlow v. Daniels*, 25 W. Va. 512, 519.

**As of such description.**

"Such as," as used in St. 5 & 6 Hen. IV, c. 50, § 27, providing that the highway rate shall be upon property ratable to the relief of the poor, provided that the same rate shall also extend to "such woods, mines, and quarries of stone or other hereditaments as have heretofore been usually rated to the highways," means of such description as. *Reg. v. Saunders*, 4 El. & Bl. 564, 569.

**SUCTION.**

"Suction" is the name given to the force exerted by one vessel on another, due to the creation of currents by the moving of the vessels, and the effect of which is apparently greatest when a larger and faster vessel is passing another moving in the same direction in shallow water and a narrow channel. The effect of the force is to produce a current which will draw the vessels together. It seems established that this power or influence is much greater or more dangerous when one vessel is passing another going in the same direction than when they are going in opposite directions. In *The City of Cleveland (U. S.)* 56 Fed. 729, the court says: "The suction of two vessels passing each other in different directions is not very powerful. It is too short to have any particular effect upon the action of the two vessels, unless one is much larger than the other; whereas, if they are going in the same direction, and passing near each other, it has a more powerful effect to deflect the weaker vessel from her course." It is a recognized cause of collisions. *The Aureole (U. S.)* 114 Fed. 224, 228, 51 C. C. A. 181.

**SUDDEN AFFRAY.**

The words "in sudden affray," as used in Ky. St. § 1242, providing for the punish-

ment of any person who shall "in a sudden affray or in sudden heat and passion" shoot another, etc., are not synonymous with the words "in sudden heat and passion." *Violett v. Commonwealth* (Ky.) 72 S. W. 1.

### SUDDEN HEAT AND PASSION.

The phrase "in sudden heat and passion," as used in the statute punishing the offense of murdering a slave, is a technical phrase of the common law to describe the offense of manslaughter. The homicide is only extenuated to the offense of killing in sudden heat and passion when there is an adequate provocation. Without this, the passion and heat of blood are not supposed to exist. *State v. Cheatwood* (S. C.) 2 Hill, 459, 462.

### SUDDEN INJURY.

The phrase "sudden injury" expresses a physical, not a mental, condition, and hence, as used in an instruction that heat of passion, as used in defining manslaughter to mean a condition of quick anger or sudden injury engendered by some real or supposed injury, is misleading and confusing. *State v. Sloan*, 56 Pac. 364, 368, 22 Mont. 293.

### SUDDEN PASSION.

The term "sudden passion," in a charge defining manslaughter, as voluntary homicide committed "under the immediate influence of sudden passion" arising from an adequate cause, means that the provocation must arise at the time of the killing and that the passion is not the result of former provocation, and the act must be directly caused by the passion arising out of the provocation, if any, at the time of the killing. It is not enough that the mind is merely agitated by passion arising from other provocation or a provocation given by some person other than the party killed. *Stell v. State* (Tex.) 58 S. W. 75, 76; *Farrar v. State*, 15 S. W. 719, 720, 29 Tex. App. 250; *Lowe v. State*, 70 S. W. 206, 207, 44 Tex. Cr. R. 224.

### SUDDENLY.

"Suddenly," as used in a statement of a collision in the official log of a vessel, reciting that the weather was "thick with rain, clearing at intervals. Steamer proceeding with careful attention to the state of the weather. Suddenly a ship was sighted nearly ahead"—shows that the appearance was unexpectedly near and that it came upon the steamer suddenly. It necessarily suggests that the steamer found itself in close quarters with the other ship, and is not such an expression as would be likely to be used if she were a mile or half a mile away. *Bunge v. The Utopia* (U. S.) 1 Fed. 892, 909.

### SUDDENLY ASSAULTED.

One who is bitten while separating two dogs that are fighting cannot be said to have been "suddenly assaulted," within Pub. St. c. 93, § 6, authorizing any person to kill any dog "that may suddenly assault him or any person of his family." *Spaight v. McGovern*, 19 Atl. 246, 247, 16 R. L. 658, 7 L. R. A. 388.

### SUE.

To "sue," according to Webster, is "to seek justice or right by legal process." This definition is broad enough to include final process, and that the Legislature used the word "sued" in its broadest sense in the married persons' property act of June 3, 1887 (P. L. 332), providing that a married woman shall be capable of being sued for her torts in all respects as if she were a feme sole, is manifest from the expression "in all respects as if she were a feme sole," with which it is connected, and a writ of ca. sa. will lie against a married woman to enforce the payment of a judgment obtained for slanderous words uttered by her. *Kuklence v. Vocht*, 4 Pa. Co. Ct. R. 370, 372.

Act July 13, 1866 (14 Stat. 145), provides that all fines, penalties, and forfeitures shall and may be sued for and recovered, where not otherwise provided, in the name of the United States, in any proper form of action, or by any appropriate form of proceedings. Held, that the words "sued for and recovered" meant the same as "prosecuted for and recovered," and, taken in connection with the expression "any proper form of action, or by any appropriate proceeding," cannot be held to exclude a suit or prosecution by indictment. *United States v. Moore* (U. S.) 11 Fed. 248, 251.

The statutory provision that a married woman shall be capable of "being sued" for her torts in all respects as if she were a feme sole only means that a married woman may be sued upon her torts without joining her husband, and that any judgment recovered against her shall be collected from her separate property. It was not intended by such provision to uproot the principle which protects a married woman from arrest or imprisonment for any tort committed during coverture. *Vocht v. Kuklence*, 13 Atl. 199, 202, 119 Pa. 365.

The word "sue," as used in practice act (Laws 1874, p. 775), declaring that it shall not be lawful for any plaintiff to sue any defendant out of the county where the latter resides or may be found, except in local actions, and except that in every species of personal actions at law, where there is more than one defendant, plaintiff may commence his action where either of them resides, and

may have his writ issued directed to any county where the other defendant may be found, does not include a scire facias to revive a judgment. *Challenor v. Niles*, 78 Ill. 78, 79.

Act Cong. June 4, 1864 (13 Stat. 12), providing that national banks shall have power to "sue or be sued, complain and defend, in any court of law or equity as fully as natural persons," merely places these corporations on an equal footing with natural persons, and confers on them the right to sue and be sued in a federal court only to the same extent as natural persons, and under like circumstances and conditions. *St. Louis Nat. Bank v. Allen* (U. S.) 5 Fed. 551.

A covenant never to sue the obligor, where there is but one in the bond, will be construed into a release by the court, to avoid circuity of actions, and because such construction can affect nobody else. But where there are several obligors, if a covenant with one of them not to sue him were construed into a release, it would enable the other obligors, who are no parties to the covenant and who are strangers to the consideration, to take advantage of it, and therefore it will never be construed to include a release. *Crane v. Ailing*, 15 N. J. Law (3 J. S. Green) 423, 427.

The word "sue," as used in 2 Rev. St. (2d Ed.) p. 274, § 5, enacting that the assignee of any bond, note, or chose in action which has been assigned may sue and recover in his own name, authorizes the assignee to have a scire facias, since a scire facias is a suit or action. *Murphy v. Cochran* (N. Y.) 1 Hill, 339, 342.

#### **SUE, LABOR, AND TRAVEL.**

"Sue, labor, and travel," as used in a policy of marine insurance, providing that in case of any loss or misfortune it should be lawful and necessary for the insured to "sue, labor, and travel" in and about the defense, safeguard, and recovery of the vessel or any part thereof, without prejudice to the insurance made by the policy, and that the company would contribute to the charges thereof according to the rate and quantity of the sum insured by the policy, does not refer to expenditures made to repair damages caused by the risk insured against. The agreement to sue, labor, and travel has reference to charges not covered by the insurance, and does not embrace losses caused by damage to the property insured. Its object was to secure diligence in its preservation and protection, and thereby prevent a loss or reduce its amount, and to provide compensation for the labor done and expense incurred in accomplishing that end. *Alexandre v. Sun Mut. Ins. Co.*, 51 N. Y. 253, 257.

#### **SUE OUT.**

To "sue out" often means to petition for and take out, or to apply for and obtain, as to sue out a writ in chancery, or to sue out a pardon for a criminal. The expression is doubtless used in that sense when applied to the commencement of a suit in those jurisdictions where the first step is the issuing of a writ, followed by filing a petition, declaration, or bill. *South Missouri Lumber Co. v. Wright*, 114 Mo. 326, 333, 21 S. W. 811.

By the procurement of a blank form of process from the clerk or an attorney, suitably filled out and intended to be served, the writ or action may well be called "commenced" or "sued out." It is the intention and act combined which in fact constitute the institution of the suit. *Cross v. Barber*, 15 Atl. 69, 70, 16 R. I. 266.

A writ is not considered as legally "sued out" until it is delivered to the sheriff, with authority to him to serve it on the defendant. *Maddox v. Humphries*, 30 Tex. 494, 496.

Since a writ of execution in its essence is simply a precept addressed by the court to the sheriff, and must not only emanate from the court, but emanate to the officer commanded, it cannot be said to have been "sued out" until it has been either actually or constructively delivered to the sheriff. This might doubtless be done either by the mail or by a messenger sent with a definite intention of a delivery to the sheriff for the purpose of having it served, or by any other reasonable agency. But where the clerk simply delivered the execution to the plaintiff or his attorney, and it was returned to the clerk without delivery to the sheriff, either actual or constructive, it was not sued out, within the meaning of section 101 of the statute of March 8, 1831, so as to prevent the judgment becoming dormant. *Kelley v. Vincent*, 8 Ohio St. 415, 420.

"Suing out process" in equity is the same in meaning as suing out process at law. It means that upon the filing of a bill a subpoena is filled out by the clerk and delivered for service. In order that the writ may be deemed to be sued out, it must have left the possession of the officer who issued it, and must either have reached the possession of the officer who is to serve it, or some one who has the remedial of transmission to such officer. *United States v. American Lumber Co.* (U. S.) 85 Fed. 827, 830, 29 O. C. A. 431.

#### **SUERTES.**

"Suertes" is a term used in the Spanish law to designate lots within the limits of cities, pueblos, or towns used for the pur-

pose of cultivation or planting as gardens, vineyards, orchards, etc. It is distinguished from "solares," which are smaller lots on which houses, etc., are built, and from "ejidos," which are in the nature of commons. *Hart v. Burnett*, 15 Cal. 530, 554.

## SUFFER.

"Suffer," as used in Rev. St. § 2227, providing that no woman endowed of lands, tenements, or hereditaments shall commit or suffer waste on the same, etc., does not render the dowress liable for acts amounting to waste committed without her permission by third persons. *Willey v. Laraway*, 25 Atl. 436, 437, 64 Vt. 559.

Where a lessee covenants not to make or suffer any arrest, or any unlawful, improper, or offensive use of the premises, etc., the words "make or suffer" should be interpreted as a stipulation that there shall be no unlawful use by the original lessee, or by any person who is occupying under him; an unlawful use by a person occupying under him coming within the meaning of the word "suffer." *Miller v. Prescott*, 39 N. E. 409, 410, 163 Mass. 12, 47 Am. St. Rep. 434.

A debtor who remains passive and supine, and permits his property to be taken by one creditor at the expense of the others, has "suffered and permitted" a preference to be obtained, within Bankr. Act July 1, 1898, c. 541, § 3, subd. 3, 30 Stat. 546 [U. S. Comp. St. 1901, p. 3422] providing that an act of bankruptcy by a person shall consist of his having suffered or permitted, while insolvent, any creditor to obtain a preference through legal proceedings, etc. In *re Rome Planing Mill* (U. S.) 96 Fed. 812, 815.

The "suffering" of a judgment, within the meaning of the bankruptcy act, does not imply anything more than mere passive unresistance of an insolvent debtor to regular judicial proceedings against him. In *re Gallagher* (U. S.) 6 Am. Bankr. R. 255, 256.

Where, within four months before the filing of a petition in involuntary bankruptcy, a judgment was entered against the alleged bankrupt, without his knowledge or consent, upon a warrant of attorney to confess judgment given by him in 1885, the judgment entered and the levy of an execution thereon constitute a preference suffered or permitted by the debtor, within the meaning of Bankr. Act July 1, 1898, c. 541, § 3, cl. 3, 30 Stat. 546 [U. S. Comp. St. 1901, p. 3422], and his failure to vacate and discharge his preference so obtained is an act of bankruptcy. *Wilson v. Nelson*, 7 Am. Bankr. R. 142, 145, 183 U. S. 191, 22 Sup. Ct. 74, 46 L. Ed. 147.

Under Bankr. Act July 1, 1898, c. 541, § 3, 30 Stat. 546 [U. S. Comp. St. 1901, p. 3422] an insolvent debtor commits an act

of bankruptcy "by suffering or permitting" a creditor to obtain a preference to legal proceedings, if he fails to discharge an attachment levied by such creditor on his stock of goods and allows a sale to be made thereunder. In *re Reichman* (U. S.) 91 Fed. 624, 1 Am. Bankr. R. 17.

Where a debtor, many years before the enactment of the bankruptcy law, gave a promissory note with warrant of attorney, based on a good consideration, on which the creditor entered judgment after the passage of the law, the debtor not procuring such action to be taken nor being able to prevent it, it cannot be said that he has "suffered or permitted" the creditor to obtain a preference through legal proceedings, within the meaning of Bankr. Act July 1, 1898, c. 541, § 3, cl. 3, 30 Stat. 546 [U. S. Comp. St. 1901, p. 3422]; and hence the transaction does not constitute an act of bankruptcy on the part of the debtor. In *re Nelson* (U. S.) 98 Fed. 76, 1 Am. Bankr. R. 63 (following *New York City Tenth Nat. Bank v. Warren*, 96 U. S. 539, 24 L. Ed. 640).

Where the members of an insolvent firm appeared in a suit against them for the appointment of a receiver, and named persons for such receiver, they must be held to have "suffered or permitted" any preference obtained by creditors through such suit. In *re Kersten* (U. S.) 110 Fed. 929, 6 Am. Bankr. R. 516.

### As allow, admit, or permit.

See, also, "Permission—Permit."

One of the meanings of the word "suffer" is to allow, to admit, or to permit. *Gregory v. Marks* (U. S.) 10 Fed. Cas. 1194, 1198; *Adams v. Nichols* (Vt.) 1 Alkens, 316, 318; *City of Ft. Wayne v. DeWitt*, 47 Ind. 391, 394; *Dunseath v. Pittsburg, A. & M. Traction Co.*, 28 Atl. 1021, 1022 (citing *Philadelphia & R. R. Co. v. Long*, 95 Pa. 257).

"Suffer," as used in a note, making such note due in case the maker permits or suffers any attachment to be issued against his property, is synonymous with "permit," and is not used in the sense of "tolerate"; so that the provision does not mean that if the attachment shall issue with the maker's permission, or without it, but implies acquiescence in the issuance of the attachment, and the power to prohibit, prevent, or hinder it. *Robertson v. Ongley Electric Co.*, 31 N. Y. Supp. 605, 607, 82 Hun, 585.

"Suffer," as used in Comp. St. p. 454, c. 55, providing that no swine shall be allowed to run at large on the highways or commons, and, if any person or persons shall "suffer his or their swine to run at large on the highways or commons," it shall be the duty of the haywards to impound such swine, means to allow or permit. *Adams v. Nichols* (Vt.) 1 Alkens, 316.

To "suffer" an act to be done by a person who can prevent it is to permit or consent to it; to approve of it, and not to hinder it. It implies a willingness of the mind. Such is not only the popular, but the proper, meaning of the word as used in the act relating to sheep; section 6 imposing a penalty upon persons who shall suffer their sheep to run at large. *Sellick v. Sellick*, 19 Conn. 501, 505.

In construing a statute providing that "the board of education of any school shall permit children of school age who reside farther than 1½ miles from the school where they have legal residence to attend the nearest school," the court said: "Webster defines 'permit' as to grant permission; to give leave; to grant express license or liberty to. As distinguished from 'allow' or 'suffer,' 'permit' is more positive, denoting a decided assent, either directly or by implication; 'allow' is more negative, and denotes only acquiescence or an abstinence from prevention; 'suffer' is used when our feelings are adverse, but we do not think best to resist. The instructor of a school may 'suffer' some things to pass unnoticed which he does not 'allow,' and 'allow' certain practices for a time which he would by no means directly 'permit.'" The ordinary meaning would be that the board of education is to do some affirmative act; to grant permission to children to attend the nearest school. *Board of Education v. Board of Education*, 3 Ohio S. & C. P. Dec. 70, 71.

#### Knowledge and intention implied.

The word "suffer" includes knowledge of what is to be done under the sufferance and permission, and intention that what is done is what is to be done. The word "suffer" is not as positive a word as the word "permit"; the latter denoting a decided assent. *Wilson v. State*, 46 N. E. 1050, 1051, 19 Ind. App. 389.

A debtor suffers or procures his property to be seized on execution when, knowing himself to be insolvent, an admitted creditor, who has brought suit against him, and who he knows will, unless he applies for the benefits of the bankrupt act, secure a preference over all other creditors, proceeds in the effort to get a judgment until one has been actually gotten by the perseverance of the creditor and the default of the debtor. *Buchanan v. Smith*, 83 U. S. (16 Wall.) 277, 308, 21 L. Ed. 280.

The word "suffer" is defined as to allow, to admit, to permit. It implies a knowledge of the thing suffered or done; and a forfeiture for suffering a thing to be done cannot be sustained without proof of knowledge. *Gregory v. United States* (U. S.) 10 Fed. Cas. 1195, 1197.

It is no defense to an application for the revocation of a liquor tax certificate, be-

cause of a violation of Liquor Tax Law, § 23 (*Heydecker's Gen. Laws*, p. 2378, c. 29), providing that no person as owner or agent shall "suffer or permit" gambling in the place in which the traffic is carried on, that the violation was permitted by an agent, in the absence and without the knowledge and consent of the certificate holder. In re *Cullinan*, 84 N. Y. Supp. 492, 88 App. Div. 6.

"Suffer," as used in an ordinance providing that any owner of certain animals who shall suffer the same to run at large shall be subject to a certain penalty, etc., means knowingly permitting such animals to run at large, or being guilty of such negligent conduct in enabling them to do so as is equivalent thereto. *Town of Collinsville v. Scanland*, 58 Ill. 221, 225.

#### As paid.

A guaranty that a person shall become liable for "damages suffered" means damages paid. *Beekman v. Van Dolsen*, 24 N. Y. Supp. 414, 418, 70 Hun, 288.

#### Passivity implied.

To "permit" is defined as not to hinder. Webster defines the word as more negative than "allow"; that it imports only acquiescence or an abstinence from prevention. He defines the word "suffer" as having an even stronger passive and negative sense than "permit," and as implying sometimes mere indifference. It would seem, therefore, that to permit or suffer implies no affirmative act. It involves no intent. It is mere passivity, indifference, abstaining from preventive action. For an insolvent debtor to suffer an execution to issue on a judgment, and to permit his personal property to be levied on and sold thereunder, without taking affirmative action to pay the judgments and to vacate and discharge the executions, is an act of bankruptcy, within Bankr. Act July 1, 1898, c. 541, § 3, 30 Stat. 546 [U. S. Comp. St. 1901, p. 3422], providing that acts of bankruptcy shall consist of an insolvent debtor having suffered or permitted, while insolvent, any creditor to obtain a preference through legal proceedings, and not having vacated or discharged such preference. In re *Thomas* (U. S.) 103 Fed. 272, 274.

The word "suffered," in the rule that the words "grant, bargain, and sell," in a conveyance of land in fee simple, is a covenant only against acts done or suffered from the grantor, necessarily implies that it is not confined to the voluntary acts of the grantor; and it has never been doubted that he is liable on a judgment obtained against him by adverse proceedings. It is apparent that the same principle extends to and includes a tax assessed on the land during his title, nor ought it to make any difference that such tax does not create personal liability. A tax on unceded lands would be such an in-



cumbrance. *Shaffer v. Greer*, 87 Pa. 370, 375.

#### Power to prevent implied.

A deed of land, covenanting that the grantor had not done or suffered to be done anything whereby the premises were or might be in any manner incumbered or charged, means that the incumbrance was one within his power and duty to have avoided. "Suffered," in that connection, implies responsible control, and it cannot be held to apply to a thing not caused by the act of the party, nor within his power to prevent. An incumbrance on the property at the time the grantor acquired the title to it is not one suffered by him. *Smith v. Elgerman*, 31 N. E. 862, 5 Ind. App. 269, 51 Am. St. Rep. 281.

"Procured or suffered," as used in a bankruptcy act avoiding a judgment procured or suffered by the insolvent as a preference, cannot be construed to apply to a judgment obtained in proceedings by the cestui que trust to procure the removal of the insolvent, who was the trustee; the judgment being for the payment of the trust fund. *Fry v. Pennsylvania Trust Co.*, 46 Atl. 10, 12, 195 Pa. 343.

#### Procure distinguished.

Under a provision of a bankruptcy act to the effect that if one, being insolvent or in contemplation of insolvency, shall "procure or suffer" his property to be taken on legal process, he commits an act of bankruptcy, etc., it is said that the word "procure" and the word "suffer" have different meanings. "Procure" is active, while "suffer" is passive. A man may suffer a thing to be done when he has the means of doing something other than suffering it to be done. So it is held that if the person omits to go into bankruptcy under a state of facts such that he knew that his property might be taken on legal process, though against his will, he must be regarded as having suffered his property to be taken on legal process within the meaning of the act. In *re Dibblee* (U. S.) 7 Fed. Cas. 651, 654.

The word "suffer," as used in section 39 of the bankruptcy act, providing that if any insolvent person shall give any warrant to confess judgment, or procure or suffer his property to be taken on legal process, with intent to give a preference, he shall be deemed to have committed an act of bankruptcy, is different from the word "procure." "Suffer" implies a passive condition, so to speak, as to allow, to permit, and not a demonstrative, active course, like the word "procure." It is the very definition to apply to the case of pressure and powerful motives brought to bear upon a party. Under the influence of this pressure and the operation of these motives, he suffers a thing to be done—that is, allows or permits it—and the

law intended to prevent this. *Campbell v. Traders' Nat. Bank* (U. S.) 4 Fed. Cas. 1192, 1195.

#### Procure synonymous.

The phrase "suffer his property to be taken," in section 39 of the bankrupt act of 1867, which authorizes proceedings in a voluntary bankruptcy against a debtor who suffers his property to be taken by legal process with intent to give a preference to one or more of his creditors, is used in the same meaning as the phrase "procuring his property to be attached or seized on execution," in section 35 of the act, which declares that an attachment or seizure under execution of such person's property, procured by him with a view to give a preference, shall be void, etc. *Wilson v. City Bank of St. Paul*, 84 U. S. (17 Wall.) 473, 482, 21 L. Ed. 723.

#### Voluntary act implied.

The word "suffer," as used in Bankr. Act July 1, 1898, c. 541, § 3, cl. 3, 30 Stat. 546 [U. S. Comp. St. 1901, p. 3422], defining an act of bankruptcy to occur where an insolvent suffered or permitted any creditor to obtain a preference through legal proceedings, which was not vacated or discharged, denotes a voluntary act of the debtor. It does not denote or describe acts of the creditor. The debtor must by this act consciously and voluntarily in some degree co-operate with the creditor in obtaining the preference. He cannot suffer or permit what he cannot hinder. *Duncan v. Landis* (U. S.) 106 Fed. 839, 849, 45 C. C. A. 666.

Act 1705, providing that no swine shall be "suffered" to go at large, means voluntarily allowing the hogs to go at large unringed and unyoked. *Commonwealth v. Fourteen Hogs* (Pa.) 10 Serg. & R. 393, 396.

#### Willfulness or carelessness implied.

Rev. St. § 4202, makes it unlawful for any person, being the owner of horses, cattle, etc., to suffer such animals to run at large in any public road or highway. Held, that the phrase "suffer such animals to run at large" involves the element of willfulness or carelessness on the part of the owner, and hence the statute did not impose on the owner anything more than the duty to use reasonable care and precaution in restraining his animals on his own premises; and if they were breachy or unruly, and escaped without the owner's fault, he having used reasonable care and precaution to restrain them, he could not be said to be within the prohibition of the statute. *Pittsburgh, C. & St. L. Ry. Co. v. Howard*, 40 Ohio St. 6, 8.

#### SUFFERING CONDITION.

Rev. St. tit. 59, § 5, providing that any stray beast in a "suffering condition" may be taken up and cared for, etc., means con-

dition in which the animal itself endured pain, distress, inconvenience, or damage for want of food or other cause, and needed relief for its owner's sake. *Sturges v. Raymond*, 27 Conn. 473, 478.

## SUFFERANCE.

See "Tenant at Sufferance."

## SUFFICIENT.

See "Not Sufficient."

"Sufficient," as defined by Webster, means adequate to suffice; equal to the end proposed; competent. *Pensacola & A. Ry. Co. v. State*, 5 South. 833, 835, 25 Fla. 310, 3 L. R. A. 661.

Act May 11, 1897, § 4 (P. L. 53), providing that municipal authorities shall, before issuing any obligations for an increase of municipal indebtedness, assess and levy an annual tax, which shall be equal to and "sufficient for," and applied exclusively to, the payment of the interest and principal of such debt within a period not exceeding 30 years from the date of such increase, implies that a discretion is to be exercised to determine what will be sufficient, and gives the clue with which to reach the real meaning of the statute. *Barr v. City of Philadelphia*, 43 Atl. 335, 338, 191 Pa. 438.

## SUFFICIENT ABILITY.

Laws 1885, c. 422, making it a misdemeanor for the husband, being of "sufficient ability," to refuse or neglect to provide for his wife, refers as well to capacity or skill to earn or acquire money, as to property actually owned. A husband may earn money by his industry or labor, or he may and often does gain a fortune or receive a large salary in consequence of his skill in some direction, and thus become able to support his wife and family. Ability and refusal to support constitute one act of delinquency, and where a man has physical and mental power to acquire means he comes within the intent of the law. *State v. Witham*, 35 N. W. 934, 935, 70 Wis. 473.

The Code of Criminal Procedure provides that the father, mother, and children, "of sufficient ability," of a poor person unable to maintain himself, must maintain him. In an action for wrongful death, where recovery for loss of services was sought, defendant requested the court to charge that the father has no claim on the earnings of a son beyond the age of 21 years, except in case the father becomes poor, unable to support himself, and the son is shown to have means. Held, that the words "of sufficient ability," as used in the statute, should be construed

as synonymous with the words "is shown to have means," as used in the request to charge. *Keenan v. Brooklyn City R. Co.*, 40 N. E. 15, 145 N. Y. 348.

Gen. St. c. 20, § 13, requiring a town in which a transient person is suddenly taken sick to care for such person and to recover the expenses thereof from the town in which such person is legally settled, if the person is not of "sufficient ability" to defray such expense, is not satisfied by the fact that a married woman is the owner of a note, since she cannot be sued thereon, and hence the town of her settlement is chargeable with her support. *Town of Danville v. Town of Sheffield*, 50 Vt. 243, 249.

## SUFFICIENT BARRIER.

The "sufficient barrier" which a town is required to erect when an excavation is made in a public highway does not mean one which should be absolutely safe under all contingencies, but one which would be sufficient, if not thrown down or removed. *Myers v. City of Springfield*, 112 Mass. 489, 491.

## SUFFICIENT CABLES.

A contract by which the hirer of a vessel stipulated to furnish her with "sufficient cables" means no less than that they are actually sufficient, and not merely that they are apparently so. *Parker's Ex'x v. Gillingham*, 23 N. C. 545, 552.

## SUFFICIENT CAUSE.

See "Good and Sufficient Cause."  
Other sufficient cause, see "Other."

A service of citations upon a widow, and a decree for the probate of her husband's will, where she is non compos mentis and the court has appointed no representative for her, is "sufficient cause," within Code Civ. Proc. § 7481, subd. 6, which provides that the surrogate shall have power to open, modify, or set aside a decree or order of his court, or to grant a new trial, for fraud, newly discovered evidence, or other sufficient cause, to open such decree and grant a new trial therein. *In re Donlon*, 21 N. Y. Supp. 114, 115, 66 Hun. 199.

"Sufficient cause," within the meaning of Code Civ. Proc. § 248, subd. 6, providing that the surrogate may grant a new hearing for fraud, clerical error, or other sufficient cause, in the same manner as a court of record exercises the power, does not include an erroneous construction of law. *In re Beach*, 24 N. Y. Supp. 717, 3 Misc. Rep. 393.

"Sufficient cause," as used in Const. art. 6, § 10, providing that the judges of inferior courts shall have power to issue writs of certiorari on sufficient cause, means "where the

law gives an appeal, and the party is deprived of it without any fault or negligence on his part, and has in addition a meritorious case." *Tomlinson v. Board of Equalization*, 12 S. W. 414, 415, 88 Tenn. (4 Pickle) 1, 6 L. R. A. 207.

The phrase "without sufficient cause," as used in Rev. St. § 4529, as amended by Act Dec. 21, 1898, c. 28, § 4, 30 Stat. 756 [U. S. Comp. St. 1901, p. 3077], prescribing the time for the payment of wages of seamen, and declaring that every master who neglects or refuses to make payment in the manner prescribed without sufficient cause shall be liable to penalty, is equivalent to "without reasonable cause." *The George W. Wells* (U. S.) 118 Fed. 761, 763.

The fact that the next of kin of a testator was not cited in proceedings for the probate of a will, and had no knowledge of a proceeding which was calculated to deprive him of his possible rights as heir at law and next of kin, is "sufficient cause," within Code Civ. Proc. § 2481, for opening the probate of the will as to such heir at law. *In re Odell's Estate*, 23 N. Y. Supp. 143, 144, 1 Misc. Rep. 890.

#### **As good cause.**

The term "sufficient cause" is synonymous with the term "good cause." *Kendall v. Briley*, 86 N. C. 56, 58.

#### **As legal cause.**

The phrase "sufficient cause," as used in the statute, means some legal reason, such as the filing of an answer creating an issue, or the discovery of objections fatal to the proceedings or the jurisdiction of the judge, and is so used in Code Civ. Proc. § 2249, providing that in summary proceedings, if sufficient cause is not shown, the justice must make a final order awarding to the petitioner the possession of the property. *People v. Murray*, 23 N. Y. Supp. 160, 162, 2 Misc. Rep. 152.

A cause which is "sufficient" to authorize a removal from office of a city officer means legal cause, and not any cause which the council may think sufficient. The cause must be one which specially relates to and affects the administration of the office, and must be restricted to something of a substantial nature, directly affecting the rights and interests of the public. A cause must be one attacking qualifications of the officer or his performance of its duties, showing that he is not a fit or proper person to hold the office. *State v. City of Duluth*, 55 N. W. 118, 120, 53 Minn. 238, 39 Am. St. Rep. 595.

In Comp. St. § 37, providing that, when the pleadings of the parties shall have taken place, the justice shall, upon the application of either party, if sufficient cause be shown, on oath, adjourn the case for any

time not exceeding 30 days, "sufficient cause" means some good and sufficient legal cause or excuse for delay asked, and not any pretext which, in the discretion of the party or justice, might be deemed sufficient. *School Dist. No. 7 of Wright County v. Thompson*, 5 Minn. 280, 283 (Gil. 221, 224).

#### **SUFFICIENT CONSIDERATION.**

Civ. Code, § 2235, providing that all transactions between a trustee and his beneficiary during the continuance of the trust, or while the influence acquired by the trustee remains, shall be presumed to be entered into by the latter without "sufficient consideration" and under undue influence, does not mean merely "sufficient to support a contract between ordinary parties, but sufficient to support the particular transaction." *Golson v. Dunlap*, 14 Pac. 576, 578, 73 Cal. 157.

#### **SUFFICIENT DEED.**

See "Good and Sufficient Deed."

#### **SUFFICIENT DESCRIPTION.**

A "sufficient description" of property in a chattel mortgage to charge third parties with notice is such a description as will enable third persons, aided by inquiries which the instrument itself indicates and directs, to identify the property. *Sandwich Mfg. Co. v. Robinson*, 49 N. W. 1031, 83 Iowa, 567, 14 L. R. A. 126.

#### **SUFFICIENT DISTRESS.**

A lease provided, among other things, for the payment of rent reserved, and declared that the lease was on the express condition "that, if no sufficient distress can be found on the premises to satisfy such rent due and in arrear, it shall be lawful for the grantor to enter," etc. Held, that the phrase "sufficient distress," in the lease, was not equivalent to "sufficient property to satisfy the rent," but referred to property, not only sufficient in kind and value for that purpose, but which, in addition, was subject by law to be distrained and sold in satisfaction of the rent in arrears. The words include the idea of an existing legal remedy, as well as the property subject to it. *Van Rensselaer v. Snyder*, 13 N. Y. (3 Kern.) 299, 303; *Hosford v. Ballard* (N. Y.) 39 How. Prac. 162, 167.

#### **SUFFICIENT DRAFT.**

A contract for the installation of a heating plant, requiring the purchaser to furnish flues of a "sufficient draft" for the ranges used in connection with the system, means sufficient for the ranges used in the ordinary way; there being nothing to show

that the ranges would require a greater draft for the purpose for which they were used than is commonly used with such ranges. *Brummett v. Nemo Heater Co.*, 59 N. E. 58, 59, 177 Mass. 480.

### SUFFICIENT EFFECTS.

An executrix gave an acceptance for a debt due from her testator, taking an engagement from the drawer to renew the bill from time to time until "sufficient effects" were received from the estate of the testator. Held, that this meant sufficient effects in the ordinary course of administration, and that she had not precluded herself from first applying assets to pay £3,000 to trustees for her own use in discharge of a bond given by her. *Bowerbank v. Monteiro*, 4 Taunt. 843, 846.

### SUFFICIENT EVIDENCE.

By "sufficient evidence" is meant that amount of proof which ordinarily satisfies an unprejudiced mind beyond reasonable doubt. *Moore v. Stone* (Tex.) 36 S. W. 909, 910 (citing 1 Greenl. Ev. § 2); *Missouri Pac. Ry. Co. v. Bartlett*, 16 S. W. 638, 639, 81 Tex. 42; *State v. Warford*, 16 S. W. 886, 887, 106 Mo. 55, 27 Am. St. Rep. 322 (citing 1 Greenl. Ev. p. 4, § 2); *Campbell v. Burns*, 46 Atl. 812, 814, 94 Me. 127 (citing 1 Greenl. Ev. § 2); *Richmond & D. R. Co. v. Trammel* (U. S.) 53 Fed. 196, 201.

"Sufficient legal evidence," within the rule that a grand jury should not indict unless there is such evidence, means legal evidence which proves the crime, so that a trial jury may convict. *People v. Stern*, 68 N. Y. Supp. 732, 733, 33 Misc. Rep. 455.

"Sufficient evidence" is such as is satisfactory to the purpose, satisfactory in its legal sense, or such as satisfies the law as to the incidents of a given fact; and, if such evidence of the fact be not submitted, then the evidence may be fairly said to be insufficient to sustain a verdict based thereon. *Mallery v. Young*, 22 S. E. 142, 143, 94 Ga. 804.

"Sufficient evidence" is that which is satisfactory for the purpose. Civ. Code Ga. 1895, § 5143; Pen. Code Ga. 1895, § 983.

### As prima facie evidence.

"Sufficient," as used in Rev. St. Ark. p. 687, c. 123, § 96, providing that a sheriff's deed shall be taken and considered by the court as sufficient evidence of the authority under which the sale was made, the description of the land, and the price at which it was purchased, is a synonym for "prima facie" only, and not "conclusive." *Parker v. Overman*, 59 U. S. (18 How.) 137, 141, 15 L. Ed. 313.

"Sufficient," as used in Laws Fla. c. 376, § 6, providing that the commissioners authorized and required to make for each railroad corporation a schedule of just and reasonable rates or charges for transportation of passengers and freights and cars, and such schedule should, in any suit brought against any said railroad corporation wherein its charges were involved, be admitted and taken in law courts of the state as sufficient evidence that the rates fixed therein were just and reasonable rates and charges, does not mean conclusive. "Sufficient," as defined by Webster, means adequate to suffice; equal to the end proposed; competent. *Pensacola & A. R. Co. v. State*, 5 South. 833, 835, 25 Fla. 310, 3 L. R. A. 661.

The word "sufficient," as used in a statute providing that when a debt due to the state appears on the books of the Auditor, or any other public officer whose duty it shall be to audit and keep a credit account of such debt, a copy of the balance due on the books of the Auditor or officer, certified by him to be a correct and true balance, shall be "sufficient evidence of such indebtedness," must be interpreted to mean "prima facie"; and hence, in an action on the official bond of the Treasurer, a copy of his accounts from the Auditor's book, properly certified, is prima facie evidence of the state of his accounts, and the jury should be instructed not to go into the accounts, but to take the balance certified by the Auditor, unless the accuracy of the items are impeached. *State v. Newton*, 33 Ark. 276, 284.

### SUFFICIENT FENCE.

See "Good and Sufficient Fence."

"Sufficient fences," which a person must maintain around premises or fields to entitle him to recover for a trespass thereon, do not necessarily mean lawful fences, but mean fences such as farmers of practical knowledge and experience would consider as sufficient to protect the crop from injury by usually orderly cattle. *Robinson v. Fetterman* (Pa.) 14 Atl. 245, 246.

When a general law prescribes what shall be deemed a sufficient fence, a special statute, and by parity of reasoning an agreement, requiring a "sufficient fence," without a more particular description, will be held to refer to and adopt the standard prescribed by such general law. *Albright v. Bruner*, 14 Ill. App. 319, 320, 321.

The term "sufficiently fenced," in a complaint against a railroad for killing stock at a place where it is alleged that the road was not sufficiently fenced, is a sufficient compliance with a statute which uses the language "securely fenced." "We think the word 'sufficiently,' as used in the complaint,

is of the same import and meaning as the word 'securely.'" *Evansville & T. H. R. Co. v. Kipton*, 101 Ind. 197, 198.

A "sufficient and suitable fence," as used in the chapter relating to animals injured by railroads, is a fence at least 4½ feet high, constructed of posts and wire, the top wire to be 4½ feet above the ground, and shall have at least four wires, upon posts not exceeding 20 feet apart. *Comp. Laws N. M.* 1897, § 243.

#### **SUFFICIENT JAIL.**

Within the meaning of a statute providing that "if there is no jail in a county, or it is insufficient, the sheriff may commit any person in his custody, either on civil or criminal process, to the nearest sufficient jail of another county," a jail which is in a filthy, offensive, or unhealthy condition is not a "sufficient jail," nor kept in a good and "sufficient condition." *Stuart v. La Salle County Sup'rs*, 83 Ill. 341, 345, 25 Am. Rep. 397.

#### **SUFFICIENT MEANS.**

Battle's Revisal, c. 37, § 10, providing that where a woman sues for a divorce, and it appears that she is entitled to relief if the facts stated in her complaint be true, she shall be granted alimony pendente lite if she has not "sufficient means" on which to subsist during the pendency of the suit, signifies her means or income derived from the corpus of her estate, and not her capital. *Miller v. Miller*, 75 N. O. 70, 71.

#### **SUFFICIENT NOTE.**

See "Good and Sufficient Note."

#### **SUFFICIENT QUANTITY:**

*Comp. Laws*, c. 131, § 27, exempting from execution a "sufficient quantity of hay, grain, feed, and roots for properly keeping for six months" the animals elsewhere referred to as exempt, means that only those articles shall be exempt which may be necessary for keeping such of the animals mentioned as the debtor has at the time of the levy. The exemption is given to render that of the animals practically beneficial. *King v. Moore*, 10 Mich. 538.

#### **SUFFICIENT RAILING.**

A "sufficient railing" at the side of a highway, which the town is bound to provide, is only such a railing as is suitable for the ordinary exigency of travel upon a road at such a place. *Lyman v. Inhabitants of Amherst*, 107 Mass. 339, 346.

#### **SUFFICIENT REPAIR.**

As used in the rule of law that it is the duty of a railroad company to keep its brakes in sufficient repair, the words "sufficient repair" are equivalent to the words "in proper repair and safe condition"; that is, they are reasonably safe for the purposes for which they are intended. *Richmond & D. R. Co. v. Burnett*, 14 S. E. 372, 373, 88 Va. 538.

#### **SUFFICIENT SAMPLES.**

A contract by which a principal agrees to supply his agent with "sufficient samples," as may be called for, means only that the agent shall be furnished with a quantity reasonably sufficient for the business actually done. *Jensen v. Perry*, 17 Atl. 665, 126 Pa. 495, 12 Am. St. Rep. 888.

#### **SUFFICIENT SECURITY.**

See "Good and Sufficient Security."

The phrase "sufficient security," used in an agreement by which a person agreed to lease to another a certain tavern and land for one year for a specified rent, for the payment of which the latter agreed to give sufficient security, means adequate security, and it makes no difference whether it is personal or real security. The fact that the real estate offered as security had a previous mortgage upon it is no legal objection to its sufficiency. It might notwithstanding be abundantly adequate. *Hard v. Brown*, 18 Vt. 87, 97.

#### **SUFFICIENT SUPPORT.**

See "Good and Sufficient Support."

#### **SUFFICIENT SURETIES.**

"Sufficient sureties," as used in *Gen. St.* 1878, c. 13, § 60, providing that, on an appeal from the decision of county commissioners on a petition to lay out highways, a bond shall be executed to a supervisor of the town or the commissioners of the county, with sufficient sureties, means two or more sureties. *Houston County v. Fitch*, 16 N. W. 411, 412, 30 Minn. 532.

#### **SUFFICIENT TIME.**

A guaranty of a machine, stating that if, on starting the machine, it should in any way prove defective or fail to work, the purchaser should give prompt written notice to the agent from whom he purchased and allow "sufficient time" for a person to be sent to put it in order, and the defective part, if any, replaced, means a reasonable time under the circumstances. *Sandwich Mfg. Co. v. Feary*, 33 N. W. 485, 486, 22 Neb. 53.

**SUFFICIENT WATER.**

"Sufficient water," as used in a lease of water power by which it was agreed that a quantity of water should be furnished sufficient to make, in all, a certain number of cubic feet per minute under an eight-foot head, refers to the supply of water afforded by the stream, with the covenants, in respect to the character and condition of the dam, the canal, and the raceway observed and complied with. *Cargill v. Thompson*, 52 N. W. 644, 646, 50 Minn. 211.

**SUFFICIENCY OF HIGHWAY.**

The "sufficiency of a highway" has reference to its condition, and not to the manner in which a person travels over it; and where an accident arises, not from any want of repair in the surface of the highway, but from the reckless operation of a vehicle thereon, such accident does not arise from insufficiency of the highway, within the meaning of a statute making municipal corporations liable for injuries resulting from the insufficiency of highways. *Hutchinson v. Town of Concord*, 41 Vt. 271, 273, 98 Am. Dec. 584.

**SUFFRAGE.**

It may be laid down as a general proposition that the "right of suffrage" may be regulated and modified, or withdrawn, by the authority which conferred it. The right is not a natural right, of which a person cannot be deprived, but is a privilege, which may be granted or denied by the people, or the department of government to which they have delegated power in the matter, as general policy may require. *People v. Barber* (N. Y.) 48 Hun, 198; *Blair v. Ridgely*, 41 Mo. 63, 97 Am. Dec. 248. There have always been limitations upon the right of suffrage, even in the most liberal democracies. In nearly all countries, for example, the right has been denied to women, minors, aliens, and persons non compos mentis. In England at an early day the right to vote for members of Parliament was limited to those possessed of a certain property qualification; and in a number of the United States the right of suffrage depends upon the possession of a certain amount of property, or upon the payment of taxes, and in some of the states it depends upon the ability to read and write. The right in most states has been fixed by the Constitutions, subject to amendment by vote of the people. 29 Am. Law Reg. 873-920. In some states the power both to prescribe the qualifications of voters and to regulate elections is expressly delegated to the Legislature. Although it is not uncommon in the older Constitutions, there are now no states of the Union which require the possession of property as a requisite for voting at general elections. In many of the

states, however, where questions of a local nature affecting property, such as issuing bonds, incurring debts, etc., are to be submitted to the people of a county, district, or municipality, a property qualification for suffrage is not infrequently prescribed. *Spitzer v. Village of Fulton*, 68 N. Y. Supp. 660, 662, 33 Misc. Rep. 257 (citing *McGraw v. Green County Com'rs*, 89 Ala. 407, 8 South. 852; *Murdock v. Welmer*, 55 Ill. App. 527).

**SUGGEST.**

In a will in which the testator bequeaths money to a church, and suggests, if the spire or steeple be unfinished at the time of his death, funds be used for the purpose of completing the same, "suggest" only indicates a desire, and is not a positive direction for such use of the money. There is nothing in the word "suggest," either in its meaning as ordinarily employed or as affected by the context of the will, that can be regarded as expressive of confidence, or belief, or desire, or hope, or will, or as the equivalent of a word of entreaty or recommendation. "Suggest" is, in fact, not a precatory word at all, in the ordinary sense. *Williams v. Committee of Baptist Church*, 48 Atl. 930, 931, 92 Md. 497, 54 L. R. A. 427.

**SUGGESTION.**

"Suggestion" is often employed as a synonym for the "captation" of the civil law; both being closely analogous to the "undue influence" known to the common law. *Zerega v. Percival*, 15 South. 476, 480, 46 La. Ann. 590.

**SUICIDE.**

See "Commit Suicide"; "Die by His Own Hand or Act"; "Die by His Own Hand or Act, Sane or Insane"; "Voluntary Suicide."

"Suicide" is the destruction of one's self. *Coffey v. Home Life Ins. Co.* (N. Y.) 44 How. Prac. 481, 489.

"Suicide" means self-killing. It is not restricted to mean a wrongful act of self-murder. It means self-killing to the same extent as homicide means killing any one else. There may be excusable homicide, as well as felonious; and suicide was only cognizable in law when a person was *felo de se* or guilty of a felonious act. If non compos mentis, the actor in homicide or suicide commits no crime. *John Hancock Mut. Life Ins. Co. v. Moore*, 34 Mich. 41, 42, 45.

In the Century Dictionary a "suicide" is defined to be one who commits suicide; at common law, one who, being of the years of discretion and sound mind, destroys himself,

and the act itself is defined to be designedly destroying one's own life. To constitute suicide at common law, the person must be of the years of discretion and of sound mind. *Weber v. Supreme Tent of Knights of Macabees of the World*, 65 N. E. 258, 172 N. Y. 490, 92 Am. St. Rep. 753.

The term "death by suicide," as used in a life policy, means death by a criminal act of self-destruction. *Breasted v. Farmers' Loan & Trust Co.* (N. Y.) 4 Hill, 73.

"Suicide" is not criminal; it not being punishable. At common law suicide was both criminal and felonious, although the punishment, except of anticipatory dread, was of necessity visited upon the innocent. As to the abstract immorality of suicide generally, opinions may differ; but all will admit that in some cases it is ethically defensible, else how could a man "lay down his life for his friend"? Suicide may be self-sacrifice, as when a woman slays herself to save her honor. Sometimes self-destruction, humanely speaking, is excusable, as where a man curtails by weeks or months the agony of an incurable disease. *Campbell v. Supreme Conclave I. O. H.*, 49 Atl. 550, 553, 68 N. J. Law, 274, 54 L. R. A. 576.

The word "suicide," as used in an insurance policy, is synonymous with other phrases employed to convey the idea of voluntary, intentional self-destruction. *Grand Lodge I. O. M. A. v. Wieting*, 48 N. E. 59, 62, 168 Ill. 408, 61 Am. St. Rep. 123.

The term "suicide" has no technical or legal meaning. It is derived from the Latin; but the compound word "suicidium," from which the English word is said to be derived, is not to be found in Latin dictionaries or glossaries. In all the English books in which it occurs, legal or other, the word "suicide" is almost invariably used to denote a criminal act. In *Johnson's Dictionary* "suicide," when used as denoting an act, is said to mean "self-murder," "the horrid crime of destroying one's self," and, when used as denoting a person, is said to mean a "self-murderer." In *Webster's Dictionary* the same meaning is given, and so in *Rees' Encyclopedia* and in the *Encyclopædia Britannica*. In 4 Bl. Comm. 189, the term "suicide" is used as meaning a *felo de se*. *Clift v. Schwabe*, 3 C. B. 437, 458.

The word "suicide," in *Rev. St. Mo.* 1879, § 5982, providing that it shall be no defense on a policy of life insurance that the insured committed suicide, etc., is not used in its technical and legal sense of self-destruction by a sane person, but according to its popular meaning of death by one's own hand, irrespective of the mental condition of the person committing the act. The statute was manifestly intended to apply to all cases of self-destruction or suicide, unless the same

were contemplated at the time application was made for the policy. The same words may require a different construction when used in different documents, as, for instance, in a contract and a statute; and identity of words is not decisive of identity of meaning, when they are used in different connections and for different purposes. Undoubtedly the word "suicide," in its usual sense, includes all cases of self-destruction. *Knights Templars' & Masons' Life Indemnity Co. v. Jarman*, 23 Sup. Ct. 108, 110, 187 U. S. 197, 47 L. Ed. 139.

"Suicide" is the intentional taking of one's own life. *Gen. St. Minn. 1894, § 6426*.

#### As an accident.

See "Accident—Accidental."

#### "Die by one's own hand" synonymous.

The word "suicide" and the words "to die by his own hand," or "by his own act," or "to take his own life," mean the same thing, and each conveys the idea of voluntary, intentional self-destruction. *Supreme Lodge Order of Mutual Protection v. Gelbke*, 64 N. E. 1058, 1060, 198 Ill. 365.

"Self-destruction," "suicide," and "death by his own hands" are synonymous terms, and are defined to be the voluntary destruction of one's self. The involuntary destruction of one's self is not self-destruction. Self-destruction by a fellow being bereft of reason can with no more propriety be ascribed to his own hand than to the deadly instrument that may have been used for the purpose, and, whether it was by drowning, poisoning, or hanging, or in any other manner, was no more his act, in the sense of the law, than if he had been impelled by irresistible physical power." Thus an exception in a life policy, releasing the insurer from liability in case the insured comes to his death by self-destruction, does not include self-destruction while the insured is insane. *New Home Life Ass'n of Illinois v. Hagler*, 29 Ill. App. 437, 439.

#### As deliberate or voluntary self-killing.

A suicide "is one who deliberately puts an end to his own existence, or commits any unlawful malicious act, the consequence of which is his own death, as if, attempting to kill another, he runs upon his antagonist's sword, or, shooting at another, the gun bursts and kills himself. The party must be of years of discretion and in his senses; else it is not suicide." *Moore v. Connecticut Mut. Life Ins. Co.* (U. S.) 17 Fed. Cas. 672, 673.

"Suicide," as used in an insurance policy exempting the insurance company from paying a loss caused by "suicide," means to deliberately end one's existence when in possession and enjoyment of all mental faculties. *Mutual Benefit Life Ins. Co. v. Davless'*

Ex'r, 9 S. W. 812, 815, 87 Ky. 541; *Breasted v. Farmers' Loan & Trust Co.* (N. Y.) 4 Hill, 73, 75.

"Suicide," means, in a popular as well as in a legal sense, the death of a party by his own voluntary act; and such is its use in an insurance policy providing that no benefit shall be paid on account of the death of a member, when death is the result of suicide within a certain time after admission. *Hart v. Modern Woodmen of America*, 57 Pac. 936, 937, 60 Kan. 678, 72 Am. St. Rep. 380 (citing *Bigelow v. Berkshire Life Ins. Co.*, 93 U. S. 284, 23 L. Ed. 918); *Phadenhauer v. Germania Life Ins. Co.*, 54 Tenn. (7 Heisk.) 567, 570, 19 Am. Rep. 623.

For colloquial purposes, the term "suicide" is at once sufficiently specific and comprehensive to cover all kinds of human self-destruction; but, if the law is to distinguish between the self-destruction of the insane and the self-inflicted death of the sane, insurance contracts must be construed in the light of definitions which express the distinction. Pen. Code, § 172, defines "suicide" as the intentional taking of one's own life; and the definitions referred to in *Weber v. Supreme Tent of Knights of Maccabees of the World*, 172 N. Y. 490, 65 N. E. 258, 92 Am. St. Rep. 753, are to the same effect. Intent is of the essence of the act, and this presupposes reason or sanity. *Shipman v. Protected Home Circle*, 67 N. E. 83, 85, 174 N. Y. 398, 63 L. R. A. 347.

In *Breasted v. Farmers' Loan & Trust Co.*, 8 N. Y. (4 Seld.) 299, 59 Am. Dec. 482, it was held that the word "suicide," in a policy providing, "if the insured die by his own hand or shall commit suicide," etc., the policy shall be void, etc., means "the deliberate purpose to end existence by one in the possession and enjoyment of his mental faculties." *Mutual Ben. Life Ins. Co. v. Daviess' Ex'r*, 87 Ky. 541, 551, 9 S. W. 812, 815.

All agree that death, self-caused, in an uncontrollable frenzy, without knowledge or appreciation of the physical nature of the act, would not be death by suicide, or by one's own hand, within the meaning of such a provision in a policy. Some judges make a distinction between death by one's own hand and death by suicide, but most judges consider the language in either form as meaning death by one's own act. *Daniels v. New York, N. H. & H. R. Co.*, 67 N. E. 424, 425, 183 Mass. 393, 62 L. R. A. 751.

#### As malum in se.

In the eye of the law, suicide is an offense. It is an unlawful act, and if a man with a deadly weapon undertakes to take his own life he is doing an unlawful act; and if, in the commission or attempted commission of that act, he takes the life of another standing by, then in the eye of the

law that is murder. *State v. Levelle*, 34 S. C. 120, 130, 13 S. E. 319, 27 Am. St. Rep. 799.

"Suicide, though strictly a crime, is not reckoned among offenses or violations of law." *Kerr v. Minnesota Mut. Ben. Ass'n*, 39 Minn. 174, 175, 39 N. W. 312, 313, 12 Am. St. Rep. 631.

By the law of Massachusetts suicide is deemed criminal as malum in se; and, although an attempt to commit it is not punishable, yet a person who, in attempting to commit suicide, accidentally kills one who is trying to prevent its accomplishment, is guilty of criminal homicide. *Commonwealth v. Mink*, 123 Mass. 422, 25 Am. Rep. 109.

Suicide was a felony at common law, and is none the less criminal because no punishment can be inflicted. Hence it is held that an attempt at suicide is an indictable offense. *State v. Carney*, 55 Atl. 44, 45, 69 N. J. Law, 478.

#### Self-killing by accident or mistake.

As used in a life policy exempting the company from liability if the insured should die by suicide, "suicide" is limited to the deliberate act of the insured in ending his own existence, or committing any unlawful malicious act, the consequence of which is his own death. The insured must be of years of discretion and in his senses when committing such act, as "it would be unreasonable to interpret it as including death by accident or by mistake, though the direct or immediate act of the insured may have contributed to it." *Supreme Commandery of Knights of Golden Rule v. Ainsworth*, 71 Ala. 436, 448, 46 Am. Rep. 332.

"Suicide," as used in a life insurance policy denying liability in the case of insured's suicide, whether insane or sane, means intentional self-destruction. The taking of an overdose of morphine, not shown to have been taken with intention to end the taker's life, is not suicide. *Brown v. Sun Life Ins. Co.* (Tenn.) 57 S. W. 415, 416, 51 L. R. A. 252.

#### Self-killing while insane.

Self-destruction while insane is not "suicide," within a policy relieving the insurer from liability for death resulting from suicide. *Accident Ins. Co. v. Crandal*, 7 Sup. Ct. 685, 687, 120 U. S. 527, 30 L. Ed. 740; *Connecticut Mut. Ins. Co. v. Akens*, 14 Sup. Ct. 155, 156, 150 U. S. 468, 37 L. Ed. 1148; *Breasted v. Farmers' Loan & Trust Co.* (N. Y.) 4 Hill, 73, 75; *St. Louis Mut. Life Ins. Co. v. Graves*, 69 Ky. (6 Bush) 268, 273; *Olift v. Schwabe*, 3 C. B. 446; *Life Ass'n of America v. Waller*, 57 Ga. 533, 536.

"Suicide" as used in an insurance policy providing that it should become void if the insured committed suicide, does not include



a suicide committed while insane, although the insanity does not amount to delirium or frenzy, whereby all power of self-will or control is lost. *Hathaway's Adm'r v. National Life Ins. Co.*, 48 Vt. 333, 352.

Speaking legally, self-destruction by a fellow being bereft of reason can with no more propriety be ascribed to his own hand than to the deadly instrument that may have been used for the purpose, and, whether it was by drowning, or poison, or hanging, or in any other manner, was no more his act in the sense of the law than if he had been impelled by irresistible physical power. *Manhattan Life Ins. Co. v. Broughton*, 3 Sup. Ct. 99, 105, 109 U. S. 121, 27 L. Ed. 878.

In legal acceptance and in popular use, the word "suicide" is employed to characterize the crime of self-murder. Self-destruction under insane impulses so strong as to be beyond the control and restraint of the will is a result produced by disease, for which the victim of it is no more morally responsible than he would be for any other of the maladies of which men die, and does not come within the meaning of the term "suicide," as used in a life insurance policy providing that it should be void if the insured should die by suicide. *Tritschler v. Keystone Mut. Ben. Ass'n*, 36 Atl. 734, 180 Pa. 205.

Generally, in legal acceptance and popular use, the word "suicide" is employed to characterize the crime of self-murder; and it is held that, where a policy of insurance provides that it shall be void if the insured shall die by suicide, it is not forfeited by the insured destroying himself while insane, but intending to take his life and knowing that death would result from his act. *Connecticut Mut. Life Ins. Co. v. Groom*, 86 Pa. 92, 97.

"Suicide," as used in an insurance policy providing that if the assured shall die by suicide the policy shall be void, does not include the act of the assured in taking his own life, if he was not capable of distinguishing between right and wrong, though he was capable of apprehending that the means selected to produce death, would accomplish that result; and in order to constitute suicide, so as to avoid the policy, the insured must have mind enough to entertain a criminal intent. *Phadenbauer v. Germania Life Ins. Co.*, 54 Tenn. (7 Heisk.) 567, 576, 19 Am. Rep. 623.

In an action on a life policy containing a provision that, "if the insured should die by his own hand, the policy should be void," the court said: "We think there was sufficient evidence tending to show that insured was insane at the time he committed suicide to require the submission of that question to the jury. Without referring to

it in detail, our conclusion is that, although it might have required the jury to find that insured was aware when he took the laudanum that it would terminate his life, yet it would also have justified a finding that he acted under the control of an insane impulse, caused by disease and derangement of his intellect, which deprived him of the capacity of governing his own conduct in accordance with reason. An act committed under such circumstances cannot be regarded as voluntary or within the proviso of the policy." *Newton v. Mutual Ben. Life Ins. Co.*, 76 N. Y. 426, 429, 32 Am. Rep. 335.

In an action on a life policy, the defense being suicide, the court said: "That the insured died by his own hand is not disputed, and by this act the policy was avoided, unless his mind was so impaired that he did not understand the consequences of his action and that death would ensue. If he exercised volition, was capable of forming an intention, and, with full knowledge that death would follow his action, his mind concurring in the act, he voluntarily destroyed his own life, the policy by its terms became null and void and of no effect." *Weed v. Mutual Ben. Life Ins. Co.*, 70 N. Y. 561, 563.

In an action on an insurance policy which provided that, in case the assured should die by his own hand, the policy should be void, he having shot himself through the head with a pistol, an instruction: "If the insured possessed sufficient mental capacity to form an intelligent intent to take his own life, and was conscious that the act he was about to commit would effect that object, it avoided the policy. If, however, his mind was so far impaired that he was incapable of forming such an intent, and was unconscious of the effect of his action upon his life, a recovery could be had"—was approved. *American Life Ins. Co. v. Isett's Adm'r*, 74 Pa. 176, 180.

In an action on a life policy containing a provision that if the insured should die by suicide the policy should be void, it appearing that the insured's death was caused by his own act, that he was insane at the time, that he intended to take his life, and that he knew death would result from the act he committed, the court said: "Generally, in legal acceptance and in popular use, the word 'suicide' is employed to characterize the crime of self-murder. It is called 'self-murder' in terms in Webster, and is defined to be the act of designedly destroying one's own life, committed by a person of years of discretion and of sound mind. Self-destruction under insane impulses so strong as to be beyond the control and restraint of the will is a result produced by disease, for which the victim of it is no more morally responsible than he would be for any other of the maladies of which men die. The disease,

when it manifests itself in that form of melancholia which creates a prevailing propensity to suicide, consists in the unfounded and morbid fancies of the sufferer regarding his means of subsistence or his position in life, or in distorted conceptions of his relations to society or his family, of his rights or duties, or of dangers threatening his person, property, or reputation." Connecticut Mut. Life Ins. Co. v. Groom, 86 Pa. 92, 97, 27 Am. Rep. 689.

"'Felo de se,' or 'suicide,' is where a man of the age of discretion and compos mentis voluntarily kills himself." Hale's Pleas of the Crown, 411. "A 'felo de se,' therefore, is he that deliberately puts an end to his own existence, or commits any unlawful, malicious act, the consequence of which is his own death. The party must be of years of discretion and in his senses, else it is no crime." 4 Bl. Comm. 189. It is something more than self-sought or self-inflicted death. It is a species of crime or wickedness; something wrong; a kind of self-murder. Let it be supposed that the unfortunate man is so far gone in mental derangement that he has lost the power of distinguishing right and wrong, and of electing between them in conduct. While his moral agency is thus suspended, he conceives the design that he will dispose of his life by suicide. He selects a fit instrument for his purpose and uses it fitly. Though by reason of his malady he knows nothing of good and evil, he can still apply the law of cause and effect. He remembers that a loaded pistol may be discharged by pulling the trigger, and that a bullet in the brain will produce death. With a distinct purpose to kill himself, a purpose as easily performed, perhaps, in particular cases of insanity, as the intention to take food or drink—nay, in some cases, it may be impossible not to form it—he fires the fatal shot and dies. The result is a so-called suicide, but not a real one. The physical properties are all present, but the essential moral property is absent. Such an act is not suicide, within the meaning of a policy of insurance that, "if the insured shall die by suicide during the continuance of this policy," the policy shall be void. Life Ass'n of America v. Waller, 57 Ga. 533, 536.

"Suicide," according to its legal definition and acceptance, means the act of malicious self-murder. 2 Bouv. Law Dict. The great weight of authority in this country undoubtedly is that the term "suicide" implies an act of self-destruction deliberately done by a person capable of forming a legal intention, and that when one kills himself while insane, even though he intends that the result of the act shall be fatal, but through the impairment of the reasoning faculties is not able to understand the moral character, nature, consequence, and effect of such act, or is impelled by an irresistible

impulse which he cannot withstand, such act is not "suicide" within the legal sense of the term. Such meaning will be given to the term, in a life policy which provides that the insurer shall not be liable in case insured commits suicide, unless the policy contains other words extending the meaning of the term. Grand Lodge of Illinois, Independent Order of Mut. Aid, v. Wieting, 68 Ill. App. 125, 126.

The term "shall die by suicide," as used in an insurance policy providing that it shall be void if the insured "shall die by suicide," is synonymous with "shall die by his own hand" and "shall commit suicide," and includes self-destruction induced by insanity. Cooper v. Massachusetts Mut. Life Ins. Co., 102 Mass. 227, 230, 3 Am. Rep. 451.

The words "committed suicide," as used in Rev. St. Mo. 1889, § 5855, excluding a defense to an action on a life insurance policy on the ground that the insured committed suicide, are used in their popular sense, as comprehending all cases where the insured took his own life, whether while sane or insane. Knights Templars' & Masons' Life Indemnity Co. v. Jarman (U. S.) 104 Fed. 638, 643, 44 C. C. A. 93.

#### SUICIDE, SANE OR INSANE.

The term "suicide, sane or insane," in life policies providing that there shall be no recovery if the death of the insured is caused by suicide, sane or insane, is equivalent to the words "suicide, felonious or otherwise." Spruill v. North Western Mut. Life Ins. Co., 27 S. E. 39, 40, 120 N. C. 141.

A life policy providing that it shall become void if the assured "shall commit suicide while sane or insane" does not operate to avoid liability in all cases of self-destruction by the insured. If the assured takes his own life while in a state of unconsciousness, or does it involuntarily, whether sane or insane, such act is nothing more than an accident, and would not operate to avoid the policy. Parish v. Mutual Benefit Life Ins. Co., 49 S. W. 153, 155, 19 Tex. Civ. App. 457 (citing Pierce v. Travelers' Life Ins. Co., 34 Wis. 380).

Where a life policy provides that it shall be void if the insured commits suicide, feloniously or otherwise, sane or insane, the policy is avoided by the suicide of the insured committed while temporarily insane, though he was in no manner conscious of or responsible for the act. Scarth v. Security Mut. Life Soc., 39 N. W. 658, 659, 75 Iowa, 346, quoting Bigelow v. Berkshire Life Ins. Co., 93 U. S. 284, 23 L. Ed. 918, where defendant pleaded that the insured died from the effect of a pistol wound inflicted on his person by his own hand, and

that he intended by such means to destroy his life, and plaintiff by reply pleaded that the insured, when he inflicted the pistol wound on his person, was of unsound mind and wholly unconscious of the act, and it was held that a demurrer to the replication was properly sustained. In *Streeter v. Western Union Mut. Life & Accident Soc.*, 31 N. W. 779, 65 Mich. 199, 8 Am. St. Rep. 882, the policy provided that it should be void if the insured died by his own hand, sane or insane. The insured died from a pistol shot inflicted by himself while, as the evidence tended to show, he was insane. Witnesses expressed the opinion that his mental capacity was such that he was unable to control any of his physical actions that might have been called upon to carry out any one of his impulses. It was held that the insurer was not liable. In support of the rule announced by these cases, see, also, *Pierce v. Travelers' Life Ins. Co.*, 34 Wis. 389; *Salentine v. Mutual Ben. Life Ins. Co.* (U. S.) 24 Fed. 159; *Riley v. Hartford Life & Annuity Ins. Co.* (U. S.) 25 Fed. 315; *Adkins v. Columbia Life Ins. Co.*, 70 Mo. 27, 35 Am. Rep. 410. In some of these cases language was employed which would seem to indicate that, if the insured was not at the time conscious of the physical nature and consequences of the act, the policy might not be void. We think, however, that the better rule and logical conclusion of all the cases is that the condition in the policy was meant to include self-destruction, no matter what the mental condition of the insured was at the time of the act. Of course, the policy never was intended to include death by accident, as by taking poison by mistake, or accidental discharge of a gun or pistol held in the hands of the insured, or the like. It means all suicidal acts, whether denominated as criminal or such as are the offspring of insanity. *Scarth v. Security Mut. Life Soc.*, 39 N. W. 658, 659, 75 Iowa, 846.

#### SUICIDE, VOLUNTARY OR INVOLUNTARY.

The term "suicide, voluntary or involuntary," in a life policy providing that the insurer shall not be liable for death resulting from suicide, voluntary or involuntary, does not include death resulting from the taking of poison, unless it is taken knowingly. *Edwards v. Travelers' Life Ins. Co.* (U. S.) 20 Fed. 661, 662.

As used in a life policy providing that the insured shall not be liable in case of "suicide, voluntary or involuntary, sane or insane," the phrase is sufficient to include self-destruction in any form and from any cause, and is not limited to intelligent, conscious, criminal self-destruction. *Haynie v. Knights Templars' & Masons' Life Indemnity Co.*, 41 S. W. 461, 464, 139 Mo. 416.

#### SUIT.

See "Ancillary Suit"; "Fictitious Suit"; "Lawsuits"; "Nullity Suit"; "Original Suit"; "Right of Suit."

See, also, "Case"; "Cause (in practice)"; "Civil Action—Case—Suit—Etc."

Collusive suit, see "Collusion."

The term "suit" is a very comprehensive one, and is said to apply to any proceeding in a court of justice by which an individual pursues that remedy which the law affords him. The modes of proceeding may be various; but, if the right is litigated between the parties in the court of justice, the proceeding is a suit. *Kohl v. United States*, 91 U. S. 367, 375, 23 L. Ed. 449; *Weston v. City of Charleston*, 27 U. S. (2 Pet.) 449, 464, 7 L. Ed. 481; *Upshur County v. Rich*, 10 Sup. Ct. 651, 653, 135 U. S. 467, 34 L. Ed. 196; *Mooney v. Buford & George Mfg. Co.* (U. S.) 72 Fed. 32, 36, 18 C. C. A. 421; *Ward v. Congress Const. Co.* (U. S.) 99 Fed. 598, 603, 39 C. C. A. 669; *The Jarnecke Ditch* (U. S.) 69 Fed. 161, 166; *Clafin v. Robbins* (U. S.) 5 Fed. Cas. 806, 807; *Nichols v. Bingham*, 40 Atl. 827, 829, 70 Vt. 320; *Rowan v. Shapard*, 2 Willson, Civ. Cas. Ct. App. §§ 295, 302; *In re Jenckes*, 6 R. I. 18, 22.

A suit is any proceeding in a court of justice on which a plaintiff pursues his remedy to recover a right or claim. *Gurnee v. Brunswick County* (U. S.) 11 Fed. Cas. 117, 119 (citing *Sewing Mach. Co.'s Cases*, 85 U. S. [18 Wall.] 585, 21 L. Ed. 914).

"A suit is defined to be the prosecution of some demand in a court of justice." *Ex parte Towles*, 48 Tex. 413, 433; *Callen v. Ellison*, 13 Ohio St. 446, 453, 82 Am. Dec. 448.

A "suit" is a proceeding in a court of justice for the enforcement of a right. *Drake v. Gilmore*, 52 N. Y. 389, 393.

A suit is an action or process for the recovery of a right or claim. *Philadelphia & R. Coal & Iron Co. v. City of Chicago*, 41 N. E. 1102, 1103, 158 Ill. 9.

A "suit" is the prosecution or pursuit of some claim, demand, or request. *Callen v. Ellison*, 13 Ohio St. 446, 453, 82 Am. Dec. 448.

"Suit" is defined as the rightful method of obtaining in court what is due to any one. *Sanford v. Sanford*, 28 Conn. 6, 20.

A "suit" is a proceeding in court according to the forms of law to enforce the remedy to which a party deems himself entitled. *Kuhl v. Chicago & N. W. Ry. Co.*, 77 N. W. 155, 159, 101 Wis. 42.

A suit or action is the means of administering judgment, which is the remedy prescribed by law for the redress of an injury. *Zeigler v. Vance*, 3 Iowa (3 Clarke) 528, 530.

"The term 'suit' means the prosecution or pursuit of some claim, demand, or request. In law language it is the prosecution of some demand in a court of justice. 'The remedy for every species of wrong is,' says Blackstone, 'the being put in possession of that right whereof the party injured is deprived.' The instruments whereby this remedy is obtained are a diversity of suits and actions, which are defined by the Mirror to be the lawful demand of one's right, or, as Bracton and Fleta express it, in the words of Justinian, 'jus prosequendi in iudicio quod alicui debetur.'" *Cohens v. Virginia*, 19 U. S. (6 Wheat.) 264, 405, 5 L. Ed. 257.

Popularly the word "suit" means an action of any kind in a court of justice, whether commenced by writ, bill, or petition, or by information or indictment. Nor is the legal definition much less general; for, as Blackstone has it, it is "the lawful demand of one's rights," or as Bracton and Fleta express it, in the words of Justinian, "jus prosequendi in iudicio quod alicui debetur." In *re Grape St.*, 103 Pa. 121, 123, 18 Wkly. Notes Cas. 377, 378.

Lord Coke defines a suit to be "actio allud est, quam jus prosequendi in iudicium quod sibi cebetur." Blackstone says a suit or action is a legal demand of one's rights. *Peeler v. Norris' Lessee*, 12 Tenn. (4 Yerg.) 331, 339.

The meaning of the word "suit," in a legal sense, as given by Webster, is: "An attempt to gain an end by legal process." *Dobbins v. First Nat. Bank*, 112 Ill. 553, 566.

A suit at law is a contest between two parties in a court of justice; the one seeking and the other withholding the thing in contest. The same individual cannot be at the same time both the person seeking and the person withholding. *Pearson v. Nesbit*, 12 N. C. 315, 316, 17 Am. Dec. 569.

The words "suit" and "action" import the legal demand of a civil right. *Cannon v. Phillips*, 34 Tenn. (2 Sneed) 185, 190.

By Code, §§ 2242, 3251, a suit is remedy which the law gives to enforce a right arising from the violation of a contract or for an injury to person or property. *Chisholm v. Lewis*, 66 Ga. 729, 732.

A suit is the usual mode of settling a right. *Glenn v. Thistle*, 23 Miss. (1 Cushm.) 42, 54.

A proceeding in a court of common law or equity, which culminates in a judgment which conclusively determines a right or obligation, so that it cannot be further litigated except by writ of error or appeal, is a "suit," within the meaning of the federal judiciary acts. In *re Stutsman County* (U. S.) 88 Fed. 337, 341.

Rev. St. § 1846, providing that the filing of a petition shall be the commencement of a suit, may mean either an action or a special proceeding, according to the nature of it. *Wisconsin Cent. Ry. Co. v. Cornell University*, 5 N. W. 331, 332, 49 Wis. 162.

There is no doubt that by the word "suit" was once understood an original writ; but such is not the case now, since what was called an "original writ" is abolished. *Tyler v. Canaday* (N. Y.) 2 Barb. 160, 162.

#### Action synonymous.

See "Action."

#### Proceeding by appeal, error, or review.

The bankruptcy law of 1867 (14 Stat. 517) provides that no suit at law or equity shall be maintained in any court between an assignee in bankruptcy and a person claiming an adverse interest touching any property or right of property transferable to or vested in such assignee, unless brought within two years from the time when the cause of action accrued for or against the assignee. Held, that the word "suit" does not apply to a proceeding to review a decree in equity. *Wilt v. Stickney* (U. S.) 30 Fed. Cas. 256, 257.

"Suit," as used in Rev. St. art. 3212, providing that any person interested in any will which has been probated may institute a suit in the proper court to contest the validity thereof within four years after its probate, is of a very comprehensive signification, and, unless the context requires it, does not extend ordinarily to a proceeding by appeal, error, or review, as the latter term is ordinarily understood and used in speaking of bills of review technically. *Franks v. Chapman*, 61 Tex. 576, 580 (citing Abb. Law Dict.).

In 2 Rev. St. p. 474, § 100, providing that "no suit commenced by or against any officers shall be abated or discontinued by the death of such officers, their removal from or resignation of their office, or the expiration of their term, but the court in which any such action shall be pending shall substitute the names of the successors in such office," the word "suit" is used in its modern sense, and is synonymous with "action." A suit is defined to be the prosecution or presentment of some claim, demand, or request. In law it is the prosecution of some demand in a court of justice. A civil action is defined to be a legal demand of one's rights, or it is the form of a suit given by law for the recovery of that which is due. Until judgment the suit is called an "action." A writ of error is not a "suit" or "action," as those words are understood and used. Hence such section does not require the substitution of a successor in office as plaintiff in a writ of error which was sued out by his predecessor.

**Town of Clayton v. Beedle** (N. Y.) 1 Barb. 11, 15, 16.

The word "suit," in the bankruptcy act of 1867, providing that no suit at law and equity shall be maintained between an assignee and bankrupt and a person claiming an adverse interest touching any property or right of property transferable to or vested in such assignee, unless brought within two years from the time when the cause of action accrued for or against such assignee, does not include a bill of review in equity. *Wilt v. Stickney* (U. S.) 30 Fed. Cas. 258, 257.

#### Arbitration.

An arbitration is not a suit in court, within the meaning of Act Feb. 20, 1866, an act to regulate judicial proceedings. It is a proceeding before triors chosen by the parties. It is not an action commenced in court, in which there may be an appearance term, and a pleading term, and a judgment term. *Crook v. Chambers*, 40 Ala. 239, 243.

#### Attachment.

An attachment against a nonresident debtor is a "suit," within the meaning of the judiciary act of the United States, giving exclusive jurisdiction to the District Courts of the United States of all suits against consuls. In *re Aycizena*, 3 N. Y. Super. Ct. (1 Sandf.) 690, 692.

Although attachment is an ancillary remedy, and applicable to a limited class of cases, yet within its limits it rests upon its own facts, and not upon the facts of the action. *Reed v. Maben*, 21 Neb. 690, 33 N. W. 252. An attachment, though sometimes called an ancillary or auxiliary proceeding, is nevertheless in all essential respects a suit. *Jordan v. Dewey*, 40 Neb. 639, 59 N. W. 88; *Gibson v. Sidney*, 69 N. W. 314, 315, 50 Neb. 12.

Where an attachment is adjudged void, it cannot be treated as a "suit," or "case," within Code, § 2932, allowing a renewed case to be brought within six months after a suit has been disposed of and limitations have run. *Edwards v. Ross*, 58 Ga. 147.

The word "suit," as used in Const. art. 5, § 8, conferring on the district court alone original jurisdiction of all suits for the trial of title to land and for the enforcement of liens thereon, embraces an attachment suit, and therefore the district court alone has authority to enforce attachment liens on land. *Rowan v. Shapard*, 2 Willson, Civ. Cas. Ct. App. §§ 295, 302.

A suit commenced by summons in a state court of New York, and under Code Civ. Proc. § 135, against a foreign corporation having property in that state, followed by a warrant of attachment issued under section 227 et seq., against the property of the

corporation in the state, and duly served by attaching the property, is a "suit," within the meaning of Judiciary Act Cong. Sept. 24, 1789, providing for the removal of suits from state to federal courts. *Barney v. Globe Bank* (U. S.) 2 Fed. Cas. 894, 895.

#### Assessment proceeding.

In considering the question whether proceedings for a special assessment constitute a suit within the meaning of the federal judicial laws, the court says: "There have been frequent definitions by the Supreme Court of a suit in the sense of these removal acts, applying it to all proceedings which are strictly judicial and in which parties are litigating their rights." This definition is a very comprehensive term, and one understood to apply to any proceeding in a court of justice by which an individual pursues the remedy which the law affords him. The modes of proceeding may be various; but, if a right is litigated between parties in a court of justice, the proceeding by which the decision of the court is sought is a suit. It is held, however, that the assessment proceedings, being an exercise of the tax power and an administrative act, do not constitute a suit, though they are conducted under judicial forms by a court of general power. In *re City of Chicago* (U. S.) 64 Fed. 897, 898.

A proceeding under Act W. Va. Feb. 23, 1883, providing that a person aggrieved by the assessment of his real estate may apply to the county for redress, is not a "suit," within the meaning of United States statutes authorizing the removal of suits from state to federal courts. *Upshur County v. Rich*, 10 Sup. Ct. 651, 653, 135 U. S. 467, 34 L. Ed. 196.

#### Cause of action distinguished.

The marked distinction that exists between the word "suit," "cause," or "action," and the words "cause of action," is sharply presented in *Koon v. Nichols*, 85 Ill. 155. It is there said: "The word 'cause' here means the particular suit in which the order is made, not that the cause of action shall be considered as abandoned, but only that such particular suit shall be considered as abandoned, and no further action shall be had thereon." *Fish v. Farwell*, 43 N. E. 367, 372, 15 Ill. 236.

#### Certiorari.

The term "suit," in Limitation Act March 6, 1836, § 23, providing that if any suit shall be commenced within the time limited by the act, and the same shall be discontinued, dismissed, or the plaintiff nonsuited, or judgment be arrested, and the period of limitation expires during the pendency of such suit, it shall be lawful to renew such suit within any time after six months

after such termination of the case, includes an application for a writ of certiorari, as a suit is an action or a process for the recovery of a right or claim, a legal application to a court for justice, the prosecution of a right before any tribunal, and certiorari is but a process, an action, or a prosecution by petition to the court for the recovery of a right without which the right is gone. *Hendrix v. Kellogg*, 32 Ga. 435, 437.

#### **Proceeding to charge stockholder.**

Rev. St. Mo. 1880, § 2517, provides that, after the return nulla bona of an execution against a corporation, a judgment creditor may, on motion and after notice in writing to the person to be charged, have an execution against any stockholder for the amount of his unpaid stock. Held, that this proceeding to charge the stockholder is not merely auxiliary to and dependent on the suit against the corporation, but is within itself a suit, within the meaning of the removal of causes acts, and may be removed by the stockholder to a federal court when the requisite diversity of citizenship exists. *Lackawanna Coal & Iron Co. v. Bates* (U. S.) 58 Fed. 737, 738.

#### **Proceeding to collect delinquent taxes.**

The proceeding for the collection of delinquent taxes, provided for by Laws N. D. 1897, c. 67, is a "suit," within the meaning of that phrase in the federal judiciary acts (Act March 3, 1887, c. 373, 24 Stat. 552, and Act Aug. 13, 1888, c. 866, 25 Stat. 433 [U. S. Comp. St. 1901, p. 508]). In *re Stutsman County* (U. S.) 88 Fed. 837, 841.

#### **Proceeding to compel issuance of certificate of stock.**

The word "suit" comprehends, not only actions at law, but every judicial proceeding for the enforcement of a right (*Bouv. Law Dict.*), and therefore includes a proceeding against a national bank to compel the issuance of a duplicate certificate of stock, and was within the jurisdiction of a state court under U. S. Comp. St. 1901, p. 3458. In *re Hayt*, 79 N. Y. Supp. 845, 846, 39 Misc. Rep. 356.

#### **Condemnation proceeding.**

A proceeding by a city to condemn land for the extension of a street may be referred to the inhabitants, under Code, § 3419, authorizing the submission of a suit. *City of Marion v. Ganby*, 26 N. W. 40, 41, 68 Iowa, 142.

A proceeding for the condemnation of private property for a public use, while before the commissioners appointed to appraise the land, is not in the nature of a suit at law; yet, when the same is transferred to the district court by appeal from an award of the commissioners pursuant to the provisions of the statute of the state, the proceeding

then becomes a suit at law, within the meaning of Act March 3, 1875, providing that any suit of a civil nature at law or in equity, pending or brought in a state court, in which there is a controversy between the citizens of different states, may be removed by either party into the Circuit Court of the United States for the proper district, and such proceedings may therefore, if between citizens of different states, be removed to a federal court. *Mississippi & Rum River Boom Co. v. Patterson*, 93 U. S. 403, 406, 25 L. Ed. 206.

The word "suits," as used in Judiciary Act Sept. 24, 1789, § 11, providing that the Circuit Court shall have original cognizance, concurrent with the courts of the several states, of all suits of a civil nature at common law, when the matter in dispute exceeds, exclusive of costs, \$500, and the United States are plaintiffs, includes a proceeding brought by the United States to condemn land for public use. *United States v. Inlots* (U. S.) 26 Fed. Cas. 482, 487.

A proceeding under the statutes of Colorado for the appropriation of private property for public use and to fix the compensation thereof is a suit at law, within the meaning of the Constitution of the United States and the acts of Congress conferring jurisdiction upon the courts of the United States; and therefore it is the right of a party to such a proceeding to have it removed from the state to the federal courts on the ground of citizenship. *Searl v. School Dist. No. 2*, 124 U. S. 197, 199, 8 Sup. Ct. 460, 31 L. Ed. 415.

By Rev. St. c. 114, it is provided that "all controversies which might be the subject of a personal action at law or of a suit in equity" may be submitted to the decision of arbitrators. Held, that such section did not authorize the submission to arbitrators of a claim under the mill act (Rev. St. c. 116) for damage occasioned to land by flowing it by a milldam, collectible under a particular statutory mode of redress, and hence not a controversy which might be the subject of a personal action at law or of a suit in equity. *Henderson v. Adams*, 59 Mass. (5 Cush.) 610, 612.

A proceeding under the right of eminent domain to condemn land is not a "suit prosecuted against an estate," within the meaning of the Constitution, of which a United States Circuit Court has no jurisdiction. *Warren v. Wisconsin Valley R. Co.* (U. S.) 29 Fed. Cas. 290, 292.

#### **Controversy synonymous.**

Controversy distinguished, see "Controversy."

Code, c. 130, § 23, providing that all persons to any civil action, suit, or proceeding shall be competent witnesses for or against

each other in the same manner as other witnesses, except that the husband shall not be examined for or against his wife, or the wife for or against her husband, except in an "action or suit" between the husband and wife. It was held that the words action and suit are synonymous with "controversy," and cannot be construed as merely designating the particular mode in which the controversy may be presented to the court by action or suit; and, in order to exclude either the husband or wife as a witness, the controversy, in whatever form presented, must be between the husband and wife, and does not include a controversy between a stranger and the husband and wife. *Anderson v. Snyder*, 21 W. Va. 632, 645.

**Proceeding before county board.**

A petition to a board of supervisors for the allowance of a claim is not a "suit"; the board of supervisors not being a court. They constitute a branch of the executive part of the government, not of the judiciary. *Gurnee v. Brunswick County* (U. S.) 11 Fed. Cas. 117, 119.

A claim against a county for right of way for a public road, while the same is pending before the county board of a county created by the law of Nebraska, is not a suit, within the meaning of the acts of Congress providing for the removal of suits from state to federal courts. *Fuller v. Colfax County* (U. S.) 14 Fed. 177, 178.

Proceedings before the county commissioners on a petition to lay out a highway, in which counsel appear, witnesses are examined, and arguments made as in other courts, is a "suit," within the meaning of a by-law of a town authorizing its selectmen to appear and defend suits brought against it. *Inhabitants of Hyde Park v. Wiggin*, 31 N. E. 693, 694, 157 Mass. 94.

The word "suit" as used in an act providing that no act of the general assembly shall affect any suit begun or pending at the time of its passage, embraces proceedings before selectmen for the laying out of highways. This holding seems to be based largely on the fact that under the provisions of the statutes relative to such proceedings the action of the selectmen is in itself judicial, and that from their decision an appeal lies to the county court, which court is confined to the same matter that the selectmen acted upon; so the proceedings in that court are but a continuation of the proceedings before the selectmen. *Dunn v. Town of Pownal*, 26 Atl. 484, 485, 65 Vt. 116.

**Criminal prosecution.**

"Suit," in its widest signification, means any proceeding in a court of justice, and hence includes a criminal prosecution; but it is not generally understood in such latter

sense. *State v. Chitty* (S. C.) 1 Bailey, 379, 389.

The word "suit" is sometimes applied as well to criminal as to civil prosecutions, but is often used both in statutes and in elementary treatises in a more restrained and narrow sense. It is frequently, if not ordinarily, confined to civil proceedings, and, as used in a statute giving a federal District Court exclusive original jurisdiction of all suits for penalties and forfeitures incurred under the laws of the United States, the term did not include a prosecution for the exportation of goods to a foreign country contrary to law, which is punishable by fine and forfeiture. *United States v. Mann* (U. S.) 26 Fed. Cas. 1153, 1154.

The word "suit" has, in practice, been considered as meaning criminal prosecutions, as well as civil proceedings. The word is held to have this meaning in the Massachusetts statutes providing that upon motion of either party to a suit the court is required to examine the person called as a juror therein, to know whether he is related to the party or has any interest in the cause, or has expressed or formed an opinion, or is sensible of any bias or prejudice therein. *Commonwealth v. Moore*, 9 N. E. 25, 26, 143 Mass. 136, 58 Am. Rep. 128.

Code, § 1728, providing that, "if any of the jurors drawn have a suit pending and at issue in the superior court, the scrolls with their names must be returned into partition No. 1 of the jury box," cannot be construed to include one accused of crime and prosecuted for it; but the language may be well applied to either party to a controversy which has found its way in court to be there settled. *Hodges v. Lassiter*, 2 S. E. 923, 924, 96 N. C. 351.

The word "suit" in Act Jan., 1853, requiring instructions in suits to be in writing, applies only to civil causes. *Leonardo v. Territory*, 1 N. M. 291, 296.

**Proceeding to discover assets of estate.**

A proceeding under sections 74-78, Rev. St. 1899, for the discovery of assets of an estate, is a "suit pending," within the meaning of the law for obtaining depositions. *Eckert v. Wood*, 69 S. W. 45, 46, 95 Mo. App. 378.

**Divorce proceeding.**

"A suit for divorce is not a suit between two parties, but is a triangular proceeding, in which the state is an adverse party, as the state has an interest in all suits for divorce. \* \* \* The court, as representative of the state, is not bound by the pleadings of the parties, but may, on its own motion, examine witnesses as to suspicious conduct showing recrimination, collusion, or condona-

tion, although the defendant has not alleged any such defenses." *Decker v. Decker*, 61 N. E. 1108, 1109, 193 Ill. 285, 55 L. R. A. 697, 86 Am. St. Rep. 325 (citing 2 Bish. Mar. & Div. c. 16).

A proceeding to obtain a divorce is a "suit," within the statute of April 14, 1834, authorizing the president of another district, residing nearest to the place where the cause is pending, with one or more of the associate judges of the proper county, to hold a special court for the trial of it. *Kolb's Case (Pa.)* 4 Watts, 154, 155.

#### **Election contest.**

There is a broad distinction between suit for an office and a mere contest of the result of the election as declared by the officer to whom the duty of certifying the fact is intrusted. The power of the officer or tribunal before whom an election contest is conducted is limited to the mere award of the election, or of ordering another election. Neither the officer nor the tribunal before whom the contest is had gives the contestant a judgment for his right to the office, or for the fees and emoluments of it, but merely gives him a certificate and leaves him, if the office is not voluntarily surrendered by the contestee, to assert his title thereon. Furthermore the character of the proceedings is the same, whether the contest is prosecuted before the judge in chambers or before the court. Though heard before the court, it is to be determined without a jury. Indeed, if the Legislature should see fit to do so, unless restrained by some constitutional provision, it might authorize a review of the action of the officer conducting the election by some other executive officer. On the other hand, if it was a suit, a trial by jury should not be denied, if demanded. Const. art. 5, § 10. It therefore follows that an election contest is not a "suit, complaint, or plea," within the meaning of the phrase as used in defining the constitutional jurisdiction of the district court. *Williamson v. Lane*, 52 Tex. 335, 345.

#### **Proceeding to establish drain.**

Under the Indiana statutes relating to the establishment of drains (2 Burns' Rev. St. §§ 5622, 5664), proceedings are commenced by a petition of landowners, after which the drainage commissioners locate the route of the proposed drain, ascertain the costs, assess benefits and damages, and then file their report in the circuit court. Thereafter any landowners opposed to the drain may file remonstrances, putting in issue the questions whether the drain will promote public health or be a public utility, whether the scheme is practical and can be accomplished for the aggregate amount of benefits assessed and whether the assessment of benefits to the lands of remonstrants is too large. Held, that within the meaning of the Removal Acts

this proceeding presents a civil suit. In re *The Jarnecke Ditch* (U. S.) 69 Fed. 161, 166.

#### **Execution.**

The words "suits or proceedings," in the saving clause of section 66 of the act of 1872 relating to judgments and executions, which repeals certain prior laws, embrace executions. *Dobbins v. First Nat. Bank*, 112 Ill. 553, 560.

"Lord Coke says the word 'suit' includes the execution, which the word 'action' does not; so, if the body of a man be taken in execution and the plaintiff releaseth all actions, yet he shall remain in execution, but if he release all suits the execution is gone." *People v. Rensselaer County Judge* (N. Y.) 13 How. Prac. 398, 400 (quoting Co. Lit. 2919).

#### **Foreclosure proceeding.**

"Suit," within the meaning of a statute prohibiting attorneys, etc., from buying choses in action with intent or for the purpose of bringing suits thereon, applies to suits in equity, but not to a proceeding to foreclose a mortgage by advertisement. *Hall v. Bartlett* (N. Y.) 9 Barb. 297, 300.

#### **Foreign attachment.**

The word "suit," as used in a policy of insurance providing that no suit for the recovery of any claim on the policy should be sustainable in any court of law or chancery unless commenced within 12 months after the loss occurred, clearly meant any proceeding in a court for the purpose of obtaining such remedy as the law allows a party under the circumstances; and as the proceeding by foreign attachment is authorized by statute in order to enable a creditor to hold the goods or credits of his debtor in the hands of a third party, the commencement of that proceeding is the commencement of a suit for that purpose, within the meaning of this provision. *Harris v. Phoenix Ins. Co.*, 35 Conn. 310, 312.

#### **Proceeding under fugitive slave law.**

A "suit" is a prosecution of some claim, demand, or request. *Cohens v. Virginia*, 19 U. S. (6 Wheat.) 407, 5 L. Ed. 257. The interposition of the claim by legal process is the commencement of a suit, and the trial of such claim is the trial of a suit. The prosecution of a claim to a fugitive from labor, or resistance to such claim by legal proceedings on the part of the fugitive, under the fugitive slave law, is a suit. In re *Booth*, 3 Wis. 1, 39, 40.

#### **Garnishment proceeding.**

Garnishment proceedings are not "suits" against the receiver for an act or transaction of his, within the meaning of Judiciary Act March 3, 1887, c. 373, 24 Stat. 554, as corrected by Act Aug. 13, 1888, c. 868, 25 Stat.



436 [U. S. Comp. St. 1901, p. 582], allowing receivers of federal courts to be sued for such acts in carrying on the business connected with the property without leave of the appointing court. *Central Trust Co. v. Chattanooga, R. & C. R. Co.* (U. S.) 68 Fed. 685, 687, 690.

**Habeas corpus.**

The word "suit," as used in Act Cong. Sept. 24, 1789, § 25, authorizing a writ of error to the federal Supreme Court to review a final judgment in a suit in the Supreme Court of the state in certain cases, includes a proceeding in habeas corpus. Therefore the Supreme Court had jurisdiction of a writ of error to review an application for habeas corpus in extradition proceedings in the Supreme Court of the state. *Holmes v. Jennison*, 39 U. S. (14 Pet.) 540, 564, 10 L. Ed. 579.

A procedure by habeas corpus can in no legal sense be regarded as a suit or controversy between private parties, and, even when not used to relieve against illegal restraint under a criminal charge, it cannot in the proper sense of the term be regarded as a "civil suit." It should rather be held the exercise of a special jurisdiction conferred by the Constitution and laws upon either the courts or judges for the prompt relief of the citizen against any improper interference with his personal liberty. Consequently it does not come under the provisions of the Code allowing an appeal to the Supreme Court in civil suits. *McFarland v. Johnson*, 27 Tex. 105, 109.

The word "suit," as used in Act Cong. March 3, 1875, c. 137, § 2, providing for the removal from a state court into a federal court of any suit of a civil nature at law or in equity, where the matter in dispute exceeds, exclusive of costs, \$500, does not include a writ of habeas corpus. *Kurtz v. Moffitt*, 115 U. S. 487, 505, 6 Sup. Ct. 148, 29 L. Ed. 458, 459.

**Proceeding to establish, alter, or discontinue highway.**

A proceeding in a county court to establish, alter, or discontinue a public road is intended for the public convenience, and cannot, in any form it may have assumed, be considered as a suit between individuals, so as to authorize costs to be adjudged against one of the parties as a party to a suit. *Hawkins v. Robinson*, 28 Ky. (5 J. J. Marsh.) 8, 9.

**Proceeding by indictment to recover fine or penalty.**

In its most extended sense the word "suit" includes, not only a civil action, but also a criminal prosecution, as indictment, information, and conviction by a magistrate. *Bouv. Law Dict.* Under this definition a provision of Acts Md. 1882, c. 451, that suit may

be brought for the recovery of certain funds provided for therein, and "that all suits therefor" shall be brought by the court of the county commissioners in the name of the state, does not necessarily preclude a proceeding by indictment for the collection of such funds, especially since Acts 1880, c. 211, requires that in all instances proceedings for the recovery of fines must be by indictment. *Snowden v. State*, 14 Atl. 528, 529, 69 Md. 203.

A statute provided that a penalty prescribed thereby should be recovered only by a suit by the prosecuting attorney in the name of the people. An action was brought under such statute by a pleading which was in form an indictment, but in substance a complaint, prepared and signed by the prosecuting attorney, alleging a violation of the statute and asserting a right to recover the penalty provided therefor. Held, that the proceeding was a "suit," within the meaning of the statute. If the pleading had been prepared and filed by the prosecuting attorney, without being returned by the grand jury, it would undoubtedly have been a suit; and, though the return of the grand jury added nothing, it could, on the other hand, detract nothing. *St. Louis, I. M. & S. Ry. Co. v. State*, 17 S. W. 806, 807, 55 Ark. 200.

**Law actions.**

The word "suit," as used in the statutory provisions relating to suits by and against the state, is used in its broad sense, so as to include suits at law, as well as suits in equity. *State v. Curran*, 12 Ark. (7 Eng.) 321, 348.

The word "suit" embraces actions at law as well as equity cases. *Minnett v. Milwaukee & St. P. Ry. Co.* (U. S.) 17 Fed. Cas. 449, 450.

"Suit," as used in the statutes, is to be construed as meaning either proceedings at law or in equity, unless there is something in the statute to show that it is only used in reference to a particular court. *Didier v. Davison* (N. Y.) 10 Paige, 515, 517.

In holding that "suit," within the meaning of Pub. Laws 1887, c. 632, as amended by Pub. Laws 1889, c. 820, providing that, when the assignee of an insolvent debtor disallows a claim, the claimant shall bring suit to test the validity thereof, was a suit in equity, because there is no provision in the statute for a mere declaratory judgment for the amount due, or judgment against assets merely, the court say that the respondents urge that it must mean a suit in equity, because that is the usual and technical designation of a proceeding in equity, as "action" is at law. While this is the common use of the terms, we do not think that the words "suit" and "action" are used with such exactness in statutes as to warrant the conclusion that they are only to be taken in this

limited sense. Indeed, they are often used in application to both classes of cases, and we so find them in our statutes. The word "suit" is the more general term, and is broad enough to cover either form of proceeding, but not so the provisions of the statute in question. *Niantic Mills Co. v. Riverside & Oswego Mills*, 31 Atl. 432, 19 R. I. 34.

#### **Mandamus proceeding.**

A proceeding for mandamus is a "suit at law." *City of Roodhouse v. Briggs*, 62 N. E. 778, 194 Ill. 435.

A mandamus proceeding is not a "suit of a civil nature at law or in equity," within the meaning of an act conferring jurisdiction of such suits. *Rosenbaum v. Board of Sup'rs* (U. S.) 28 Fed. 223, 224.

The term "suit," within the meaning of a statute which requires all suits against a county to be brought in the circuit court of the county being sued, includes a mandamus proceeding. *McBane v. People*, 50 Ill. 503, 507.

The word "suit," as used in Laws 1889, c. 117, § 1, providing that suits in equity may be begun, injunctions granted, or receivers appointed in aid of any suit at law, must be construed in its comprehensive sense, and comprehends a mandamus proceeding. *In re Sloan*, 25 Pac. 930, 937, 5 N. M. 590.

#### **Petition for new trial.**

A suit or action is a legal demand of one's right; but a petition for a new trial, like a motion for the same object, is not an action. It demands nothing, but simply asks permission to review a cause already decided. *Magill v. Lyman*, 8 Conn. 59, 61.

#### **Partition.**

"Collected by suit," as used in a stipulation in a mortgage note providing that, if the note was collected by suit, 10 per cent. commission as attorney's fees should be allowed, included and comprised any legal action in which or by which the debt embraced in the note should be collected; and hence, where the mortgagee was made a defendant in a suit for partition brought by the mortgagor's heirs, and the mortgagee had judgment on the note, the note was "collected by suit," and the mortgagee entitled to the attorney fees stipulated. *Branyan v. Kay*, 11 S. E. 970, 971, 33 S. C. 283.

#### **Application for poor debtor's oath.**

The application of a poor debtor before a master in chancery, in Massachusetts, to be admitted to the poor debtor's oath, under Supp. Rev. St. Mass. c. 141, is a "civil suit," in the sense of the deposition act of Rhode Island, providing that it shall be lawful for any justice of the Supreme Court to take the

deposition of any witness to be used in any civil suit. *In re Jenckes*, 6 R. I. 18, 22.

#### **Probate proceeding.**

An order of court authorizing an administrator to sell the lands of his intestate, remaining unexecuted, is not a "suit or prosecution" pending, within the meaning of a clause of a general repealing law excepting all suits or prosecutions pending from the operation of the statute. *Ludlow's Heirs' Lessee v. Wade*, 5 Ohio (5 Ham.) 494, 507.

As used in the acts of Congress relating to removal of causes, the phrase "suits at common law and in equity" cannot be construed to embrace only ordinary actions at law and ordinary suits in equity, but must be construed to embrace all litigation between parties which in the English system of jurisprudence, under the light of which the judiciary act, as well as the Constitution, was framed, were embraced in all of the various forms of procedure carried on in the ordinary law and equity courts, as distinguished from the ecclesiastical, admiralty, and military courts in the realm. The matters litigated in these extraordinary courts are not, by a fair construction of the act, embraced in the term "suits at law or in equity," or "suit," unless they have become incorporated with the general mass of municipal law, and subjected to the cognizance of the ordinary courts. It is perfectly plain that an application for the probate of a will is not such a subject as is fairly embraced in these terms. *Gaines v. Fuentes*, 92 U. S. 10, 24, 25, 23 L. Ed. 524.

The word "suit" is general, and includes proceedings to establish claims in the probate, as well as in the district court. *Hanson v. Towle*, 19 Kan. 273, 279.

Code, §§ 2265, 2603, declares that a suit or action commenced by a personal representative of deceased may be prosecuted by any successor of the executor or administrator who may on motion be made a party, and that no action shall abate by the death or disability of the party, if the cause of action survive or continue, but must on motion be revived in the name of or by the legal representative of deceased, his successor or party in interest. Held, that a claim filed by the administratrix under order of the court against the estate of another decedent, and pending in that court for allowance or rejection, is a suit or action, within the meaning of the sections cited, so that, on the administratrix's death, it might be revived on motion of or in the name of her successor. *Reynolds v. Crook*, 11 South. 412, 414, 95 Ala. 570.

A statutory proceeding to probate a will to some extent partakes of the nature of a proceeding in rem, because all parties inter-

ested are cited to appear, and because it does not of necessity involve a controversy between parties; but an action to establish a will is in form and substance a "suit." There is an issue between the two parties involving the execution, existence, and validity of the supposed will; the one party contending for her rights as legatee, and the other for her rights as the only heir at law. Of necessity the controversy had to assume the usual form of a suit between hostile parties in the state court, and hence such proceeding was naturally a suit of a civil nature in equity, within the provision of a statute providing that any suit of a civil nature in which there shall be controversy between citizens of different states may be removed to the United States court. *Southworth v. Adams* (U. S.) 4 Fed. 1, 4.

Stat. 1792, c. 32, providing that in all "suits at law," whether of a civil or criminal nature, wherein any town, person, or parish may be a party or interested in the suit, any inhabitant of such town or parish shall and may be admitted as a competent witness, providing he has no other interest than as such inhabitant, and is not otherwise legally disqualified, means all judicial controversies in which legal rights are drawn in question; and hence a proceeding in the probate court seeking the proof and establishment of a will of lands is a "suit at law," within the meaning of the statute. "It is a suit in which adverse parties are seeking to establish their legal rights, both to real and personal property. The offering of the will for probate is the institution of the suit. It is a suit by which titles to real estate by devise are to be settled. It may be tried by jury or otherwise, according to circumstances. It proceeds on the legal rules of evidence, and must be conducted and determined upon legal principles." *Haven v. Hilliard*, 40 Mass. (23 Pick.) 10, 19.

#### **Writ of prohibition.**

"Suit," as used in Judiciary Act, § 25, providing that a final judgment or decree in any suit in the highest court of law or equity in the state in which a decision in the suit could be had, where is drawn in question the validity of a statute or of an authority exercised under any state, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of their validity, may be re-examined in the Supreme Court of the United States, should be construed to include a writ of prohibition. "Suit" is a very comprehensive term, and is understood to apply to any proceeding in a court of justice by which an individual pursues that remedy in a court of justice which the law affords him. The modes of proceeding may be various; but, if a right is litigated between parties in a court of justice, the proceeding by which

the decision of the court is sought is a "suit." *Weston v. City Council of Charleston*, 27 U. S. (2 Pet.) 449, 463, 7 L. Ed. 481.

#### **Proceeding before railroad commissioners.**

V. S. 1894, c. 170, § 3936, provided that on the failure of the alderman of any city and a railway corporation to agree in regard to the location or use of a street railway, either party might appeal to the railroad commissioners, who, after due notice to the parties, should decide the questions. This statute was repealed by implication (Acts 1896, c. 148, § 53, subd. 44); but another statute (V. S. §§ 28, 29) saved from the effect of the appeal suits and proceedings in civil causes then pending. Held, that a proceeding before the commissioners was not a "suit," or a "civil cause," since the functions of the commissioners were merely ministerial, and their decision final, and the words as used in sections 28 and 29 include only actions which are commenced in a court of justice, or which may come before such court by appeal, or such other proceedings as are required to be commenced before tribunals, not courts, as a condition precedent to giving courts jurisdiction of the matter involved. *City of Burlington v. Burlington Traction Co.*, 41 Atl. 514, 515, 70 Vt. 491.

#### **Proceeding in rem.**

"Suit is the following of a person, and is not only not technically, but not even in common parlance, applied to seizures or proceedings in rem. It would be, to say the least, a form of speech liable to considerable criticism to speak of a suit being brought against a vessel or bale of goods." *The Little Ann* (U. S.) 15 Fed. Cas. 622, 624.

"Suit," as used in a fire insurance policy, providing that no suit for the recovery of any claim on the policy should be sustainable in any court of law or chancery, unless commenced within 12 months after the loss occurred, means any proceeding in a court for the purpose of obtaining such remedy as the law allows a party under the circumstances, and a proceeding by foreign attachment, in order to enable a creditor to hold the goods or credits of the insured in the hands of the insurer, is the commencement of a suit for that purpose within the meaning of the policy; for as a proceeding in rem against the debt it is properly a proceeding against the defendants who owe the debt, and so is a suit against the company for the recovery of a claim by virtue of the policy. *Harris v. Phoenix Ins. Co.*, 35 Conn. 310, 311.

#### **Scire facias.**

A scire facias is not such a "suit" or "action," within the meaning of the Constitution of Georgia, as will abate under a plea

setting out the pendency of another scire facias between the parties for the same purpose. *Heath v. Bates*, 70 Ga. 633, 635.

"Suit at law," as used in a city charter giving the right of appeal from the city court to the superior court, at the first term to which any suit at law is returnable and before the trial by the jury, from any judgment or determination of said city court in said city, when the matter in demand exceeds a certain sum, should be construed to include a writ of scire facias; for it is a suit at law, being "proceeded with in all respects as a suit at law, the writ being issued by the clerk of the court which rendered the original judgment and containing a summons to the defendant to appear and answer and upon which the property might be attached, and, although it is not an original writ, but a judicial writ, still it is an action, and may be pleaded to as an action, and may be released by the release of all actions. 'Actions at law' and 'suits at law' are synonymous terms. They are one and the same thing." *White v. Washington School Dist.*, 45 Conn. 59, 60.

#### SUIT AGAINST THE STATE.

The phrase "suit commenced by an individual against the state" means process sued out by that individual against the state for the purpose of establishing some claim against it by the judgment of a court. It is used in such sense in the amendment to the federal Constitution providing that the judicial power of the United States is not to extend to any suit in law or equity commenced or prosecuted against one of the states by the citizens of another state. *Cohens v. Virginia*, 19 U. S. (6 Wheat.) 264, 408, 5 L. Ed. 257.

#### SUIT AT COMMON LAW.

"Suits at common law" include, not merely modes of proceeding known to the common law, but all suits, not of equity or admiralty jurisdiction, in which legal rights are settled and determined. *Boyd v. Clark* (U. S.) 13 Fed. 908, 910.

"Suits at common law," as used in the clause of the Constitution providing that the right of trial by jury shall be preserved in suits at common law, means "suits in which legal rights are to be ascertained and determined, in contradistinction to those where equitable rights alone are recognized and equitable remedies administered, or where, as in admiralty, a mixture of public law or maritime law and equity was often found in the same suit." *Bains v. The James and Catharine* (U. S.) 2 Fed. Cas. 410, 416; *Baker v. Biddle* (U. S.) 2 Fed. Cas. 439, 444.

The expression "suits at common law," in Const. Amend. 7, providing that in suits

at common law, where the value in controversy shall exceed \$20, the right of trial by jury shall be preserved, means all civil suits in which legal rights are to be ascertained and determined, which are not of equity or admiralty jurisdiction, whatever may be the peculiar forms of such suits. *United States v. The Queen* (U. S.) 27 Fed. Cas. 669, 671.

The phrase "suit at common law," as used in the seventh amendment to the federal Constitution, providing that in suits at common law, where the value in controversy exceeds \$20, the right of trial by jury shall be preserved, embraces all suits which are not of equity and admiralty jurisdiction, whatever may be the peculiar form in which they assume to settle rights. A proceeding by information in the nature of a quo warranto is a suit at common law, within the meaning of this constitutional provision. *Bradford v. Territory*, 34 Pac. 66, 67, 1 Okl. 366.

#### SUIT FOR DECREE FOR TITLE.

An act creating a special court and declaring its jurisdiction provided that it should not have jurisdiction of any suit in equity for decree for title. Held, that the term "suit for decree for title" included a case where plaintiff, having title to the land subject to a deed of trust, sued to set aside a sale and annul a deed which had been made by the trustee under a deed of trust; such a suit being substantially an action to reinvest in the plaintiff a legal title to the property. *Moise v. Franklin*, 79 Mo. 518.

#### SUIT FOR DOWER.

Code, § 1372, providing that all "suits or proceedings for dower" must be commenced within three years after the death of the husband, should be construed to include the application by an heir to the probate court for an assignment of dower to the widow. *Farmer v. Ray*, 42 Ala. 125, 126, 94 Am. Dec. 633.

A "suit for dower" is an action at law, in which the parties are entitled to a jury to pass upon the questions of fact. *Shipp v. Snyder*, 25 S. W. 900, 901, 121 Mo. 155.

#### SUIT FOR NECESSARIES.

"Suit for necessities furnished," as used in Rev. St. c. 86, § 55, cl. 6, providing that under certain conditions and restrictions wages were not to be exempt from trustee process in a suit for necessities furnished, means the original action of debt for the necessities actually furnished; and hence the claim for necessities is merged in and extinguished by a judgment rendered in a suit on the claim, and an action upon such a judgment is not a suit for necessities furnished, within the meaning of the statute, so

as to charge a trustee in such action on the judgment for wages earned. *Brown v. West*, 73 Me. 23, 24.

**SUIT FOR PENALTY OR FORFEITURE.**

Act Cong. Sept. 24, 1789, § 9 (1 Stat. 76), provides that the District Court has original jurisdiction of all "suits for penalties and forfeitures" incurred under the laws of the United States; and section 9 also limits the criminal jurisdiction of the District Court to offenses where no other punishment than whipping not exceeding 30 stripes, a fine not exceeding \$100, or a term of imprisonment not exceeding 6 months, is to be inflicted. Held, that the words "suits for penalties and forfeitures" do not include crimes and offenses punishable by the District Court, but the phrase should be construed as restrained to such penalties and forfeitures as may be sued for in a civil action. *United States v. Mann* (U. S.) 26 Fed. Cas. 1153, 1154.

**SUIT FOR THE RECOVERY OF REAL PROPERTY.**

The phrase "suit for the recovery of real property," as used in the statute limiting the right to the maintenance of a suit for the recovery of real property to 15 years after the right first accrued, embraces an action by a widow to recover dower. *Anderson's Trustee v. Sterritt*, 79 Ky. 499, 501.

**SUIT IN EQUITY.**

An action by partners against a copartnership to obtain a dissolution of the partnership, the appointment of a receiver to wind up its affairs, and a distribution of the proceeds, where defendant files a cross-complaint asking for an accounting and settlement of the business, is a "suit in equity," within the meaning of Act Feb. 16, 1893, providing that the Appellate Court shall not have jurisdiction of suits in equity, when the words "suits in equity" mean such cases as were known and recognized as suits of equitable cognizance and wherein specific decrees are appropriate and essential. *Miller v. Rapp*, 34 N. E. 125, 126, 7 Ind. App. 89.

An application for an injunction is within the meaning of the term "suit in equity," as used in the amendatory act of 1893 prescribing the jurisdiction of the Appellate Court, by providing that it shall not have jurisdiction of suits in equity. *Leatherman v. Orange County Com'rs*, 47 N. E. 347, 348, 22 Ind. App. 700.

**SUIT MONEY.**

The temporary alimony authorized to be paid by Rev. St. 1894, § 1054, on entering a decree of divorce in favor of a wife, for the purpose of paying the reasonable expenses of

a wife, is commonly denominated "suit money," and is for the purpose of insuring to the wife an efficient preparation of her case and a fair and impartial trial thereof. *Yost v. Yost*, 41 N. E. 11, 12, 141 Ind. 584.

**SUIT OF CIVIL NATURE.**

P. L. 1882, p. 195, extending the jurisdiction of district courts to every "suit of a civil nature," etc., means suits for the remedy of private wrongs. There are three classes of suits: Private suits for private wrongs, private suits for public wrongs, and public suits for public wrongs; and "suits of a civil nature" means only suits of the first class. *Koch v. Vanderhoof*, 9 Atl. 771, 773, 49 N. J. Law, 619.

Act 1789, § 11, vesting exclusive jurisdiction in the circuit court of all "suits of a civil nature" at common law or in equity, as used in contradistinction to suits in admiralty, the exclusive jurisdiction of which was vested in the District Court, and in contradistinction to criminal cases, jurisdiction of which was also conferred by other sections of the act; so that by "suit of a civil nature" at common law or in equity is meant in the old and settled proceeding, as recognized at common law or in equity, or suits in which legal rights are to be ascertained and determined, in contradistinction to cases in admiralty or criminal law. *United States v. Block* 121 (U. S.) 24 Fed. Cas. 1176, 1179.

"Suits of a civil nature," as used in Act 1875 providing for the removal from a state court into a Circuit Court of the United States of "suits of a civil nature" arising under the Constitution or laws of the United States, or treaties made under its authority, is a less comprehensive term than the word "cases," as used in that provision of the Constitution providing that the judicial power of the United States shall extend to all cases in law and equity arising under it, and under the laws of the United States and treaties made under their authority, as the law embraces proceedings not usually or strictly termed suits, and hence there can be no question as to the validity of the congressional legislation. *San Mateo County v. Southern Pac. R. Co.* (U. S.) 13 Fed. 145, 147.

Act Cong. 1875, §§ 1, 2, providing for the removal of "a suit of a civil nature at law or in equity" from a state to a federal court, cannot be construed as meaning a mandamus; for mandamus is not a "civil action" in the ordinary sense of that term. An action is an ordinary proceeding in a court of justice by which one party prosecutes another for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense. Every other remedy is a special proceeding, and, mandamus being a remedy which can only be made use of when there is not a plain, speedy, and adequate remedy in the courts

of the law, it is not an action at law or a suit in equity, but a special proceeding for which there is no plain, speedy, and adequate remedy in the ordinary courts of law. *Rosenbaum v. Board of Sup'rs* (U. S.) 28 Fed. 223, 224.

Act Cong. March 3, 1887, c. 359, § 2, 24 Stat. 505 [U. S. Comp. St. 1901, p. 753], provides that any "suit of a civil nature" of which the Circuit Courts of the United States are given jurisdiction, etc., may be removed into the Circuit Court of the United States, by the defendant, being a nonresident of the state, etc., does not include a proceeding brought under the statutes of Ohio to contest the validity of a will by an original bill for that purpose. *Reed v. Reed* (U. S.) 31 Fed. 49, 51.

The act of 1789 conferring original jurisdiction on the Circuit Courts of all "suits of a civil nature, at common law or in equity," does not mean and is not confined to suits which are based on rights which owe their origin to the common law, as distinguished from the rights created by a statute. The phrase means all those suits in which the rights must be established and the remedies sought by the procedure known and prevailing in the courts of law, as distinguished from the procedure and remedies prevailing in and employed by courts of equity; that is, by a court and jury. *Brisenden v. Chamberlain* (U. S.) 53 Fed. 307, 309.

A proceeding under an act of Congress to condemn property is a "suit of a civil nature" at law or in equity, within the meaning of the judiciary act (1 Stat. 73). *United States v. Block 121* (U. S.) 24 Fed. Cas. 1176, 1179.

## SUIT OF A LOCAL NATURE.

See "Local Nature."

## SUIT TO CORRECT ASSESSMENT.

"Suits to correct an assessment" are those suits in which an assessment is complained of and attacked for overvaluation and misdescription of the property listed, involving merely the irregularity or correctness of the assessment. If the attack in such cases is successful, the result is not that of destroying, but of reducing or correcting the assessment. Such suits must be brought before the beginning of November of the year in which the assessment complained of is made. *Morgan's Louisiana & T. R. & S. S. Co. v. Pecot*, 23 South. 948, 950, 50 La. Ann. 737.

## SUIT TRIABLE BY JURY.

The expression "suits triable by jury," as used in Code 1875, §§ 3602-3605, means suits pending in the courts which are to be tried by jury in the usual and ordinary

course of the procedure of such courts. In practice in chancery suits, either party may have a jury to determine any material fact in dispute. The jury returns no verdict, but says that such and such an allegation or proposition is true or false. In other words, the jury report their opinion from the questions submitted, and the chancellor determines the suit between the parties on the facts; so that suits pending in chancery are not within the description of suits triable by jury. *Cooper v. Stockard*, 84 Tenn. (16 Lea) 140, 142.

## SUITABLE.

See "Evidently Unsuitable."

The ordinary and general signification of "suitable" is "likely to suit," "capable of suiting," or "adapted." This is by no means equivalent to "adequate." That which is adequate must be suitable, but that which is suitable may not be adequate. *St. Anthony Falls Water Power Co. v. Eastman*, 20 Minn. 277, 296 (Gil. 249, 255).

According to the definitions in Webster's and the Century Dictionaries, "suitable" means fitting, capable of suiting, or appropriate. The test of the suitability of an article for a certain purpose is, not whether it is commonly used therefor, but whether it possesses actual, practical, commercial fitness for that purpose. *White v. United States* (U. S.) 69 Fed. 93.

A railroad charter exempting from taxation all property "suitable and proper" for carrying into execution the powers granted to the corporate body should be construed to include a tract of land used as a gravel pit, from which, by means of a connecting track, ballast was transferred for the main line of the railroad, provided that such land is necessary for its uses and required for this purpose. *Camden & A. R. & Transp. Co. v. Woodruff*, 38 N. J. Law (7 Vroom) 94, 95.

## SUITABLE AGE AND DISCRETION.

A person who has attained the age of 14 is prima facie a person of "suitable age and discretion," within the meaning of Gen. St. 1868, c. 66, § 59, subd. 4, requiring that service of a summons in a civil action, when made at the house of the usual abode, shall be with a person of suitable age and discretion. *Temple v. Norris*, 55 N. W. 133, 134, 53 Minn. 286, 20 L. R. A. 159.

## SUITABLE APPLIANCES.

See "Suitable Means and Appliances."

## SUITABLE BRIDGE.

"Suitable bridges," as used in St. 1871, c. 343, § 11, enacting that one or more rail-

road tracks shall be constructed in a certain city from a given point to another point, and shall pass over certain streets by suitable bridges, etc., means such bridges prescribed by the railroad commissioners as in their judgment the safety and convenience of the public and the interests of all the corporations building such track require. *City of Worcester v. Board of Railroad Com'rs*, 113 Mass. 161, 171.

### SUITABLE CONNECTION.

St. 1897, c. 500, § 17, providing that, wherever a certain elevated railroad company is authorized to construct its road, the transit commission shall construct a tunnel of sufficient size for two railway tracks, etc., from a certain point to another point where a "suitable connection" with surface tracks may be made, means an actual, physical contact; and hence such end of the tunnel must touch the subway, or at least come in immediate connection with it, and the tracks between them must come to the same grade at the point of junction, so that the passengers may pass directly from one to the other. *Browne v. Turner*, 54 N. E. 510, 515, 174 Mass. 150.

### SUITABLE DEVICE.

A condition in a contract for the sale of a machine that it shall be provided with a "suitable air starting device" necessarily involves the idea that a contrivance is to be provided which will start the machine. *Van Pub. Co. v. Westinghouse, Church, Kerr & Co.*, 76 N. Y. Supp. 340, 344, 72 App. Div. 121.

### SUITABLE DRAW.

The phrase "suitable and sufficient," as used in the provision of the act incorporating the New York & Long Branch Railway Company, and authorizing the company to construct a bridge over a certain river, with suitable and sufficient draws, so as not to obstruct navigation, requires that the draws shall be sufficient not to obstruct navigation. *Easton v. New York & L. B. R. Co.*, 24 N. J. Eq. (9 C. E. Green) 49, 53.

### SUITABLE FENCE

Gen. St. c. 63, § 43, requiring a railroad corporation to make and maintain "suitable fences" on both sides of its entire length of road, cannot be construed to mean the fences prescribed by statute for adjoining owners of land. They may be suitable fences in many places, though they differ largely from the fences required to be built by adjoining proprietors of improved land. *Eames v. Salem & L. R. Co.*, 98 Mass. 560, 565, 96 Am. Dec. 676.

### SUITABLE FOR CULTIVATION.

The term "suitable for cultivation," as used in Const. art. 17, § 3, providing that lands belonging to this state which are suitable for cultivation shall be granted only to actual settlers, etc., "includes all lands ready for occupation and which by ordinary farming processes are fit for agricultural purposes." It does not include lands which are not fit for actual occupation. *Manley v. Cunningham*, 13 Pac. 622, 625, 72 Cal. 236; *Albert v. Hobler*, 111 Cal. 398, 400, 43 Pac. 1104, 1105. It includes swamp lands which can be reclaimed and cultivated by an actual settler. *Fulton v. Brannan*, 26 Pac. 506, 507, 88 Cal. 454; *Goldberg v. Thompson*, 30 Pac. 1019, 96 Cal. 117.

### SUITABLE FOR RAFTING AND SAWING.

Where a grant of timber was of timber "suitable for rafting and sawing," such language gave the grantee the right to select and judge of the suitability of the timber. *Boults v. Mitchell*, 15 Pa. (3 Harris) 371, 379.

### SUITABLE FRAME.

"Suitable," as used in a city ordinance prohibiting the erection or use of any awning, except the same be upon a suitable frame and attached entirely to the building, is incapable of any general or legal definition. Its use of necessity implies the judgment of some tribunal or person who is to determine the question of suitability. The term "suitable," as here used, is altogether too vague and indefinite to serve as the basis of a highly penal ordinance. *State v. Clarke*, 37 Atl. 975, 977, 69 Conn. 371, 39 L. R. A. 670, 61 Am. St. Rep. 45.

### SUITABLE INDEX.

An index to records of such a kind as a man of ordinary intelligence, of fair business capacity, would require to make a search, such an index as would enable a man understanding the plan on which the index is made up and having ordinary, fair business capacity to take it and thereby find the record he is in search of, is a "suitable index" to town records, within the meaning of a statute simply prescribing that such index shall be a suitable index. It is not necessary that the index or alphabet should be one that all men could take and at once find a record. *Smith v. Town of Royalton*, 53 Vt. 604, 608.

### SUITABLE MAINTENANCE.

A will providing that the testator's wife, during her natural life or widowhood, should be given a "comfortable maintenance" out of the testator's real estate must be construed as intended in lieu of dower, since, if the

widow be allowed one-third of the testator's estate as dower, it wholly deranges the testator's settlement, and her claim of dower contravenes the will by defeating the maintenance the testator had provided for her. *White v. White*, 16 N. J. Law (1 Har.) 202, 213, 31 Am. Dec. 232.

#### **SUITABLE MEANS AND APPLIANCES.**

An instrument declaring that it was the duty of a carrier to take due precaution to protect cotton from loss by fire, and to provide all "suitable means and appliances" to prevent the cotton catching fire, and then for extinguishing it, did not require the carrier to cover the cotton with a covering impervious to fire when it was carried in open flat cars according to custom, but only required buckets of water, etc., to be furnished for use in the extinguishment of fire, in case one occurred. *Chicago, St. L. & N. O. Ry. Co. v. Moss*, 60 Miss. 1003, 1012, 45 Am. Rep. 428.

#### **SUITABLE MONUMENT.**

"Suitable," as used in a will directing the testator's executor to appropriate and use for and in the erection and construction of a suitable monument at testator's grave such sum as the amount of funds in the executor's hands would warrant, relates to the form and style of the monument, which is left to the discretion of the executor, with the cautionary direction to have due regard to the amount of the funds. *Appeal of Bainbridge*, 97 Pa. 482, 485.

#### **SUITABLE NEIGHBORHOOD OR LOCALITY.**

The word "suitable," as used with reference to the conducting of a business in a neighborhood or locality suitable for that purpose, cannot carry with it the consequence that a trade may be carried on in a particular locality, the consequence of which trade may be injury and destruction to the neighboring property. *Susquehanna Fertilizer Co. v. Spangler*, 39 Atl. 270, 273, 86 Md. 562, 63 Am. St. Rep. 533.

#### **SUITABLE PACKAGE.**

A "suitable package," within 1 Supp. Rev. St. p. 505, c. 840, § 6, requiring retail dealers in oleomargarine to pack the same in suitable packages, is such a package as the dealer himself may reasonably find to be convenient and proper according to the usages and demands of the trade. *United States v. Dougherty* (U. S.) 101 Fed. 439, 441.

#### **SUITABLE PERSON.**

The term "suitable person" means proper and competent person, and intends a legal suitability, as used in an act authorizing administration to be granted to all, some, or

one of the parties, either alone or associated with some other suitable person, as the surrogate may order. *Peters v. Public Adm'r* (N. Y.) 1 Bradf. Sur. 200, 207.

A statute empowering a justice of the peace to authorize any "suitable person," not a party to the action, to serve process, does not prohibit a justice from granting such authority to a relative of a party to the action. *Mudrock v. Killips*, 28 N. W. 66, 68, 65 Wis. 622.

"Suitable," as used in a statute regulating the licensing of the sale of intoxicating liquors and prohibiting the appointment of any one not recommended by the selectmen and not found to be a suitable person, has a settled meaning, indicating a finding of a judicial nature. *Appeal of Malmo*, 43 Atl. 485, 487, 72 Conn. 1.

The word "suitable," as descriptive of an applicant for license, is insusceptible of any legal definition that wholly excludes the personal views of the tribunal authorized to determine the suitability of the applicant. A person is suitable who, by reason of his character, his reputation in the community, and his previous conduct as a licensee, is shown to be suited or adapted to the orderly conduct of a business which the law regards as so dangerous to public welfare that its transaction by any other than a carefully selected person, duly licensed, is made a criminal offense. It is patent that the adaptability of any person to such a business depends upon facts and circumstances that may be indicated, but cannot be fully defined, by law, whose probative force will differ in different cases, and must in each case depend largely upon the sound judgment of the selecting tribunal. *Appeal of Smith*, 31 Atl. 529, 530, 65 Conn. 135; *Batters v. Dunning*, 49 Conn. 479, 480.

The word "suitable" may be so used as to involve nothing more than a direction to appoint a proper person; but it was held in *Appeal of Smith*, 31 Atl. 529, 65 Conn. 135, and *Appeal of Hopson*, 31 Atl. 531, 65 Conn. 140, that the statutory provision requiring the licensee of a saloon to be a suitable person was intended to define a statutory qualification calling for an interpretation of a judicial nature, as well as an exercise of personal judgment. The substantial qualifications were, as to the person, that he must not have been convicted of violating the law, must not be a sheriff or other officer, must not be a female not known to be of good repute, and must not keep a disorderly house or a gambling house. *Appeal of Moynihan*, 53 Atl. 903, 904, 75 Conn. 358.

#### **SUITABLE PLACE.**

Gen. Laws, c. 49, § 2. authorizing a town to take land for a public cemetery without



the owner's consent, when land necessary therefor cannot be obtained in any "suitable place," etc., means the most suitable place, or a place as suitable as any other, or a place as suitable as the town can afford to pay for. *Crowell v. Londonderry*, 63 N. H. 42, 48.

A "suitable place" for discharging iron rails is not a place at which the customs officers will not weigh such articles, and not a place where the owners of the wharf will not permit iron rails to be landed. *Teilman v. Plock* (U. S.) 21 Fed. 349.

A "suitable and convenient place for a business," in the legal sense of those words, means, not a place which may be convenient to the party himself, looking at his interest merely, but a place suitable and convenient when the interests of others are considered. *Evans v. Reading Chemical & Fertilizing Co.*, 28 Atl. 702, 710, 160 Pa. 209 (citing *Bamford v. Turnley*, 3 Best. & S. 65, 75).

#### SUITABLE PRECAUTIONS.

An agreement that certain work in the construction of a tunnel shall be prosecuted with "all suitable precautions" for safety, etc., means all such suitable precautions as a discreet, prudent, and cautious man of ordinary capacity would adopt in the construction of such a tunnel, were the risk all his own, under the facts and circumstances as then and there known and understood, and which, by the use of reasonable diligence, caution, and skill, might have been known or anticipated. *St. Anthony Falls Water Power Co. v. Eastman*, 20 Minn. 277, 296 (Gil. 249, 255).

#### SUITABLE ROOM.

A contract to furnish for post office purposes a "room that is improved and suitable" does not bind the party to furnish any particular room. *Thompson v. Stewart*, 14 N. W. 247, 248, 60 Iowa, 223.

#### SUITABLE TIME.

A discharge at a "suitable time," as applied to the duty of a carrier of goods by water, does not mean discharge at a time when, for want of notice, the goods cannot be removed by a consignee before they would be destroyed by frost. *Dixon v. The Surrey* (U. S.) 26 Fed. 791, 793.

#### SUITABLE WATCH.

What would be "a suitable watch," in a policy of insurance on a starch factory, conditioned that a suitable watch be kept while manufacturing starch, must depend much upon the character of the different processes

used in the manufacture of starch and the danger attending each. The operation of washing the materials and reducing them to a pulp, and also the separation of the starch from the grosser parts, may not require the aid of fire to the same extent demanded in the process of drying the starch; and a watchman would not be regarded so remiss in his duty, at a time when water, rather than fire, was used, as when a very high degree of temperature was raised, if he was not at his post. The watch may be entirely suitable at some times, while the manufacture is going on in parts of its stages, if the person employed is absent from the mill. *Percival v. Maine M. M. Ina. Co.*, 83 Me. 242, 249.

#### SUITOR.

"Suitor," as used in a statement that a person acted toward a certain woman as a suitor, means one who solicits a woman in marriage. *Carney v. State*, 79 Ala. 14, 18.

A "suitor" is one who solicits a woman in marriage; a wooer. Words spoken of an unmarried woman who has a beau and suitor are not actionable, where the same would not be actionable if spoken of a single woman who had no beau or suitor. Words spoken of an unmarried woman, because of which she claimed to have lost her suitor, with whom, however, there had been no contract of marriage, are not actionable, in the absence of anything in the words spoken involving moral depravity or turpitude on the part of the woman. *Weaver v. Ritter*, 14 Pa. Co. Ct. R. 486, 489.

#### SUIT—SUITED.

A note payable in "good leather such as suits" means such leather as will suit the payee. *Balley v. Simonds*, 6 N. H. 159, 25 Am. Dec. 454.

The clause "suited for public representation," as used in the act of Congress authorizing the copyright of a dramatic composition suited for public use, means more than that the composition is technically adapted to the stage and capable of being produced upon it. To be suited to public use, it must be fit to be represented. "I do not for a moment suppose that Congress has the power to interfere directly and prescribe a standard of good morals on this subject; but the benefit of a copyright is a privilege conferred by Congress in pursuance of the Constitution of the United States, and it is proper and constitutional for Congress to so legislate as to encourage virtue and discourage immorality. And I am strongly impressed with the belief that the Black Crook, a spectacular composition, is not suited for proper representation, not fit to be exhibited, within the

meaning of the act of Congress." *Martinetti v. Maguire* (U. S.) 16 Fed. Cas. 920, 922.

## SULPHATE OF AMMONIA.

"Sulphate of ammonia" is a commercial article, large quantities of which are used for making aqua ammonia, anhydrous ammonia, alum, nitrate of ammonia, and many ammoniacal compounds, as well as in making ammoniated fertilizers; much the larger quantity being used, not for fertilizers, but in the arts. Though made exclusively from bone, it is dutiable as "sulphate of ammonia," under Tariff Act Oct. 1, 1890, par. 10, and cannot be admitted free of duty under paragraph 600 as a substance expressly used for fertilizer, even when imported and actually used for manure. *Marine v. George E. Bartol & Co.* (U. S.) 60 Fed. 601 (citing *Magone v. Heller*, 150 U. S. 70, 14 Sup. Ct. 18, 37 L. Ed. 1001).

## SULPHIDE OF ANTIMONY.

"Sulphide of antimony" is the product of a process by which the gangue or slag is separated from the ore by heat. It may be imported free of duty under Tariff Act July 24, 1897, c. 11, § 2, Free List, par. 476, 30 Stat. 195 [U. S. Comp. St. 1901, p. 1680], as sulphite of antimony ore, as, there being no such thing as "sulphite of antimony," the term was evidently a mistake, and intended for "sulphide of antimony." *McKesson v. United States* (U. S.) 113 Fed. 996, 997.

## SULPHOTOLUIC ACID.

"Sulphotoluic acid" is a remote derivative of coal tar, by combination with sulphuric acid, and used in the manufacture of coal tar colors or dyes, which is its only commercial use. *William J. Matheson & Co. v. United States* (U. S.) 65 Fed. 422.

"Sulphotoluic acid" is a coal tar preparation, but not a color or dye, and is also an acid used for chemical and manufacturing purposes. Its chief use is for chemical combination with other ingredients in the manufacture of coal tar colors or dyes. *Matheson & Co. v. United States* (U. S.) 71 Fed. 394, 18 C. C. A. 143.

## SUM.

See "Round Sum"; "Trifling Sum."  
All sums collected, see "All."  
Like sum, see "Like."

### As debt.

The word "sum" as used in St. 8 & 9 Vict. c. 145, § 1, providing that the court of Manchester shall have authority to try actions of assumpsit, covenant, and debt,

etc., in trespass or trover, provided the sum or damages sought to be recovered shall not exceed £50, is equivalent to "debt." *Joule v. Taylor*, 7 Exch. 58, 65.

### As money.

A testator devised certain real property to certain persons, and bequeathed certain legacies to be "paid out of moneys due from the firm of C. & S. or otherwise," and the will provided that "should there be a further sum after paying all the bequests herein named, I leave it to my executors, to be divided among the parties herein named," etc. Held, that the words "further sum" should not be construed as denoting an intention on the part of the testator to devise all the real property. The words show indisputably that they were intended to designate a sum of money, and not real property. Testator had given different sums to be paid out of the moneys due to him, and then said, if there should be a further sum, it should be divided first among the parties therein named as legatees, then for general charity, in the discretion of the executors. There was no direction or intent expressed in the will to convert any real estate into money. The word "sum" as here used could only legitimately refer to such personal estate only. *Lynes v. Townsend*, 33 N. Y. 558, 568.

Act Cong. July 17, 1862, 12 Stat. 592, which declares that no private corporation, banking association, firm, or individual shall make, issue, or circulate any check, token, or other obligation for a less sum than \$100, intended to circulate as money, means a sum of money. *United States v. Van Auken*, 96 U. S. 366, 368, 24 L. Ed. 852.

When used with reference to values, "sum" imports a sum of money, and is so used in Laws Okl. 1893, c. 18, art. 15, providing that probate courts shall have jurisdiction in civil cases in any sum not exceeding \$1,000, and in actions of replevin where the appraised value of the property does not exceed that sum, and will not include jurisdiction of injunction proceedings. *Wetz v. Elliott*, 51 Pac. 657, 658, 4 Okl. 618.

Gen. Assignment Act 1877, § 2, as amended by Laws 1878, c. 318, § 7, providing that the assignee shall receive for his services a commission of 5 per cent. on "the whole sum" which will have come into his hands, means the whole sum of money which may have come into his hands, and not the entire amount of property. In re *Hulburt*, 89 N. Y. 259, 262.

### As share.

"Sum," as used in a will directing the executors to pay over the whole sum belonging to each child's share upon her attaining a certain age, is equivalent to what is de-

scribed as a "share." Appeal of Clark, 89 Atl. 155, 161, 70 Conn. 195.

### SUM DEMANDED.

Sum in controversy synonymous, see "Sum in Controversy."

"Sum demanded," as used in that clause of the Constitution which gives justices of the peace jurisdiction where the sum demanded does not exceed \$200, means, where the suit is an action on a bond, that the penalty on the bond, and not the damages claimed, is the sum demanded. *Morris v. Saunders*, 85 N. C. 138, 140 (citing *Bryan v. Rousseau*, 71 N. C. 194).

In a suit on the note, the "sum demanded" is not only the principal of the note, but also the interest on the same. *Hedgecock v. Davis*, 64 N. C. 650, 651.

In an action against the sureties on an official bond of a constable, the penalty expressed in the bond is the "sum demanded," and not the damages collectible for the breach in question. *Fell v. Porter*, 69 N. C. 140, 141.

Act June 29, 1818, provides that the Supreme Court shall not have jurisdiction over personal actions originally brought, unless the sum demanded in damages shall exceed the sum of \$50. Held, that the term "sum demanded," as so used, meant the sum claimed in the complaint, and as so used was not synonymous with the "sum in dispute," which determines the jurisdiction of federal courts. *Holt v. Molony*, 2 N. H. 322, 324 (citing *Wilson v. Daniel*, 3 U. S. [3 Dall.] 401, 408, 1 L. Ed. 655).

In Rev. St. § 821, providing that a justice of the peace has jurisdiction of actions of trespass on the freehold, when the sum in demand does not exceed \$20, and the county court has original jurisdiction when the sum in demand exceeds \$20, the *ad damnum* in the writ is the "sum in demand," determining the jurisdiction. *Smith v. Fitzgerald*, 9 Atl. 604, 606, 59 Vt. 451.

### SUM IN CONTROVERSY.

In acts relating to jurisdiction, "sum in controversy" has precisely the same meaning as "sum demanded." The demand of a sum is the sum in controversy. *Kline v. Wood* (Pa.) 9 Serg. & R. 294, 300.

"Sum in controversy," as used in Act March 30, 1811, which provides that all suits pending in the court of common pleas in the city and county of Philadelphia, where the sum in controversy exceeds \$100, shall be transferred to the district court, means in actions in tort the amount of damages demanded in the declaration; and in an action of replevin for goods distrained for rent

the amount of the rent, and not the property or the goods, would be the sum in controversy. *Ancora v. Burns* (Pa.) 5 Bin. 522, 523.

The "sum in controversy," as used in Const. art. 6, § 3, declaring that the circuit court shall have original jurisdiction in all matters of contract when the sum in controversy is over \$100, and section 15, providing that justices of the peace shall have exclusive jurisdiction when the sum in controversy is \$100 and under, is not determined by the verdict in the case. The verdict may determine the controversy or ascertain the respective rights of the parties in the subject-matter, but it cannot in the nature of things indicate or decide what sum was originally in controversy between the parties; and, if no sufficient plea to the jurisdiction is interposed, the circuit court has a legal right to pronounce final judgment between parties, notwithstanding the verdict may be for a less sum than \$100, or in favor of defendant. *Heilman v. Martin*, 2 Ark. (2 Pike) 158, 169.

### SUM IN QUESTION.

The words "sum in question," as used in Code, § 1103, which provides that the jurisdiction of justices of the peace shall not extend to any case where the sum in question shall exceed \$100, but may extend to that sum in all cases, except as limited in this title, do not mean the amount claimed by the plaintiff, but are construed to mean, in case of mutual accounts, the balance which is due to one party or the other. *Moore v. Darrow*, 9 N. W. 637, 638, 11 Neb. 462.

### SUM PAID.

In a policy of insurance, providing that if the ship by negligence should run down any other vessel, and the assured should thereby become liable to pay and should pay any sum, not exceeding the value of the vessel assured and her freight, the insurer should pay a certain proportion of the sum so paid as aforesaid, "sum paid" meant the amount of the damages which had been satisfied to the damaged party; and therefore, where the assured vessel was sold, but only a part of the proceeds reached the party damaged, such part was the sum paid. *Thompson v. Reynolds*, 7 El. & Bl. 172, 175.

### SUMMARILY.

"Summarily," as used in Const. art. 1, § 19, providing that cases of a certain character "shall be tried summarily before a justice of the peace or other officer authorized by law, on information under oath," implies a trial without a jury. *State v. Williams*, 19 S. E. 5, 7, 40 S. E. 373.

**SUMMARY.**

"Summary" is defined by Webster to mean short, concise, reduced into a narrow compass or into a few words. *Ricker v. Levitt* (Me.) 3 Atl. 180.

**SUMMARY APPLICATION.**

Laws 1860, c. 264, § 10, subd. 2, which gives an appeal from a final order affecting a substantial right in special proceedings, or upon a summary application in an action after judgment, would include an order made on application to set aside an execution issued in the action, or the levy made under it, or for a stay of proceedings upon it, or directing the judgment to be satisfied of record, but it would not include an order for retaxation of costs. *Ernst v. The Brooklyn*, 24 Wis. 616, 617.

**SUMMARY CONVICTION.**

A "summary conviction" is defined to be a record of the summary proceedings upon any penal statute before one or more justices of the peace, or other person duly authorized, in a case where the offender has been convicted and sentenced. *Blair v. Commonwealth* (Va.) 25 Grat. 850, 853 (citing 1 Bouv. Law Dict. tit. "Conviction").

**SUMMARY MANNER.**

Under a statute requiring exceptions on appeal to be stated separately and in a summary manner, it is held that the term "summary manner" means within a narrow compass. *McKown v. Powers*, 29 Atl. 1079, 1081, 86 Me. 291.

Exceptions in a bill of exceptions are presented in a summary manner when they are stated expressly, pointedly, and concisely. *Toole v. Bearce*, 39 Atl. 558, 559, 91 Me. 209.

Under a statute requiring exceptions to be presented in writing in a summary manner, it was held that a general exception to several pages of instructions was not presented in a summary manner. *Ricker v. Levitt* (Me.) 3 Atl. 180.

**SUMMARY MODE.**

Where defendant's bill of exceptions to the refusal of the court to rule that the plaintiff upon the whole evidence had failed to make out his case sets out a full report of the evidence, constituting over 55 pages, much of which was immaterial to the exception, the bill was properly disallowed, because not "reduced to writing in a summary mode," as required by Pub. St. Mass. c. 153, § 8. *Ryder v. Jenkins*, 40 N. E. 848, 849, 163 Mass. 536.

**SUMMARY PROCEEDING.**

The meaning of the term "summary proceedings" is such proceedings as are not according to the course of the common law. 4 Bl. Comm. 280. Or, in other words, proceedings may be called regular or summary. Wherever a court acts or professes to act upon common-law principles, its proceedings are called regular, and not summary, however expeditiously it may act; but where a court of ancient common-law jurisdiction is by some law authorized to act different from the common-law mode, it is called a "summary proceeding." *Phillips v. Phillips*, 8 N. J. Law (3 Halst.) 122, 124.

A "summary proceeding" is defined in Bouvier's Law Dictionary to be "a form of trial in which the ancient established course of a legal proceeding is disregarded, especially in the matter of trial by jury, and, in the case of the heavier crimes, presentment by a grand jury." A proceeding to determine a contested election is a special proceeding, and hence it is competent for the Legislature to dispense with the jury trial in such a case; and a mere provision for the trial of an election contest in a summary way has the effect of dispensing with the jury trial. *Govan v. Jackson*, 32 Ark. 553, 557.

The power to abate nuisances in a summary manner does not at all mean that they may be abated without notice or hearing, but simply that it may be done without a trial in the ordinary forms prescribed by law for a regular judicial procedure; and the abatement of a nuisance by the municipal authorities, after investigation and determination that a nuisance exists, on their order, by a police officer, is a summary proceeding. *Western & A. R. Co. v. City of Atlanta*, 38 S. E. 996, 999, 113 Ga. 537, 54 L. R. A. 294.

**SUMMARY PROCESS.**

"Summary," as applied to process, means immediate, instantaneous, in contradistinction from the ordinary course, by emanating and taking effect without intermediate applications or delays. *Gaines v. Travis*, 8 N. Y. Leg. Obs. 45, 49.

**SUMMER.**

All summer, see "All."

"The word 'summer' strictly, perhaps, includes only the months of June, July, and August, yet it is frequently used in a more general sense to indicate the warmest period of the year." As used in an agreed statement of facts that a debt accrued in the "summer," it was held that it would not be presumed that the debt accrued after June 1st. *De Witt v. Wheeler & Wilson Sewing Machine Co.*, 23 N. W. 506, 507, 17 Neb. 533.

Where it was agreed in a fire policy that the house insured might be left unoccupied during the summer, and it appeared that during the negotiation for the policy it was agreed the house might be left unoccupied during the farming season, it was held, in construing the agreement in the policy, that the word "summer" was used in its broadest sense, and that it was understood by both parties to be equivalent to the words "farming season." *Vanderhoef v. Agricultural Ins. Co.*, 46 Hun, 328, 335.

An agreement extending the time of payment of a note "until the summer" of 1871 will be construed to mean the 1st of June. *Abel v. Alexander*, 45 Ind. 523, 526, 15 Am. Rep. 270.

## SUMMING UP.

Stating the testimony in a case means more than repeating it. It includes the idea of stating it in its logical relations to the proposition it is to support or contradict, as well as to the principles of law by which its bearing and force ought to be controlled, or as it is expressed by the technical phrase "summing up." *State v. Ezzard*, 18 S. E. 1025, 1028, 40 S. C. 312.

## SUMMIT.

"Summit of a mountain," as used in a law making the summit of a mountain the division line between counties, when the mountain is not continuous, but breaks off and the ends pass each other, forming an intervening valley between them, at one side of which the mountain is gradually sinking and terminating, and on the other it is commencing and rising, should be construed to mean a line from one to the other at or about the place where the respective mountains acquire an equal height. *Beale v. Patterson (Pa.)* 3 Watts & S. 379, 381.

## SUMMON.

See "Duly Summoned"; "Lawfully Summoned."

The calling of jurymen from the bystanders sufficient to complete a panel under the order of court is not a summoning of jurors, in the sense in which the term "summoned" is used in Act June 30, 1879, providing for the drawing of jurors from the box containing the names of persons possessing the necessary qualifications. *United States v. Rose (U. S.)* 6 Fed. 136, 137.

The word "notify," as used with respect to procuring the attendance of a juror, is equivalent to the word "summon," as used in the like connection in the same Constitution and laws. *Code Civ. Proc. N. Y.* 1899, § 3343, subd. 19.

## SUMMONS.

A "summons" is a process issued from the office of a court of justice requiring the persons to whom it is addressed to attend the court for the purpose therein stated. *Whitney v. Blackburn*, 21 Pac. 874, 876, 17 Or. 564, 11 Am. St. Rep. 857.

"Summons" is the name of a writ, commanding the sheriff, or other authorized officer, to notify the party to appear in court to answer a complaint made against him and in said writ specified, on a day therein mentioned. *Johns v. Phoenix Nat. Bank (Ariz.)* 56 Pac. 725, 726.

The writ of summons is an instrument running in the name of the state, issuing out of a court having jurisdiction of the action, directed to the ministerial officer, commanding him to execute the same, and certified to the court who executes it. *Burrill, Law Dict.* The notice required by the statute in the case of appeal from the judgment of a justice of the peace is not process or a writ of summons in any legal sense; and, as the statute does not devolve on the sheriff the duty to serve such notice and make return, the return by the sheriff of the service of such a notice is not even prima facie evidence of the facts cited by him in the return. *Horton v. Kansas City, Ft. S. & G. Ry. Co.*, 26 Mo. App. 349, 358.

A summons is not a process, but merely a notice given by the plaintiff's attorney to the defendant that proceedings have been instituted, and that judgment therein will be taken against him if he fails to answer. *Plano Mfg. Co. v. Kaufert*, 89 N. W. 1124, 1125, 86 Minn. 13.

A summons is a notice to bring a party into court; but if the summons is never issued or served, and yet the party voluntarily comes into court and tries the case, neither he nor the adverse party can be heard to say that the judgment is void, or even voidable. *Riesterer v. Horton Land & Lumber Co.*, 61 S. W. 238, 242, 160 Mo. 141.

A summons is the paper which gives jurisdiction to the court over the person of the party brought in. *Adkins v. Moore*, 43 S. C. 173, 175, 20 S. E. 985.

A summons should recite the names of all the defendants to an action, though a copy of the petition be served which names all the defendants. *Battle v. Eddy*, 31 Tex. 368, 369.

A summons is not a process or writ. It is only a notice, and hence not within the statute exempting jurors from service of process while in attendance on court. *Grove v. Campbell*, 17 Tenn. (9 Yerg.) 7, 9.

Under the law of South Dakota a summons is the only process by which a civil action in a court of record can be commenced.

**Ayers, Weatherwax & Reid Co. v. Sundback,** 58 N. W. 4, 6, 5 S. D. 31.

As has been held in the case of *Genobles v. West*, 23 S. C. 154, a summons is a mere notice, addressed to defendant, giving him information that a certain proceeding has been commenced for a certain purpose. *Prince v. Dickson*, 39 S. C. 477, 483, 484, 18 S. E. 33, 35.

Notice of an application to admit to probate an alleged will, under section 13 of the probate law, or to admit a copy of a foreign will, with an authenticated probate thereof, under section 28, is not a "summons, notice, or advertisement," required to be published in "a state paper," under Act March 29, 1870. In *re Miller's Estate*, 39 Cal. 550, 554.

The "process which issues upon filing a libel," though in form an order of notice, is in legal effect a summons. It is the process by which the libelee is directed to appear in court and answer to a civil action. It was never contemplated that it could be served by any disinterested person, unless by a special order of court. Private persons cannot serve legal process issuing from a court, unless they are authorized to do so by express provision of statute. *Leavitt v. Leavitt*, 135 Mass. 191, 192.

#### Citation.

See "Citation."

#### Complaint distinguished.

See "Complaint."

#### SUMMONS IN ERROR.

A summons in error is the process by which jurisdiction of the defendants is obtained. *Glick v. Lowe*, 65 Pac. 231, 232, 63 Kan. 882.

#### SUMP.

The term "sump" has been used to designate a pit dug in the lower part of a coal mine to catch the drainage of the mine. *Coal Run Coal Co. v. Jones*, 19 Ill. App. (19 Bradw.) 365, 366.

"Sumps" is a mining phrase denoting rude wells or cisterns along the line of the shaft in which the water in the mine is trained to collect, and from which it is pumped out of the mine by the same engine which moves the cars in the shaft. *Woodward Iron Co. v. Jones*, 80 Ala. 123, 124.

#### SUN TIME.

See "True Sun Time."

#### SUNDAY.

See, also, "Lord's Day."

The "Day of the Sun"—"Dies Solis"—was used at a very early period as synonymous with "Dies Dominicus," the "Lord's Day." It is spoken of by Justin Martyr, A. D. 140-148, as the "Day of the Assemblage of Christians" and the "Day of Resurrection." "Diem Dominicum" is the phrase of Tertullian, before A. D. 218, and of Ignatius before 107, whose acts are traced to the year 70. A late writer says: "It is sometimes called 'Sunday'—'Dies Solis'—in compliance with the common phraseology, and when it was necessary to distinguish it in addressing the heathen." *Campbell v. International Life Assur. Soc. of London*, 17 N. Y. Super. Ct. (4 Bosw.) 298, 314 (citing Riddle, *Christian Antiquities*, pp. 649-651; Pearson, *Creed*, 391 note).

"In contemplation of law Sunday is merely a day of rest." It is not there regarded from the standpoint of the religious. "To the Christian it is far more. It has sanctity not derived from human laws, but stamped upon it by the Almighty. His observance of it is not the mere performance of a civil duty, but an obedience to the precept of the Most High. In this faith he is protected. The faith itself is regarded with respect, but the law does not enforce it." *Bloom v. Richards*, 2 Ohio St. 387, 405.

The term "Sunday" or "Christian Sabbath," in laws prohibiting labor upon the first day of the week, are used simply to designate the day selected by the Legislature. It is not the intention of the law to enforce the Sabbath as a religious institution. The same construction would obtain, and the same result follow, if any other terms were employed, as "the Lord's Day, commonly called Sunday," "the Sabbath day," or "the first day of the week." The power of selection being in the Legislature, there is no valid reason why Sunday should not be distinguished, as well as any other day. *Ex parte Newman*, 9 Cal. 502, 521.

"Sunday" is not an ordinary working day. It is a day observed by the Christian world as holy and set apart for the purposes of rest and worship, and for this reason an interdiction has been passed upon the carriage of freight and passengers upon such day. Hence the operation of switch engines in a railroad yard on such a day is a nuisance. *Georgia R. & Banking Co. v. Mad dox*, 42 S. E. 315, 323, 116 Ga. 64.

Sunday is a nonjudicial day, and by the common law all judicial proceedings which take place on that day are void. *Ex parte Tice*, 49 Pac. 1038, 1040, 32 Or. 179.

Sunday is stated in all the books to be "dies non juridicus," not made so by stat-

ute, but by a canon of the church incorporated into the common law. According to the history given by Lord Mansfield in the case of *Swann v. Broome*, 3 Burrows, 1597, anciently, the courts of justice did not sit on Sunday. It appears, from Sir Henry Spellman, that "Christians at first used all days alike for the hearing of cases, not sparing, as it seemeth, the Sunday itself. They had two reasons for it: One was in opposition to the heathens, who were superstitious about the observations of days, at times conceiving some to be ominous and unlucky, and some lucky, and therefore Christians laid aside all observations of days. A second reason they had was that by keeping their own courts always open they prevented the Christian suitors from resorting to the heathen courts." *Story v. Elliot* (N. Y.) 8 Cow. 27, 28, 18 Am. Dec. 423.

"Sunday" is not "dies juridicus," and is not to be computed in determining the number of days in which the business of the court has not been transacted. A judgment is not erroneous on the ground that three days had elapsed without the transaction of any business by the court, where one of those days is Sunday. *Qualter v. State*, 120 Ind. 92, 94, 22 N. E. 100.

#### **As legal holiday.**

See "Holiday."

#### **As from midnight to midnight.**

At common law the natural and civil day consists of 24 hours, from midnight to midnight, and the artificial or solar day extends from sunrise to sunset; and the Sabbath, or Lord's Day, having its origin in the Christian church, has sometimes been held to mean both at common law, and under the statutes of some of the states the artificial or solar day extends from morning light to setting sun. In *Hiller v. English* (S. C.) 4 Strob. 486, the whole subject is examined at length and with much learning. In Connecticut the statute naming the Lord's Day only was held by a majority of the judges to refer to the artificial or solar day. *Fox v. Abel*, 2 Conn. 541. But in New Hampshire a statute prohibiting work on the Lord's Day was held to extend from midnight on Saturday till midnight on Sunday. *Shaw v. Dodge*, 5 N. H. 462. In our statute there is no language of definition, but the simple word "Sunday." Sunday is the name of the civil day, and it does not necessarily refer to the Christian festival, or Lord's Day, and is a whole civil day, like the other six. *State v. Green*, 37 Mo. 466, 470.

"Sunday" embraces the twenty-four hours next ensuing the midnight of Saturday. There is no distinction between the Sabbath and Sunday. The Sabbath is emphatically the day of rest, and the day of rest is

the Lord's Day or Christian Sunday. *Kilgour v. Miles*, 6 Gill & J. 268, 274.

"Sunday," as used in the statutes, means from 12 o'clock on Saturday night until 12 o'clock on Sunday night. The civil day of Sunday is *dies non juridicus*. *State v. Green*, 37 Mo. 466, 470.

"Sunday," as used in a statute forbidding the sale of liquors on Sunday, has reference to the 24 hours of that day commencing and ending at midnight, and a sale of liquor at 15 minutes before one is no violation of the Sunday law. *Schwab v. Mayforth* (N. Y.) 1 City Ct. R. 177, 179.

The word "Sunday" conveys all the meaning that is conveyed by the phrase "the 24 hours immediately following 12 o'clock Saturday night." Hence, under a statute forbidding stores to be kept open or liquors to be sold during the 24 hours immediately following 12 o'clock Saturday night, it is sufficient to charge that the unlawful acts were committed on "Sunday." *State v. Heard*, 31 South. 384, 107 La. 60.

The court will take judicial notice that in the regular division of time Sunday embraces all the 24 hours next ensuing the midnight of Saturday. *Philadelphia, W. & B. R. Co. v. Lehman*, 56 Md. 209, 226, 40 Am. Rep. 415.

Within the meaning of a statute forbidding secular labor on Sunday, the word "Sunday" includes 24 hours, beginning and ending at midnight. *Shaw v. Dodge*, 5 N. H. 462, 463.

For the purposes of the chapter relating to the closing of saloons and business places on Sunday, the first day of the week, commonly called "Sunday," shall begin with midnight Saturday and terminate the following midnight. *Rev. St. Wyo. 1899, § 2642*.

#### **As from midnight to sunset.**

"Sunday" is defined, in the statute prohibiting work on Sunday, as including the time between midnight preceding and sunset of the same day. Therefore a bond dated on Sunday is not necessarily illegal, as it may have been made after sunset. *Nason v. Dinsmore*, 34 Me. 391, 392; *Bryant v. Inhabitants of Biddeford*, 39 Me. 193, 197.

#### **As from sunrise to midnight.**

Sunday, for the purposes of an act relating to the observance of the Sabbath, is regarded as the time between sunrise and midnight of said day. *Comp. Laws N. M. 1897, § 1372*.

### **SUNDAY SCHOOL.**

A gift to a "Sunday school" is clearly charitable, within the meaning of a statute relating to charitable gifts, and it might

be held such under either of the three provisions thereof, as being for the maintenance of the ministry of the gospel, or of a school of learning, or as a general public and charitable use. That it is not incorporated or is a voluntary association is of no consequence. *Conklin v. Davis*, 28 Atl. 537, 540, 63 Conn. 377.

## SUNDRY.

"Divers and sundry" is a term used in indictments charging the larceny of various articles of one kind, for the purpose of describing the property; and where the property stolen is so described, it is not necessary to allege any specific number of the articles stolen. *Commonwealth v. Butts*, 124 Mass. 449, 452.

## SUNK.

If a vessel lies on the bottom in shallow water, but in such a condition that she cannot be floated by any of the means ordinarily possessed by the naval force, such vessel must be regarded as "sunk," within the meaning of the statute granting a bounty for every vessel of the enemy "sunk or otherwise destroyed." *United States v. Dewey*, 23 Sup. Ct. 415, 418, 188 U. S. 254, 47 L. Ed. 463.

## SUNK OR DESTROYED.

The words "sunk or destroyed," as used in the United States statute giving a bounty for each person on board the vessel of an enemy sunk or otherwise destroyed, are equivalent to "destroyed by sinking or otherwise." *United States v. Dewey*, 23 Sup. Ct. 415, 417, 188 U. S. 254, 47 L. Ed. 463.

## SUNSET.

The term "sunset," as used in the schedules of the Constitution requiring polls to be kept open on the day of the election in respect to the adoption or rejection of such Constitution until sunset, is not used in the precise mathematical sense, but rather in a more practical sense, requiring only a reasonable approximation to that time. *People v. Town of Bishop*, 111 Ill. 124, 135, 53 Am. Rep. 605.

## SUNSTROKE.

"Sunstroke" is defined to be acute prostration from excessive heat, and the same effects may be produced by heat which is not of solar origin. *Supreme Lodge, Order of Mutual Protection, v. Gelbke*, 100 Ill. App. 190, 196 (quoting Cent. Dict.).

A man working in the heat, exposed to the rays of the sun, may be overcome by the

heat to the point of exhaustion, so as to be prostrated with weakness, and even fall into insensibility and unconsciousness, without having a "sunstroke" in its technical sense. *Knickerbocker Life Ins. Co. v. Trefz*, 104 U. S. 197, 206, 26 L. Ed. 708.

"Sunstroke," or "heat prostration," is a term applied to the effects on the central nervous system, and through it on other organs of the body, by exposure to the sun or to overheated air. Though most frequently observed in tropical regions, this disease also occurs in temperate climates during hot weather. In all its forms, ranging from heat syncope and heat apoplexy to ardent thermic fever, it is subjected to medical treatment as a disease, and cannot be termed an "accident," though it may be an accident to a person who is exposed to it; for the conditions under which the human system may be affected by it certainly belong to natural causes, which may reasonably be anticipated, as they come not by chance. *Dozier v. Fidelity & Casualty Co. of New York (U. S.)* 46 Fed. 446, 447, 13 L. R. A. 114.

## SUPERANNUATED.

St. 11 & 12 Vict. p. 14, § 2, provided for the collection of a fund to be called the "police superannuation fund," to be applied in the payment of a superannuation or retiring allowance to police constables. It provided that the police constables who served 15 years might retire on a yearly "superannuation" allowance of an amount equal to half his full pay, or, if he continued to serve, he might receive his full pay and also one-third of the allowance from the "superannuation fund." Section 3 enacted that no constable should be entitled to be "superannuated" if under 50 years of age, unless reported unfit for service. Held, that the person was "superannuated," within the meaning of section 3, whenever he received any superannuation allowance from the fund, and to be "superannuated" did not mean "to retire on a pension." *Hobson v. Mayor of Hull*, 4 El. & Bl. 986, 990.

The phrase "superannuated preachers," in a will wherein property was left for the support of superannuated preachers of a certain church, meant such preachers as were impaired or disabled through old age. *Hood v. Dorer*, 107 Wis. 149, 154, 82 N. W. 546, 548 (citing Cent. Dict.).

## SUPERCARGO.

If a shipper consigns his goods to the master for sale and return, the master, in proceeding to dispose of them, does not act under any authority derived from his appointment as master, but in the character of "supercargo" or factor, and his duties and



Habillities are as distinct as they would be if the trusts were confided to two different persons. In all that relates to the transportation of the goods and navigation of the ship, he acts as master. All that he does in relation to the disposition of the merchandise is referred to his character as factor. The Waldo (U. S.) 28 Fed. Cas. 1356, 1357.

## SUPERFINE.

A contract for the sale and delivery of flour, in which it is warranted to be "superfine," is a warranty of the article according to the standard of exportation, and that it shall be of due fineness and good and merchantable as superfine according to the standard of inspection of flour required by Act April 15, 1835, relating to inspections of flour. *Adams v. Rogers* (Pa.) 9 Watts, 121, 122.

## SUPERINTEND.

"Superintend" means to have or exercise the charge and oversight of; to oversee, with the power of direction; to take care of, with authority, as an officer superintends the building of a ship or the construction of a fort; to have charge and direction of, as of a school; direct the course and details of some work, as the construction of a building, or movement, as of an army; to regulate with authority; manage. *Webst., Worcester, and Cent. Dicts.; Dantzler v. De Bardeleben Coal & Iron Co., 14 South. 10, 12, 101 Ala. 309, 22 L. R. A. 361.*

Gen. St. c. 18, § 69, authorizing a party to "superintend the police" of the town, includes an authority to exercise his powers as a police officer for the arrest of a person who had committed a misdemeanor within the town limits, although after the commission of the offense he left the town and was found and arrested elsewhere. *Commonwealth v. Martin, 98 Mass. 4, 5.*

## SUPERINTENDENCE.

"Superintendence" means the act of superintending, care, and oversight, for the purpose of direction, and with authority to direct. *Ure v. Ure, 56 N. E. 1087, 185 Ill. 216; Dantzler v. De Bardeleben Coal & Iron Co., 14 South. 10, 12, 101 Ala. 309, 22 L. R. A. 361.*

The word "superintendence" seems properly to imply the exercise of some authority or control over the person or thing subjected to oversight; hence, as used in Code Ala. 1886, § 2950, subsec. 2, making employers liable to servants for injuries received through the negligence of a person having power and superintendence, the person for whose negligence an employer is liable must be one to whom is delegated some of that authority or power of control which he would

otherwise himself have exercised. "Superintendence," as used in this statute has no application to a person whose sole duty is to be performed by personal acts of manual labor or in direct bringing to bear of the physical energies to the end in view. While it may be that the superintendence contemplated by the statute may be either over men or machinery, it nevertheless must be some superintendence, power of direction, superior care, and control with authority, as distinguished from direct personal manipulation. *Dantzler v. De Bardeleben Coal & Iron Co., 14 South. 10, 12, 101 Ala. 309, 22 L. R. A. 361.*

A weaver who operates a loom is not a person "intrusted with and exercising superintendence," within St. 1887, c. 270, § 1, cl. 2, providing that an employer shall be liable for an employe's injuries caused by the negligence of any person, in the service of the employer, intrusted with and exercising superintendence. *Roseback v. Ætna Mills, 33 N. E. 577, 158 Mass. 379.*

The word "superintendence," in a contract in which a contractor agreed to build a sewer under the immediate direction and superintendence of a commissioner of public works, related to the results, and not to the methods to be employed, and did not make the contractor a servant of the city, within the rule that one who, though he is to have a stipulated price for a thing, executes it under the direction and superintendence of the employer, is a servant. *Foster v. City of Chicago, 64 N. E. 322, 323, 197 Ill. 264.*

In holding that, where a city has built a reasonable and comfortable jail and furnished to the officers in charge thereof the supplies required by law, it is not liable to a prisoner for neglect of the jailer or attendants to keep fires or furnish him with necessary bed clothing, the Constitution requiring "that the structure and superintendence of city police prisons secure the health and comfort of the prisoners," the court said: "The word 'superintendence' means oversight or inspection, and was intended, as used in the Constitution, to impose upon the governing officials of a municipal corporation the duty of exercising ordinary care in procuring articles essential for the health and comfort of the prisoners and of overlooking their subordinates in immediate control of the prisons, so far, at least, as to replenish the supply of necessary articles when notified that they are needed, and in employing such agents and appropriating such amounts of money as may be necessary to keep the prison in such condition as to secure the comfort and health of the inmates." *Moffitt v. City of Asheville, 103 N. C. 237, 9 S. E. 695-698, 14 Am. St. Rep. 795.*

"Superintendence in the placing in the position of cars," within the meaning of an allegation in a pleading that a yardmaster

who negligently allowed cars to remain in dangerous proximity to a track was intrusted with superintendence in the placing in position of cars, necessarily implies that he was intrusted with the means and appliances used in placing the cars in the dangerous position. *Kansas City, M. & B. R. Co. v. Burton*, 12 South. 88, 90, 97 Ala. 240.

### **SUPERINTENDENT.**

See "Supt."

A "superintendent" is one who has the oversight and charge of something, with the power of direction. *Sacalaris v. Eureka & P. R. Co.*, 1 Pac. 835, 836, 18 Nev. 155, 51 Am. Rep. 737; *Railroad Co. v. Deford*, 16 Pac. 440, 441, 38 Kan. 259.

The word "superintendent," derived from the Latin "super" and "intendere," means to oversee. *People v. Steele*, 6 N. Y. Leg. Obs. 54, 59, 2 Barb. 397, 409.

"Superintendent," in its ordinary acceptation, means one who superintends, a director, or an overseer; and, in the absence of an undertaking defining, fixing, and enlarging his duties, they must be taken to be such, and such only, as the ordinary acceptation of the words would imply, and there is nothing in the word "superintendent," in the common use of it, as applied to the superintendent in the management of the waterworks of a town, which implies that he shall be a collector of moneys, much less a financial agent for the settlement of accounts and the handling of the revenues of such city in connection with the waterworks. *Town of Salem v. McClintock*, 46 N. E. 39, 40, 16 Ind. App. 656, 59 Am. St. Rep. 330.

A workman who does the same work as others and receives the same pay is not a "superintendent," though he acts as a foreman, within Laws 1887, c. 270, § 1, making a superintendent a vice principal. *Adasken v. Gilbert*, 43 N. E. 199, 200, 165 Mass. 443.

The word "superintendent," when used in speaking of the superintendent of a house, implies, *ex vi termini*, not merely momentary usurpation, but a regular and recognized authority. A person may have the control and management of a house, and thus be the superintendent, who is neither the owner, nor technically the tenant, nor even the occupant; and it is because the owner or tenant is not always the actual manager that the tenth section of the statute of 1833 against gambling enacts that, where any owner or tenant of a house, outhouse, or arbor shall permit any gaming, such owner, tenant, or other superintendent shall forfeit, etc., is made to include the additional words "or other superintendent." *Calvert v. Commonwealth*, 44 Ky. (5 B. Mon.) 264, 265.

In construing a statute providing that "every railroad corporation shall be liable

for damages sustained by any employé thereof without contributory negligence on his part, when such damage is caused by the negligence of any train dispatcher, telegraph operator, superintendent, conductor, yardmaster, or engineer, or of any other employé who has charge or control of any stationary signal, target point, block, or switch," the court said: "There were at the time of the enactment, and had been for a long period of years theretofore, and have been subsequently, in railroad service everywhere in this country, as a matter of common knowledge, officers known as 'superintendents,' in the operating department of the road—general superintendents of the whole line, and superintendents of divisions. The general duties of such superintendents are intimately connected with the movement of trains and cars. Now, it must be presumed that the Legislature used the word as it was commonly used; that they had in mind the officers of railroads to whom the term was generally applied. The position of superintendent in the railway service is as definitely and well known as that of train dispatcher, telegraph operator, conductor, or engineer. It could not be sincerely claimed that the word 'conductor' can be applied to the foreman of a section gang or of a bridge crew, because he merely conducts or manages the work, or that it can be applied to any other conductor than the one who manages the railroad train; and yet the act does not say 'train conductor.' It could not be sincerely claimed that the word 'engineer' can be applied to the engineer who locates tracks and does engineering work of that kind, or who runs some little stationary pumping engine, or to any one of many other persons connected with railroad service that might properly be called 'engineers'; and yet the act does not say 'locomotive engineer.' And the same illustration might be given in respect to each of the persons specifically named in the act. It may thus be clearly seen that to apply the word 'superintendent' to the mere foreman of a repair shop would be entirely inconsistent with the obvious purpose of the act." *Hartford v. Northern Pac. R. Co.*, 91 Wis. 374, 64 N. W. 1033, 1034.

The words "superintendent of repairs," as used in Rev. St. (5th Ed.) § 135, giving the canal board power to have "so many superintendents of repairs and collectors of tolls on the canals as they may deem necessary," are merely descriptive of the officers and their business, and have no reference to their places of residence or the districts in which the business of their respective offices shall be conducted. They mean nothing more than superintendents of canal repairs. *People v. Benton*, 27 N. Y. 387.

The term "superintendent," as used in the act relating to mines and mining, means the person who shall have, on behalf of the operator, immediate supervision of one or

more mines. 2 P. & L. Dig. Laws Pa. 1894, col. 3150, § 349.

**As agent or clerk.**

See "Agent"; "Clerk."

**As employé, laborer, etc.**

See "Employé"; "Laborer"; "Operative."

**As officer.**

See "Municipal Officer"; "Officer."

## SUPERINTENDING CONTROL

The phrase "superintending control," as used in the Constitution, declaring that the circuit courts shall exercise a superintending control over the county courts and over justices of the peace, imports an authority on the part of the circuit courts over tribunals only, and has no reference whatever to parties litigant or to cases pending in or decided by such inferior courts. *Levy v. Lynchinski*, 8 Ark. (3 Eng.) 113.

The "superintending control" given by the Constitution to the circuit courts over county courts and justices of the peace is of the same character, though not to the same extent, as that which has been exercised in England by the court of king's bench over inferior tribunals for many centuries, and the terms "superintending control over the county courts," etc., are used in the Constitution in their common-law sense, and it is proper to look to the common law for their meaning. The power thus conferred on the circuit courts over the inferior tribunals is not only a grant of original jurisdiction, but is also supervisory in its character, and may be exercised by process affecting cases and parties litigant, as well as the tribunals themselves. The power of superintending control, designed to keep subordinate courts in due bounds, should rarely, if ever, be exerted otherwise than in harmony with ordinary appellate jurisdiction as regulated by law, and therefore, before final judgment, nothing short of a clear defect of power in subordinate courts, or clear breach of duty and irreparable mischief by delay, should make a case for interposition; for otherwise the extraordinary powers of superintending control would conflict with and in effect supersede the ordinary appellate jurisdiction as regulated by law. *Carnall v. Crawford County*, 11 Ark. (6 Eng.) 604, affirmed in *Ex parte Marr*, 12 Ark. (7 Eng.) 84.

## SUPERIOR.

Worcester defines the term "superior" as meaning higher in dignity, quality, or excellence. *Gilman v. Jones*, 5 South. 785, 790, 87 Ala. 691, 4 L. R. A. 113.

An engineer in charge of a locomotive, who has authority to direct or control a fire-

man serving on the same locomotive, is a "superior," within the meaning of Act April 2, 1890, declaring that every employé having power to direct or control any other employé of a railroad company is not the fellow servant, but the superior, of such other employé, etc. *Cincinnati, H. & D. R. Co. v. Margrat*, 37 N. E. 11, 14, 51 Ohio St. 130.

The word "superior," when used as descriptive of the rights which an electric car has in a street, means no more than that the right which such a car has in a street is only that other travelers shall turn off from its track in reasonable time to allow it to pass, but the car itself must be so managed as not to do any unreasonable injury to other travelers, and must be stopped if it appears that the other traveler is not turning out. *Laufer v. Bridgeport Traction Co.*, 37 Atl. 379, 382, 68 Conn. 475, 37 L. R. A. 533.

## SUPERIOR COURT.

To constitute a "superior court" as to any class of actions, its jurisdiction of such actions must be unconditional, so that the only thing essential to enable the court to take cognizance of them is the acquisition of jurisdiction of the parties. *Simmons v. De Bare*, 17 N. Y. Sup. Ct. (4 Bosw.) 547, 553.

At common law "superior courts" were courts of general jurisdiction, and the term was used to distinguish them from "inferior courts," or courts of limited jurisdiction. The latter courts derived all their powers from the statutes constituting them, and differed from those of the former as nothing was intended to be without the jurisdiction of a superior court, whether of appellate or original jurisdiction, except what appeared to be so; and every presumption consistent with the record was indulged in favor of the regularity and validity of their judgments. The distinction "followed from the character of the jurisdiction the courts exercised, and not from the subjection of the court to the appellate power of another tribunal. In this last sense, all courts of original jurisdiction are inferior to a court exercising over them appellate power." *Ex parte Rountree*, 51 Ala. 42, 44.

"Superior court," within the provision of Const. art. 5, § 1, providing for a superior court, means that there shall be one, and only one, tribunal by that name; but it was not a violation of such provision for the Legislature to authorize sessions of this court in each county at stated times in each year. *Smith v. Hall*, 42 Atl. 86, 87, 71 Conn. 427.

"Superior courts," as used in St. 12 & 13 Vict. c. 109, § 39, providing that in every action, suit, or proceeding now pending, or that at any time hereafter shall be commenced or pending, in the said court of chancery on the common-law side thereof, it shall be lawful for the superior courts of common

law and the judges thereof, respectively, and they are hereby respectively required to hear and determine such matters, means the three superior courts of the queen's bench, common pleas, and exchequer. *Garrard v. Tuck*, 8 C. B. 231, 268.

In all cases where the words "superior court" are used they shall be taken and construed to mean and intend Supreme Court. Comp. Laws N. M. 1897, § 3803.

In those enactments which confer jurisdiction or power, or impose duties, when the words "superior court," or "court," in reference to a superior court, are used, they mean the clerk of the superior court, unless otherwise specially stated, or unless reference is made to a regular term of the court, in which cases the judge of the court alone is meant. *Clark's Code N. C. 1900, § 132.*

#### **SUPERIOR FELLOW SERVANT.**

A "superior fellow servant" is one higher in authority than another, and one whose commands and directions his inferiors are in duty bound to respect, although engaged at the same manual work. *Illinois Cent. R. Co. v. Coleman (Ky.)* 59 S. W. 13, 14.

#### **SUPERIOR FORCE.**

A proceeding of a commanding general of the United States in putting a bank in liquidation, notwithstanding the protest of the bank officers, and transmitting the bank's effects to commissioners appointed by him, who sold the choses in action held by the bank as collateral security at the time of the transfer for less than their face value, constitutes "superior force," which no prudent administrator of the affairs of a corporation could resist, so that the bank was neither responsible for such proceedings nor for a loss occasioned thereby. *McLemore v. Louisiana State Bank*, 91 U. S. 27, 29, 23 L. Ed. 196.

#### **SUPERIOR LIEN.**

"Superior," as used in a contract making a certain sum payable "whenever it is finally

decided in the suit or otherwise that said bonds are superior liens to the other bonds" of the railroad and immigration company, means prior. *Gilman v. Jones*, 5 South. 783, 790, 87 Ala. 691, 4 L. R. A. 113.

#### **SUPERIOR SERVANT RULE.**

In some jurisdictions a tendency has been manifested to hold a master liable to a servant who sustains personal injuries through the negligence of a general superintendent or department manager, or a servant of any grade superior to that of the servant injured, and this, irrespective of the character of the work in the performance of which the negligence occurs. The rule that admits of such liability is commonly called a "superior servant rule." It has for its foundation the notion that the superior servant embodies the authority of the common master, so as to impose a liability on the latter for his defaults. This rule has been distinctly repudiated in this state, and it may be added that it is now rejected almost universally in other jurisdictions. *Knutter v. New York & N. J. Telephone Co.*, 52 Atl. 565, 567, 67 N. J. Law, 646, 58 L. R. A. 808.

#### **SUPERNUMERARY.**

"Supernumeraries" was the term used in Revolutionary times to designate officers of a reduced regiment who were thrown out and became detached by its being broken up and consolidated. *Williams v. United States*, 11 Sup. Ct. 43, 48, 137 U. S. 113, 34 L. Ed. 590.

"Supernumerary," as used in Acts May, 1779, c. 6, providing that all such officers who shall become supernumerary shall be entitled to half pay during life, etc., is just as much an officer as any other, but his battalion or corps has been reposed or disbanded, or so arranged in some way as to leave him for the present no command; and the state, to save expense of full pay and subsistence, discharges him from actual service. *Commonwealth v. Lilly's Adm'r (Va.)* 1 Leigh, 525, 529.

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*13/1/04*